STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Honorable L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2016-000415

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CLINTON FOLKES, 216506,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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# PETITION FOR WRIT OF CERTIORARI

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

3614 Landmark Drive, Suite A
Columbia, S. C. 29204
(803) 738-8622
(803) 738-1600 (FAX)

**ATTORNEY FOR PETITIONER.**

A.

## QUESTIONS PRESENTED

I.

**Did the lower court err denying Petitioner relief where the record below demonstrates that he meet his burden of proof concerning his allegation that his Sixth and Fourteenth Amendment right to effective assistance of appellate counsel was violated on direct appeal where Appellate Counsel failed to file a Petition for Rehearing in the Court of Appeals thereby depriving Petitioner of his right to seek certiorari in the Supreme Court of South Carolina?**

II.

**Did the lower court err denying Petitioner relief where the record below demonstrates that he meet his burden of proof concerning his allegation that his Sixth and Fourteenth Amendment right to effective assistance of appellate counsel was violated on direct appeal where Appellate Counsel failed to brief the error of the trial court in overruling the Applicant's objections to the jury instruction, and supplemental charge, as given on ABHAN and limited her presentation on direct appeal to the failure of the trial court to issue the specific charge on ABHAN requested by Trial Counsel?**

III.

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, where Trial Counsel failed to object to closing arguments by the State in which the prosecution told the jury that the difference between Assault and Battery with Intent to Kill and Assault and Battery of a High and Aggravated Nature *was whether or not malice existed?***

IV.

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, where Trial Counsel failed to object to closing arguments by the State in which the prosecution erroneously advised the jury that if they found malice existed, they could not find the Applicant guilty of the lesser included offense of ABHAN?**

V.

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, by advising the jury in his closing argument that the trial judge was going to instruct [the jury] that the absence of malice is not an element of assault and battery of a high and aggravated nature without determining in advance that the Court would in fact issue such an instruction?**

VI.

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, where Trial Counsel failed to object to the State introducing testimony concerning other knives alleged to have been carried by the Applicant and said testimony bore no logical relevance to the Applicant's case and constituted evidence of prior bad acts?**

VII.

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, where Trial Counsel failed to object to the State's use of a knife for demonstrative purposes in their examination of the Victim where the knife was not the one used in the incident which led to the charge against Petitioner and was identified by the Victim as being only similar to the weapon used in this case?**

VIII.

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, by failing to object to hearsay testimony from Investigator Robert McCracken advising that when he was dispatched to the scene he *"was told someone was cut severely"* ?**

IX.

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, by failing to provide Petitioner reasonable professional assistance of counsel in that he neglected to introduce testimony, and employment records, which would have demonstrated that the Petitioner was gainfully employed the week the incident resulting in these charges occurred, and that he had been at work just prior to going to Finley Park?**

X.

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, by failing obtain and introduce motel records which would have proven that at the time of this incident Petitioner had been living in a motel and was not homeless as the State and its witnesses claimed?**

XI.

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, by failing to object to a portion of the State's closing argument in which the prosecution argued matters not in evidence?**

XII.

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, by neglecting to remind the jury that, not only was there no blood visible on the shirt the State alleged belonged to the Applicant, but the State's own witness testified that no DNA was found on the shirt when it was analyzed?**

## XIII.

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, where Trial Counsel failed to take adequate measures to insure that Applicant understood that if he accepted a plea offer to plead guilty to ABWIK with a negotiated sentence, he would not face potential interpretation of his sentence as a mandatory life without parole sentence pursuant to §17-25-45 ?**

## XIV.

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, where Trial Counsel failed to advise Applicant that he had the constitutional right under the Sixth Amendment to the United States Constitution to be fully heard in his defense?**

## B.

## STATEMENT OF THE CASE

This matter comes before the Court of Common Pleas by way of an Application for Post-Conviction Relief[1] filed October 26, 2010. Respondent made its Return on February 8, 2011, requesting an evidentiary hearing be held. Evidentiary hearings addressing Petitioner's case were convened July 17, 2014 and September 25, 2014, at the Richland County Courthouse. Petitioner was present at both hearings and was represented by his court-appointed attorney, Tara Dawn Shurling, Esquire, of the Richland County Bar. Respondent was represented by Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office.

The records before this Court indicate that the Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. He was indicted during the November, 2007 term of the Richland County Grand Jury for assault and battery with intent to kill (2007-GS-40-06654). E. Deon O'Neil and Luke Shealey, both then Deputy Public Defenders with the Richland County Public Defender's Office represented Petitioner. The State was represented by Assistant Solicitors Heather Weiss and Andrew Rogers from the Fifth Circuit Solicitor's Office. On July 7-9, 2008, Petitioner proceeded to jury trial before the Honorable James R. Barber, III, presiding circuit court judge. He was subsequently convicted as indicted. On July 9, 2008, Judge Barber sentenced Petitioner to life imprisonment without parole pursuant to S.C. Code Ann. § 17-25-45 based on two prior judgments for Assault and Battery with Intent to Kill, both of which were entered on August 17, 1994; slightly over thirteen years before the incident which gave rise to the instant charge.

[1] Hereafter, PCR.

Petitioner pursued a direct appeal from his conviction and sentence. Appellate Defender M. Celia Robinson, formerly of the Appellate Division of the South Carolina Commission of Indigent Defense, represented him on appeal in the South Carolina Court of Appeals. Following briefing, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Clinton Folkes*, 2010-UP-420 (filed September 24, 2010). The Remittitur was returned to the lower court on October 18, 2010.

In his original *pro se* Application for Post-Conviction Relief, Petitioner alleged he is being held in custody unlawfully where he received ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amends to the United States Constitution, prior to and during his jury trial. He specifically alleged the following:

1. Ineffective assistance of counsel

    a. "Counsel failed to call key witnesses for the defense;"

    b. "Counsel failed to properly investigate presented by applicant;"

    c. "Counsel failed to object to the use of a knife in the courtroom (State's 25) that was not even used in the crime"; and

    d. "Counsel failed to object to other issues, like closing argument from Solicitor. See State v. Simmons."

2. Judicial Error

    a. "The court failed to inform him of his right to put up a defense without having to testify, only that he could remain silent."

On March 12, 2014, Petitioner, acting through his court-appointed counsel, filed an Amended Application for Post-Conviction Relief alleging the following additional grounds for relief:

> 1. Trial counsel was ineffective for failing to object to a closing argument by the State in which they told the jury that the difference between Assault and Battery

with Intent to Kill and Assault and Battery of a High and Aggravated Nature was whether or not malice existed.

2. Trial Counsel was ineffective for failing to object when the prosecution erroneously advised the jury that if they found malice existed, they could not find the Applicant guilty of the lesser included offense of ABHAN.

3. Appellate Counsel was ineffective for failing to file a Petition for Rehearing in the Court of Appeals thereby depriving the Applicant of his right to seek certiorari in the Supreme Court of South Carolina.

4. Trial Counsel was ineffective for failing to advise the Applicant of his right to put up a defense regardless of whether he himself testified at his trial.

5. Trial Counsel was ineffective for failing to object to the State introducing testimony concerning other knives alleged to have been carried by the Applicant where said testimony bore no logical relevance to the Applicant's case and constituted evidence of prior bad acts. App. p. 190, 11. 5-11.

6. Trial Counsel was ineffective for failing to challenge the position taken by the prosecutor assigned to this case, Heather Weiss, that "this is a mandatory life without parole, so I can't make an offer." Email from Weiss dated November 21, 2007.

7. Trial Counsel provided the Applicant ineffective assistance of counsel when he neglected to investigate Assistant Solicitor Weiss's claim that she could not extend any plea offers in this case due to the Applicant's exposure to a mandatory life without parole sentence.

8. Trial Counsel was ineffective for advising the jury in closing argument that the trial judge was going to instruct [the jury] that the absence of malice is not an element of assault and battery of a high and aggravated nature with determining in advance that the Court would in fact issue such an instruction.

9. Trial Counsel was ineffective for neglecting to remind the jury that, not only was there no blood visible on the shirt the State alleged belonged to the Applicant, but the State's own witness testified that no DNA was found on the shirt when it was analyzed. **App. p. 295, 1. 15- p. 296, 1.1 and App. p. 404, 1.23- p. 405, 1. 7.**

10. Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel when he conceded that the Applicant was not entitled to advance a claim of self-defense where under a reasonable interpretation of the facts in this case the Applicant had a colorable claim to that defense. **App. p. 330,11. 8-13.**

11. Trial Counsel erred in failing to object to hearsay testimony from Investigator Robert McCracken advising that when he was dispatched to the scene he ***"was told someone was cut severely."*** **App. p. 300, 11. 7-13.**

12. Trial Counsel was ineffective for neglecting to argue that State's Exhibit No. 31, a beer bottle seized at the time of the Applicant's arrest, should not be admitted into evidence where the bottle, broken after it was in the possession of law enforcement, was sealed in a bag and could not be examined by the jury, and where the Investigator who identified this exhibit prior to its admission could not positively identify what type of beer the bottle was from. **App. p. 308, 1. 17- p. 310, 1. 12.**

13. Trial Counsel was ineffective for failing to object to the introduction of State's Exhibit No. 32, the tote bag seized from the Applicant at the time of his arrest, where the bag was introduced with clothing in it which was not in the bag at the time it was seized. **App. p. 323, 1. 24- p. 324, 1. 22**.

14. Trial Counsel provided the Applicant ineffective assistance of counsel when he failed to introduce testimony from City of Columbia Police Department Officer Battiste to establish that the clothing packed under the sleeping bag inside of State's Exhibit 32 was in fact placed there by him after the Applicant's clothing was taken from him when he was made to strip and put on detention center uniform at the time he was booked.

15. Trial Counsel was ineffective for failing to establish for the jury that the clothing locked in the bottom of State's Exhibit No. 32 was the clothing the Applicant was wearing at the time of his arrest and had not been hidden by him under the sleeping bag found in that exhibit.

16. Trial Counsel was ineffective for failing to demonstrate that the clothing introduced inside State's Exhibit No. 28, a tote bag, was the same clothing worn by the Applicant in a photograph of the Applicant taken by law enforcement at the scene after he was taken into custody.

17. Trial Counsel was ineffective in failing to object to the use of a knife. State's Exhibit No. 25 for ID only, in their examination of the victim where the knife was not the one used in the incident which led to the Applicant's charge and was identified by the victim as being only similar to the weapon used in this case.

18. Trial Counsel failed to provide the Applicant reasonable professional assistance of counsel when he neglected to introduce testimony, and employment records, which would have demonstrated that the Applicant was gainfully employed the week the incident involved in the Applicant's charges occurred, and that he had been at work just prior to going to Finley Park.

19. Trial Counsel erred in failing to obtain motel records which would have proven that at the time of this incident the Applicant had been living in a motel and was not homeless as the State claimed.

20. Trial Counsel was ineffective for failing to object to a portion of the State's closing argument in which the prosecution argued matters not in evidence. **App. p. 394, 11.11-19**.

> 21. Appellate Counsel was ineffective in that she neglected to brief the error of the trial court in overruling the Applicant's objection to the jury instruction, and supplemental charge, given on ABHAN and limited her presentation on direct appeal to the failure of the trial court to issue the specific charge on ABHAN requested by Trial Counsel. Objection at **App. p. 422, 11. 17-23.**

In addition to the above, based upon the evidence and testimony presented during the PCR proceedings, Applicant has argued,

> 22. Trial Counsel was ineffective for failing to take adequate measures to insure that Applicant understood that if he accepted a plea offer to plead guilty to ABWIK with a negotiated sentence, he would not face potential interpretation of his sentence as a mandatory life without parole sentence pursuant to §17-25-45.

At the evidentiary hearing convened in this matter, Petitioner proceeded forward on the twenty-one allegations set forth in his Amended Application. In support of his application, he testified on his own behalf and presented testimony from Chief Appellate Defender Robert Dudek, former Appellate Defender M. Celia Robinson, Officer David Battiste, and trial counsels Deon O'Neil and Luke Shealey. In addition to this testimony, the lower court had before it a copy of the trial transcript, a copy of the PCR hearing transcript, the pleadings in this matter, SCDC records regarding Petitioner and a copy of the records of the Richland County Clerk of Court regarding the subject convictions and copies of the nine (9) exhibits introduced by Petitioner during the PCR hearings held in this matter.

At the conclusion of the second hearing held in connection with this application for PCR, the PCR Court agreed to receive Proposed Orders from both sides in lieu of closing arguments on the issues before the Court. Petitioner's proposed order was filed with the Richland County Clerk of Court's Office a Memorandum in Support of PCR Application in form of a Proposed

Order of Dismissal on January 14, 2016. The Order of Dismissal was filed on January 14, 2016 and was received by PCR Counsel on January 25, 2016. Petitioner's Notice of Appeal from said order was served and filed on February 24, 2016. Petitioner now asks that the Writ be granted and that he be given the opportunity to fully brief the issues presented herein.

## C.

## SUMMARY OF EVIDENCE ADDUCED AT TRIAL

**The Final Brief of Appellant from Applicant's direct appeal provides a detailed summary of the evidence adduced at trial. *See*, Final Brief of Appellant, App.pp. 453A - 456. The summary of the trial testimony found below is taken largely from that portion of the Final Brief of Appellant which is incorporated by reference herein.**

July 22, 2007, was a hot day in Columbia, South Carolina. Appellant was working but homeless. That Sunday, Petitioner and several fellow homeless workers went to lunch at a ministry. Tiffany Briggs explained the life of a homeless person in Columbia: "Most of our Sundays we spent in the park because we get to eat at Turnipseed or Café Ministries." **App. p. 453A.**[2] After lunch this particular Sunday, the homeless group, including appellant, congregated in Finley Park in an effort to escape the heat under the trees. Some, including appellant, were drinking in the park. Others, including Tiffany Briggs and Karem Jones (hereafter Victim), were on blankets under the tree talking.

Tiffany Briggs testified that she had started living at Riverside Estate apartment complex shortly before the incident, but she was previously homeless. **App. p. 453A** . Briggs testified that she spent a lot of time in Finley Park. She stated that she met Petitioner at the park and that he had been her boyfriend for some three months but that they had broken up the day before the incident. Briggs testified, "We were in a homeless situation I would say before that. Exactly I

[2] Citations to the Record on Appeal found in the Final Brief of Appellant have been changed to conform to the page numbers in the Appendix.

would say I came into it December of two thousand and, yeah, 2007. 2006, 2007. Maybe a little bit before that two years now we've been knowing him. **App. p. 38,ll. 20-25**. Briggs testified that Petitioner was drinking and that he was in a bad mood that night. **App.p.138**. Petitioner apparently took exception to the Victim talking to his girlfriend and a heated exchange ensued.

The Victim testified that the Saturday night before the incident on Sunday, he slept in a parking garage. (R. p. 84). He testified that the next morning, he went to the park in an effort to meet a friend who would take him to church. **App. p. 453A**. The Victim had lunch at the Salvation Army facility. At about 2:30 that afternoon, the Victim was dropped back off at Finley Park. He testified that he retrieved and consumed a 24 ounce beer he had left hidden in the park and he also smoked a half a blunt of marijuana. **App. p. 454**. The Victim testified that he then went back to the park. He recalled, "***I laid out my little blanket and just laid under the tree and laid down.***" **App. p. 454.** He testified that, later on that evening, he had an altercation with Petitioner.

The Victim testified that he had worked with Petitioner at Action Labor. He testified that he knew Petitioner as "New York." He alleged that he had no problems or any argument with Petitioner. **App. p. 454.** The Victim indicated that he was lying on his blanket with a buzz although he denied that he was drunk at the time. **App. p. 454.** He described Petitioner as being intoxicated and testified Petitioner was being ***"an overall nuisance."*** **App. p. 454.** The Victim testified that Petitioner was talking loud, running his mouth, and flashing money. He stated that Petitioner's former girlfriend came up to him ***"and she was like, 'Hey.'"*** **App. p. 454.** The Victim testified that he and Tiffany Briggs had started talking when he noticed Petitioner had started ***"running his mouth."*** **App. p. 454.** The Victim testified that when Petitioner started talking loudly and getting too close to him, he said, ***"Hey, you know, back up."*** **App. p. 454**.

The Victim testified that Petitioner "walked up and stood there and stood right by me while me and another person [Tiffany Beck] was talking. The Victim claimed that Petitioner was saying ***"just what the F is going on? What are you doing with her, and all this and that."*** **App. p. 454.** He went on to testify that Petitioner was ***"trash talking"*** and that he said ***"I'll fuck you up."*** **App. p. 454.**

The Victim testified, ***"I thought it meant he was going to try to hurt me, try to fuck me up. I'm just going on what he said."*** **App. p. 454.** ***"Well he kept talking and like I told him, you know, he just kept coming toward me. And I do recall him pulling a bottle out. He threw it at me. But it didn't - - like I said, it didn't hit me."*** He recalled, ***"I just - - because Tiffany was still standing there. And I'm like you know, you going to say something or something. She was pretty much ignoring him."*** The Victim testified that he stayed in the same spot as the ***"trash talking"*** escalated to blows. He claimed, ***"he punched me in my eye. He was just saying the same old thing, "I'll fuck you up and such and such and such and such."*** **App. p. 454.** The Victim recalled, ***"And that's when he took a step closer, and then that's when he punched me in the eye.... I defended myself, I hit him back. ... when I hit him, he staggered. [I] hit him a two piece. That's when you hit somebody twice.... right and left [hands]"*** **App. p. 454A.**

The State's witnesses confirmed that when Petitioner slung his book bag towards the Victim, a full King Cobra beer can flew out but did not strike the Victim. The Victim testified that Tiffany Beck was still standing there, but that she was ignoring Petitioner. At that point, Petitioner allegedly hit the Victim in the eye and the Victim responded by giving Petitioner a ***"two set."*** Petitioner fell to the ground as a result of the blows. Witnesses testified that the Victim appeared to be getting the best of Petitioner. The Victim was standing over him as

Petitioner struggled to get back up. The fight ended when Petitioner came up with a work knife and swung it at the Victim twice, striking him in the neck and in the arm. The Victim testified that at that point he was ***"still wrassling him."*** **App. p. 100**. Bystanders called out to the Victim that he was cut and bleeding. When he realized he was bleeding, the Victim ran to the phone booth where he placed a call to 911. Petitioner reportedly yelled at the Victim, ***"I should have killed you."***

A bystander gave the Victim ice and a cloth which he held on his neck. When EMS arrived the bleeding was under control; when the Victim was asked, he indicated that he did want to go to the hospital. **App. p. 454A**. He was taken to the hospital where his neck and arm injuries were cleaned and stitched up. Petitioner was taken into custody later that night.

Dr. Stephen Fann was qualified as an expert in general surgery and in trauma critical care. **App. p. 455**. He testified that on July 22, 2007, he ***met*** the victim, in the trauma resuscitation area at approximately 8:30 p.m. **App. p. 455.** The assistant solicitor proceeded to ask this doctor if he would generally consider a cut to the neck to be a serious injury. Dr. Fann indicated, ***"It's something that we- the obligation is on us as the trauma surgeon to evaluate and exclude serious injury with any neck trauma, penetrating neck trauma."*** **App. p. 455.** Dr. Fann testified that the arteries in the neck are protected by the platysma muscle. He testified that even surgeons must be careful when cutting into a person's neck and that, in his opinion, surgical precision would be difficult to achieve during a fight. **App. p. 455.**

Dr. Fann testified that the Victim sustained a 7 centimeter cut to the side of his neck, a 4.5 centimeter cut on his chin, and a cut on his arm. **App. p. 455.** Dr. Fann admitted, however, that although the platysma muscle was penetrated, the major structures of the neck were spared injury. the Victim' injuries were not actually repaired by this surgeon; Dr. Fann testified that the

Victim was treated by a second year resident. **App. p. 455**. Dr. Fann testified that if the wound had been deeper, the major structures of the neck could have been injured. He asserted that he would not characterize a wound that penetrated the platysma as ***"superficial."*** However, Dr. Fann read from the operative report that, ***"[t]he wound was simply superficial and therefore irrigated copiously."*** **App. p. 455**. Dr. Fann admitted that the surgical resident that actually examined and treated the victim had classified both the 4.5 and the 7 centimeter cuts to his neck as ***"superficial."*** **App. p. 455**.

Dr. Fann agreed that upon the Victim's arrival in the trauma bay, trauma bay personnel performed a triage evaluation. The doctor confirmed that on the evaluation, a score of zero to three is morbid and a score of four to eleven means that the patient's situation is urgent but not immediate. He acknowledged that the lowest level on the scale of triage evaluation is a twelve, which indicates the ***lowest severity of injury***. Dr. Fann, admitted that the Victim's revised trauma score was a twelve. **App. p. 456**.

Dr. Fann confirmed that the Victim tested positive for alcohol, marijuana, and cocaine. **App. p. 456**. Dr. Fann testified that the Victim was released after 23 hours with stitches and ointment and a recommendation that he seek substance abuse counseling. **App. p. 365.**

## D.

## STANDARD OF REVIEW

Petitioner's Application for Post-Conviction Relief 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 asserted in his application for relief and at his Post-Conviction Relief hearing. *Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rule 71.1(e), SCRCP.* In evaluating an Application for Post-Conviction Relief, the moving party

must demonstrate that Defense Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, the Applicant 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.

A defendant is entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); U.S. Const. amend. VI. The "right to effective assistance of counsel extends to require such assistance on direct appeal" as well as at trial. *Bell v.Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000) (en banc) (applying

the *Strickland* standard to claims of ineffective assistance of counsel during appellate proceeding). The Fourth Circuit has likewise presumed, in its analysis of such a claim, that appellate counsel "decided which issues were most likely to afford relief on appeal." *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993). That Court has also found that effective assistance of appellate counsel "does not require the presentation of all issues on appeal that may have merit." *Lawrence v. Branker*, 517 F.3d 700, 709 (4th Cir. 2008). The *Strickland* standard has been applied to find a Sixth Amendment violation involving appellate counsel "'only when ignored issues are clearly stronger than those presented'" . *Smith v. Robbins*, 528 U.S.259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (citations omitted).

## E.

## ARGUMENTS

## ONE

### Questions I and II

**Did the lower court err denying Petitioner relief where the record below demonstrates that he meet his burden of proof concerning his allegations that his Sixth and Fourteenth Amendment right to effective assistance of appellate counsel was violated on direct appeal where Appellate Counsel failed to file a Petition for Rehearing in the Court of Appeals thereby depriving Petitioner of his right to seek certiorari in the Supreme Court of South Carolina and additionally neglected to brief the error of the trial court in overruling the Applicant's objections to the jury instruction, and supplemental charge, as given on ABHAN and limited her presentation on direct appeal to the failure of the trial court to issue the specific charge on ABHAN requested by Trial Counsel?**

**Amended Application for PCR, Allegations 3 and 21.**

The testimony presented during the evidentiary hearings held in this matter reflects the following concerning this issue.

**Bob Dudek (Dudek)** , Chief Appellate Defender for the Appellate Division of the South Carolina Commission on Indigent Defense (**SCCID**), testified on behalf of Petitioner. **App. p. 546, ll. 14-25.** He confirmed that Petitioner's direct appeal was perfected by **Celia Robinson (Robinson)**, formerly an Assistant Appellate Defender. The decision of the South Carolina Court of Appeals affirming Petitioner's conviction and life without parole sentence was entered in an unpublished opinion on September 24, 2010. *State v. Clinton Folkes*, 2010-UP-420 (filed September 24, 2010) **Dudek** testified that Robinson's last day with SCCID was September 14,

2010. Through **Dudek**, Petitioner introduced an e-mail from the State Human Resources Division confirming that information. *Petitioner's Ex. No. 1.* **App. p. 547, ll, 1-24.**

**Dudek** identified a letter sent to Petitioner by SCCID on September 28, 2010. That correspondence informed Petitioner that his Petition for Writ of Certiorari has been denied and that the Court of Appeals had granted **Robinson's** Petition to be Relieved as Counsel. This letter also informed Petitioner that he has exhausted all his State Court remedies. **App. p. 548, l. 8- p. 549, l. 4.** **Dudek** testified that this letter was obviously signed by **Robinsons'** former assistant, Lauren E. Crews. Her initials were circled at the bottom left of this letter. **Dudek** testified that he was "pretty confident" that was not Robinson's signature on the letter. **App. p. 549. ll 4-17.** That letter was introduced as *Petitioner's Ex. No. 2.* **App. p. 549, ll. 18-22.** **Dudek** testified that there was no policy at SCCID that would have authorized an assistant to have written an opinion letter. **App. p. 550, ll. 4-14.** He acknowledged that the decision as to whether to Petition for Rehearing should be filed in the Court of Appeals, and whether to subsequently seek Certiorari in Supreme Court, is ultimately lawyer's decision. **App. p. 554, ll. 16-18.** He admitted that this case should have either been assigned to a new attorney or the decision whether to seek rehearing should have been "run by him." **App. p. 554, l. 19- p. 555, l. 4.**

**Dudek** initially testified he had no independent recollection of making a decision to close this case [without seeking certiorari] nor could he recall having ever seen the letter sent to Petitioner on September 28, 2010. He expressly testified that he felt certain the letter would not have gone out if he had seen it. **App. p. 555, ll. 5-15.** When asked if he would have filed a Petition for Rehearing and sought Certiorari to the South Carolina Court of Appeals, **Dudek** indirectly answered the question by stating that he most respectfully disagreed with the Court of

Appeals finding that the jury "charge as a whole" covered the principal that the absence of malice was not a required element of Assault and Battery of a High and Aggravated Nature. **App. p. 556, l. 4- p. 558, l. 4.** **Dudek** acknowledged that following the jury charge Trial Counsel objected to the specific portion of the charge wherein the Trial Court instructed the jury that Assault and Battery of a High and Aggravated Nature included all the elements of Assault and Battery with Intent to Kill *except malice*. **App. p. 559, l. 21- p. 560, l. 6; App. p. 417, ll. 6-10 and App. p. 413, l. 14- p. 418, l. 6, *see specifically*, App.p. 417, ll. 6-8.**

During its deliberations, Petitioner's jury submitted a question requesting clarification on the difference between the degrees of Assault and Battery. Specifically, they asked, *"What if the difference between intent to kill and assault and battery of a high and aggravated nature."* **App.p. 424, ll. 11-14; Court's Exhibit No. 2.** In response to this question, the trial judge indicated that he planned to answer the jury's question by advising them that, "one, is an unlawful act of violent injury to the person of another accompanied by circumstances of aggravation which is high and aggravated nature, and the other is an unlawful act of violent nature to the person of another with malice aforethought." **App. p. 424, ll. 16-21.** Trial Counsel then stated on the record that, "my only objection would be I just at this point would ask that Your Honor charge my ABHAN". **App. p. 425, ll. 3-5.** After the Court says it will not change its charge, Trial Counsel voiced no further objection. **App. p. 425, ll. 6-12.** The Trial Court initially gave a supplemental charge which highlighted the difference between assault and battery of a high and aggravated nature and assault and battery with intent to kill as being the existence of malice in assault and battery with intent to kill. **App.p. 425, l. 16 – p. 426, l. 3.** At the request of the jury,[3] the trial judge then repeated his entire original charge on these two offenses. **App. p. 426, l. 13 – p. 430, l. 16.** Thus, the trial court not only declined to give the charge requested by

[3] App.p. 426, ll. 4-12.

Trial Counsel, but subsequently repeated the previous charge that ABHAN included all the elements of ABWIK ***"except malice aforethought"*** after a question from the jury concerning the difference between ABWIK and ABHAN. **App. p. 430, ll. 11-14.** Trial Counsel renewed his previous objection to the ABHAN charge as given after the supplemental jury charge. **App. p. 430, l. 24- p. 431, l. 8.**

In his PCR testimony, **Dudek** ultimately reiterated that the decision as to whether to go further with an appeal after unfavorable Court of Appeals decision, is "on counsel-of-record ." **App. p. 571, ll. 13-23.** He went on to emphasize that he did disagree with the Court of Appeals decision in this case and ***"wish that, you know, it had been taken up."*** **App. p. 571, l. 24- p. 572, l. 7. Dudek** acknowledged that in "the wrong form letter" that was sent out by his office, Petitioner was erroneously told his Petition for Writ of Certiorari was denied and "a Petition to be Relieved as Counsel" had been granted in his case. No Petition for Writ of Certiorari had been filed in the Court of Appeals and no Petition to be Relieved had accompanied the Brief of Appellant filed in Petitioner's direct appeal because an *Anders*[4] brief was not filed in this case. **App. p. 572, ll. 8-22.**

**Dudek** acknowledged that when one of their Appellate Defenders decided not to file a Petition for Rehearing, SCCID used to tell the client the time limits for filing such a petition *pro se.* He testified that, as some point, the Court of Appeals stopped accepting *pro se* Petitions for Rehearing , but he could not recall when that change had taken place. **App. p. 572, l. 23- p. 573, l. 13.** He acknowledged, however, that Petitioner could have hired another lawyer to file a Petition for Rehearing. [5] **App. p. 573, ll. 16-20. Dudek** admitted that when he disagreed with a

[4] *Anders v. California*, 386 U.S. 738 (1967).

[5] **Dudek's** testimony indicates that the Court of Appeals stopped taking *pro se* Petitioners for Rehearing from Appellant's represented by counsel. His testimony does not address whether Applicant might have terminated his attorney from SCCID and demanded his right to proceed forward from that point forward *pro se.*

Court of Appeals decision he usually filed for Rehearing and Certiorari. **App. p. 574, ll. 2-16.** As previously noted, he had earlier testified that he wished this case had "***been taken up***".

Celia Robinson (**Robinson**) testified at the PCR proceeding held in this matter. Her testimony verified that if she had still been at SCCID when the Court of Appeals decision came out, she would have filed a Petition for Rehearing and would have sought Certiorari if that petition had been denied. **App. p. 578, ll. 15-22.** She identified the signature on the September 28, 2010 letter sent to Petitioner by SCCID as having been made by her former assistant at Appellate Defense. **App. p. 576, l. 19- p. 577, l. 23.** She confirmed that she had no input in any decision not to take further action in this appeal after the Court of Appeals decision was entered. **App. p. 578, l. 2-14.**

In her PCR testimony, **Robinson** stated that she had raised *both* the failure of the Trial Court to grant the request to charge submitted by the defense, *and* the objection to the charge as given in one issue. She stated that she "***pushed it all together in one issue.***" **App. p. 579, l. 24- p. 580, l. 7.** A review of the brief filed by **Robinson** reflects that the Statement of the Issue on Appeal squarely addressed the failure of the trial court to grant the request to charge on Assault and Battery of a High and Aggravated Nature submitted by the defense. **App. p. 452.** Likewise the header to the appellate argument presented reflected that single issue. **App. p. 457.** In the body of the argument presented, Robinson did assert that the Assault and Battery of a High and Aggravated Nature charges given by the trial court were erroneous as a matter of law. **App. p. 466.** The decision of the Court of Appeals does not reflect any consideration of the assertion that the charge ***as given*** was improper and it addressed the question of whether the lower court erred in failing to issue the requested ABHAN charge as the only issue before the Court. ***State v. Folkes*, Unpublished Opinion No. 2010-UP-420 (Ct. App. 2010).**

It is Petitioner's position that Trial Counsel's objection, found at **App. p. 422, ll. 17-23**, preserved this issue for appeal. As addressed in other arguments advanced by Petitioner, Trial Counsel filed a written request to charge asking that Petitioner's jury be instructed that the absence of malice was not an element of Assault and Battery of a High and Aggravated Nature, and that a finding of malice by the jury would not preclude a verdict of guilty of Assault and Battery of a High and Aggravated Nature. Following the Trial Court's initial jury charge, Trial Counsel objected to the Assault and Battery of a High and Aggravated Nature instruction given and specifically objected to the portion of the charge which instructed the jury that ***"ABHAN encompasses all the elements of ABWIK except malice."*** At that time Trial Counsel also renewed his request that the Court give the Assault and Battery of a High and Aggravated Nature instruction requested by the defense. **App. p. 422, ll. 16-23**.

On direct appeal Appellate Counsel filed a brief on behalf of Petitioner which raised as the sole issue on appeal, ***whether "the trial judge erred reversibly in refusing to issue the request to charge on the lesser included offense of assault and battery of a high and aggravated nature including that the absence of malice is not a required element for an ABHAN conviction".*** As noted in other sections of this Order, the brief filed on behalf of Petitioner argued error by the Trial Court in denying that request to charge, but also argued that the charges given by the Court were erroneous as a matter of law and that the error was not harmless where Petitioner's guilt of ABWIK was not proven so overwhelmingly that even a properly instructed jury would necessarily have reached a similar verdict. **App. p. 466.**

**Robinson** firmly asserted that she would have filed a Petition for Rehearing in this case and would have sought Certiorari if rehearing had not resulted in relief. She expressed the view that no attorney at SCCID had made the decision not to go further with this direct appeal. In her

PCR testimony she emphasized that the person who sent Petitioner the letter from SCCID following the decision of the Court of Appeals was a paralegal *not a lawyer*.

The decision of the Court of Appeals was entered in an unpublished opinion. Petitioner's conviction and sentence were affirmed by the Court of Appeals pursuant to *State v. Tyler*, *supra*, and *State v. Curry*, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). *State v. Tyler, supra*, dealt with a challenge to an Assault and Battery of a High and Aggravated Nature conviction on the ground that the jury instructions in that case had improperly analogized Assault and Battery of a High and Aggravated Nature and voluntary manslaughter. In *Tyler* the Supreme Court noted South Carolina precedent for the fact that it is error for a Trial Court to give instructions which equate Assault and Battery of a High and Aggravated Nature with voluntary manslaughter. *State v. Fennell*, 340 S.C. 266, 531 S.E.2d 512 (2000); *State v. Pilgrim*, 320 S.C. 409, 465 S.E.2d 108 (Ct. App. 1995)(Pilgrim I);, aff'd as modified, *State v. Pilgrim*, 326 S.C. 24, 482 S.E.2d 562 (1997)(Pilgrim II), overruled on other grounds, *State v. Froust*, 325 S.C. 12, 479 S.E.2d 50 (1996). The opinion in *Tyler* very clearly finds that the problem with equating Assault and Battery of a High and Aggravated Nature and voluntary manslaughter, is that it precludes a jury from finding Assault and Battery of a High and Aggravated Nature if it finds the defendant acted with malice. While this Honorable Court found in *Tyler, super*, that the jury charge equating Assault and Battery of a High and Aggravated Nature and manslaughter was clearly erroneous, the Court found harmless error on the facts of that case inasmuch as Tyler was convicted of murder. The Supreme Court found that the choice made by the jury in *Tyler* was in no way "premised upon malice or the absence thereof" inasmuch as the primary issue in Tyler was the question of proximate causation. Obviously the same can not be said in Petitioner's case. In Petitioner's case, the Court of Appeals cited their decision in *Curry, supra*, for the proposition

that a jury charge is sufficient if, when considered as a whole, it adequately covers the law applicable to the case. In other words, *Curry* was cited for the proposition that no specific language is required for a jury instruction, but rather it is the substance of the law which must be covered in the verbiage used by the Court. Petitioner asserts that no portion of the jury charge given in his case conveyed to the jury the fact that the law would permit a finding of guilt of the lesser included offense of Assault and Battery of a High and Aggravated Nature *even if* they found the presence of malice on the facts of this case. To the contrary, the charge issued by the trial court in this case repeatedly instructed the jury, over the objection of trial counsel, that ABHAN contained all the elements of ABWIK ***except malice***.

Both the Chief Attorney for the Appellate Division of the South Carolina Commission on Indigent Defense, **Dudek**, and Petitioner's Appellate Counsel, former Appellate Defender, **Robinson**, testified during the PCR proceeding that a Petition for Rehearing should have been filed in this case. The testimony of both **Dudek** and **Robinson** clearly indicates that, but for **Robinson's** departure from SCCID, a Petition for Rehearing would have been filed and the decision of the Court of Appeals would have been taken up with the Supreme Court had the Petition for Rehearing been denied. It is clear that no decision not to pursue this appeal further was made by any attorney in that state agency. Further, the letter sent to Petitioner following the Court of Appeals decision erroneously advised him that he had exhausted all his state remedies. That error was apparently made by a paralegal, not a lawyer, and it deprived Petitioner of the opportunity to obtain another attorney to pursue further action in his appeal, or to "fire" SCCID and request leave of court to file a *pro se* Petition for Rehearing to avoid the prohibition against hybrid representation.

Not every case decided by the Court of Appeals warrants an appeal to this Honorable Court. Petitioner argues, however, that on the facts of his case, a review of the decision of the South Carolina Court of Appeals was appropriate. A request that the Court of Appeals rehear this case was a necessary predicate to Petitioner's ability to seek review by this Court. Petitioner did not have the benefit of a deliberate decision by Appellate Counsel concerning whether to seek further review in the Court of Appeals and, ultimately, whether to seek review of the Court of Appeals decision by this Honorable Court. Further both **Robinson**, and her boss at SCCID, have acknowledged that this case presented an issue that should have been "***taken up***".

Likewise, the record below demonstrates that the trial court erred in overruling Petitioner's objections to the ABHAN instructions issued at Petitioner's trial. The record establishes that, contrary to Appellate Counsel's recollection, she did not raise this preserved error as a separate ground on direct appeal. Not only was this issue at least as strong as the issue raised on direct appeal, the two issues were so intertwined that the failure to raise the question of the propriety of the ABHAN charges, ***as given***, may have impacted the decision of the Court of Appeals on the sole issue specifically perfected by Appellate Counsel. Rule 208, SCACR, addresses the required content of briefs filed on appeal. Rule 208(b)(1)(B), sets forth the requirement that every brief contain a statement of issues on appeal. That subsection provides, that the appellate briefs shall contain, "A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal. "

In light of the problems with the jury instructions actually given at Petitioner's trial, the jury's obvious confusion concerning the distinction between Assault and Battery of a High and

Aggravated Nature and Assault and Battery with Intent to Kill and the extraordinary consequences of an Assault and Battery with Intent to Kill conviction for Petitioner, he respectfully submits that he has adequately demonstrated the prejudice arising from the deficient representation he received on direct appeal. As argued by Petitioner in the lower court, there exists a high degree of probability that the outcome of the Petitioner's direct appeal would have been different, but for the errors and omissions of Appellate Counsel. For that reason, Petitioner now argues that the lower court erred in failing to grant him a new trial on these questions.

## TWO

### Questions III and IV

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, where Trial Counsel failed to object to closing arguments by the State in which the prosecution told the jury that the difference between Assault and Battery with Intent to Kill and Assault and Battery of a High and Aggravated Nature *was whether or not malice existed* and in which the prosecution erroneously advised the jury that if they found malice existed, they could not find the Applicant guilty of the lesser included offense of ABHAN?**

**Amended Application for PCR, Allegations 1 and 2**

In Petitioner's Amended Application, Allegations 1 and 2, he alleged that Trial Counsel was ineffective for failing to object to portions of the State's closing argument wherein the prosecution erroneously advised the jury that the difference between Assault and Battery with Intent to Kill and Assault and Battery of a High and Aggravated Nature was whether or not malice existed and expressly told the jury that if they found malice existed, they ***could not*** find

Petitioner guilty of the lesser included offense of Assault and Battery of a High and Aggravated Nature.

During the State's closing argument, the prosecutor repeatedly emphasized that the distinction between Assault and Battery with Intent to Kill and Assault and Battery of a High and Aggravated Nature was the presence of malice. She specifically stated, ***"if it's Assault and Battery of a High and Aggravated Nature with malice, it's Assault and Battery with Intent to Kill."*** **App. p. 388, ll. 3-8.** She went on to inform the jury that, ***"what is in dispute today is whether there was malice aforethought, express or implied to. And that's going to be the difference between Assault and Battery of a High and Aggravated Nature and Assault and Battery with Intent to Kill."*** **App. p. 389, ll. 2-6.** In concluding the State's closing argument to the jury, the prosecutor repeated her position that Petitioner's actions demonstrated malice and therefore, that this crime was not Assault and Battery of a High and Aggravated Nature. **App. p. 395, ll. 5-11.**

The record clearly demonstrates that Trial Counsel did not object to these portions of the closing argument. These erroneous statements concerning the law in South Carolina by the prosecution went to the most important issue in this case. Trial Counsel was on notice that Petitioner was exposed to a mandatory life without parole sentences pursuant to S.C. Code Section 17–25–45 (A), if he were found guilty of Assault and Battery with Intent to Kill versus Assault and Battery of a High and Aggravated Nature. **App. p. 650, l. 18- p. 651, l. 12.** He had specifically requested a jury charge pursuant to *State v. Tyler*, 348 S.C. 526, 560 S.E.2d 888 (2002), which would have advised the jury that the absence of malice is not a required element of Assault and Battery of a High and Aggravated Nature and would have instructed them that a finding that a defendant acted with malice does not preclude a finding of Assault and Battery of

a High and Aggravated Nature. The record below indicates that Trial Counsel did not get an affirmative ruling from the Court concerning this request to charge in advance of closing arguments to the jury. **App. p. 422, l. 17 – p. 423, l. 15.** [6] He did not request a ruling on his charge requests before closing arguments began.

It is clear that at the time the Solicitor made these highly prejudicial and erroneous statements concerning the law in the State's closing argument, Trial Counsel did not know for certain whether the jury would hear a correct statement of the law from the bench. As will be discussed at length, *infra*, Trial Counsel's only direct response to these improper closing arguments was to promise the jury in his own closing argument that they would hear jury instructions from the judge which would tell them that the absence of malice was not necessary in order for them to find a Petitioner guilty of the lesser included offense of Assault and Battery of a High and Aggravated Nature. **App. p. 404, ll. 18-22**. This bold promise made to Petitioner's jury by Defense Counsel would not be born out by the charge subsequently issued by the Court.

At the time Trial Counsel made this promise to the jury he had not been told by the Court that his request to charge would be granted. Therefore, Trial Counsel not only neglected to object to these highly prejudicial and erroneous arguments by the State, he compounded the problem by informing the jury that they would hear from the Trial Judge an instruction making it clear that the absence of malice is not an element of Assault and Battery of a High and Aggravated Nature

The prejudice to Petitioner arising from Trial Counsel's failure to object to the State's closing argument was fully demonstrated by Petitioner in his circuit court PCR action. As

[6] Trial Counsel's failure to obtain an affirmative ruling from the trial judge on this request to charge before advising the jury, in his own closing argument, that such a charge would be forthcoming from the trial judge, is addressed *infra*.

previously noted, Petitioner's conviction of Assault and Battery with Intent to Kill resulted in his receipt of a life without parole sentence. The fact that there exists a realistic probability that the improper jury argument in question may have changed the outcome of Petitioner's trial is apparent where the jury came back with a question during its deliberation in which they specifically asked, ***"what is the difference between intent to kill and assault and battery of a high and aggravated nature?"*** **App. p. 424, ll. 11-14.**

Clearly the prejudice to Petitioner was exacerbated by the fact that the Trial Court ultimately gave jury instructions both before and after this question by the jury which reinforced the erroneous statement of the law made by the prosecution in these closing arguments. Petitioner now, most respectfully asserts that the lower court now erred in failing to find that Trial Counsel provided Petitioner deficient representation by failing to object to the portions of the State's closing argument addressed herein. Petitioner's judgment and sentence should have been reversed by the PCR Court on this ground.

## THREE

### Question V

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, by advising the jury in his closing argument that the trial judge was going to instruct [the jury] that the absence of malice is not an element of assault and battery of a high and aggravated nature without determining in advance that the Court would in fact issue such an instruction?**

**Amended Application for PCR, Allegation 8**

In his circuit court PCR action, Petitioner alleged that Trial Counsel was ineffective for advising the jury during his own closing arguments that the Trial Judge was going to instruct them that the absence of malice was not an element of Assault and Battery of a High and Aggravated Nature. In his PCR testimony, Trial Counsel testified that he *assumed* that the Assault and Battery of a High and Aggravated Nature charge he had requested in a written motion was going to be given to the jury because the language of the written request to charge specifically asked that the Court indicate, *prior to* commencement of arguments, which instructions that the Court would give as requested, those instructions that the Court would give as modified and which requests for instructions would not be given at all. He conceded that prior to the beginning of closing arguments, the judge *had not* provided him with a ruling on his request to charge. His testimony reveals that he simply assumed that his requests for specific jury instructions were being granted since the Trial Judge had not indicated, "***he wasn't going to give them...***". In reality, as expressly argued by Petitioner below, neither had the trial judge affirmatively granted the crucial request to charge in question. **App. p. 620, l. 20 – p. 625, l. 17.**

As was acknowledged in Trial Counsel's PCR testimony, the request to charge submitted by him asked that the Trial Judge advise the defense which of the instructions requested were going to be given, which instructions would be given with modification and which instructions were being denied completely. Trial Counsel's testimony reveals that when the Trial Judge made no mention of any ruling on these requests to charge, he assumed the instructions requested would be given. Petitioner submits that the lower court erred in failing to find that Trial Counsel's reliance upon such an assumption constituted ineffective assistance of counsel. While it is true that the written request to charge, Plaintiff's Exhibit Number Five in this PCR proceeding, included a request that counsel be advised of any instructions that *would not* be

given prior to closing arguments, it also asked that the Court advise counsel which of the requested instructions *would be* given. Therefore, Trial Counsel was not in the position to assume that silence from the bench on these requests could safely be construed as granting the request to charge in question. Having not affirmatively requested rulings from the Court on the requests to charge submitted by the defense, Trial Counsel was ineffective for failing to object to closing arguments by the State which erroneously instructed the jury that the presence of malice was the distinction between Assault and Battery with Intent to Kill and Assault and Battery of a High and Aggravated Nature. ***Questions III and IV above.*** The prejudice arising from Trial Counsel's failure to object to the State's misstatement of South Carolina law on this crucial issue was exacerbated when he himself advised the jury that they would hear the trial judge give a specific jury instruction that the absence of malice was not an element of Assault and Battery of a High and Aggravated Nature. Not only did the jury not receive such an instruction from the Trial Judge in the initial charge, but once the jury came back and expressly asked for clarification concerning the difference between the two charges, the Trial Judge repeated it's original charge which stated that ***"assault and battery of a high and aggravated nature includes all the elements of assault and battery with intent to kill except express malice."*** **App. p. 417, ll. 6-10 and App. p. 430, ll. 11-14.**

In the original jury charge, the Trial Court instructed to jury that, ***"in order to prove assault and battery with intent to kill the State must prove beyond a reasonable doubt that the defendant committed an unlawful act of a violent nature to the person of another with malice aforethought."*** **App. p. 413, ll. 15-20.** Assault and Battery of a High and Aggravated Nature was defined as including ***"all of the elements of assault and battery with intent to kill, except express malice."*** **App. p. 417, ll. 6-10.** Following the jury's request for an explanation of the

distinction between these two charges, the Court instructed the jury that ***"assault and battery with intent to kill is an unlawful act of violent nature to the person of another with malice aforethought. Assault and Battery of a High and Aggravated Nature is an unlawful act of violence injury to the person of another accompanied by circumstances of aggravation."*** **App. p. 425, l. 23 – p. 426, l. 3.** In addition, as previously noted, the trial judge repeated his earlier charge that ***"assault and battery of a high and aggravated nature includes all the elements of assault and battery with intent to kill except express malice."*** **App. p. 430, ll. 11-14.**

Nowhere in either charge is there language which came close to the instruction promised by Trial Counsel in his own closing argument. Nothing in the instruction given by the Trial Court could have in anyway lead this jury to understand that they could still find Petitioner guilty of Assault and Battery of a High and Aggravated Nature even if they found that he acted with malice on the facts of this case. Ironically, it is likely that the jury would have interpreted the fact that the Trial Judge did not give them the jury instruction Trial Counsel told them they would hear from the bench as proof that the principal in question was not an accurate statement of the law in South Carolina. This is obviously particularly true where both the Trial Judge and the prosecutor informed them that the absence of malice was the defining distinction between ABWIK and ABHAN. Petitioner asserts that he has clearly established that Trial Counsel was ineffective for informing the jury that they would hear the Trial Judge instruct them that the absence of malice was not an element of ABHAN without determining in advance that the Court would in fact issue such an instruction. He respectfully asserts that he also met the second prong of the *Strickland* standard by demonstrating that the issue involved in this error by Counsel was crucial to the defense inasmuch as the defense was on notice that Petitioner was exposed to a mandatory life without parole sentence pursuant to S.C. Code Section 17–25–45 (A), if he were

found guilty of Assault and Battery with Intent to Kill versus Assault and Battery of a High and Aggravated Nature. **App. p. 650, l. 18- p. 651, l. 12.** Petitioner's jury was obviously confused as to the distinction between ABWIK and ABHAN. There exists a reasonable probability that Counsel's unfulfilled promise that they would hear a jury instruction favorable to Petitioner on this crucial issue further exacerbated the prejudice arising from his failure to object to the state's improper closing arguments.

This claim is obviously closely related to other arguments advanced by Petitioner on collateral review. In addition to the relief which should have been granted Petitioner by the PCR Court on other grounds, he additionally asserts that this allegation warranted reversal and remand for a new trial as well.

## FOUR

### Questions VI and VII

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, where Trial Counsel failed to object to the State introducing testimony concerning other knives alleged to have been carried by the Applicant and said testimony bore no logical relevance to the Applicant's case and constituted evidence of prior bad acts and where Trial Counsel failed to object to the use of a knife for demonstrative purposes in their examination of the victim where the knife was not the one used in the incident which led to the Applicant's charge and was identified by the victim as being only similar to the weapon used in this case?**

**Amended Application for PCR, Allegations 5 and 17.**

During Petitioner's trial the prosecution asked its witness, Jerome Patrick, to view State's Exhibit No. 25, and I asked Patrick whether he had ever seen Petitioner with ***"one of these."***

Patrick was allowed to testify, without objection by Trial Counsel, to having previously seen Petitioner, outside of work, in the possession of a knife similar to State's Exhibit No. 25 and a ***"regular razor"***. **App. p. 189, l. 13- p. 190, 11.**

The Victim in Petitioner's case, was also asked to look at the knife that had been marked as State's Exhibit No. 25 for ID ***"for demonstrative purposes."*** **App. p. 108, ll. 4-14**. The Victim testified that the knife was very similar to the weapon used in his assault, but went on to acknowledge numerous differences between that knife and State's Exhibit No. 25 for ID. **App. p. 108, ll. 2-14.**

In the lower court, Petitioner alleged that Trial Counsel was ineffective in failing to object to the testimony concerning what if any knives Patrick had ever known Petitioner to carry in the past where said testimony had no logical relevance to the charge for which Petitioner was on trial and constituted an allegation of prior bad acts which should have been objected to as a violation of the character evidence rule. Likewise, Petitioner argued that Trial Counsel should have objected to the victim being shown State's Exhibit Number 25 for ID for purpose of demonstrating the type of knife allegedly used by Petitioner where the knife displayed in the court room was not the one used in this incident and where the victim himself admitted that the knife in the court room was only similar to the weapon used in this case.

A fair reading of the testimony summarized above, demonstrates that references to State's Exhibit Number 25 for ID, and the display of that weapon in the court room, were improper. In the lower court Petitioner argued that Trial Counsel should have objected to the display of this weapon in the court room, and to all testimony concerning it, as a violation of Rule 404 (b), SCRE. While it is impossible to know what definitive impact this testimony may have had on the jury, it is apparent that the testimony in question was designed to depict

Petitioner as a violent individual who routinely violated the law by carrying a concealed weapon. Further, the display of this menacing knife in the court room, where it's presence bore no logical relevance to the issues before the jury for their deliberation, was calculated to inflame the passions and prejudices of the jury and accordingly was prejudicial to Petitioner. For these reasons, Petitioner submits that the lower court erred in failing to find that Trial Counsel was ineffective for failing to object to this evidence and that Petitioner was likely prejudiced by Trial Counsel's errors pertaining to the testimony and physical evidence in question. Petitioner most respectfully submits that the lower court erred in failing to grant Petitioner relief on these grounds.

## FIVE

### Question VIII

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, by failing to object to hearsay testimony from Investigator Robert McCracken advising that when he was dispatched to the scene he *"was told someone was cut severely."* App. 300, 11. 7-13.**

**Amended Application for PCR, Allegation 11.**

Petitioner alleges the Trial Counsel was ineffective for failing to object to testimony elicited from State witness, Investigator Robert McCracken, in which he was allowed to testify that when he was dispatched to the scene he ***"was told someone was cut severely."*** Petitioner alleges that the testimony in question constituted hearsay inasmuch as the third-party alleged to have made the statement was in Court and was not available to be cross-examined by Petitioner. **App. p. 300, ll. 7-13.**

Petitioner alleges that the testimony in question was clearly inadmissible hearsay pursuant to Rule 802, SCRE. He further submits that this testimony was not subject to any of the recognized exceptions to the hearsay prohibition found in Rule 803, SCRE. In the lower court Petitioner asserted that Trial Counsel was ineffective for failing to object to this inadmissible admissible testimony. While the testimony in question was hearsay, at first blush, Trial Counsel's failure to object to this testimony appears harmless. Upon closer review, however, it is apparent that this testimony, while brief, was highly prejudicial to Petitioner. The central issue in this case became whether Petitioner was guilty of ABWIK or ABHAN. Inasmuch Assault and Battery with Intent to Kill has been found not to require the specific intent to kill, and the Supreme Court has found that the presence or absence of malice does not distinguish these offenses, the degree of injury to the victim is the primary factor in a jury's deliberation between these two offenses. Given that fact, hearsay testimony concerning the opinion of a third-party, not available for cross-examination, that the victim was "cut severely" had the potential to significantly prejudice Petitioner.

Dr. Stephen Fann, whose testimony is summarized above, testified that the victim in this case was triaged upon arrival at the ER as having the lowest possible score for severity of injuries. His testimony confirmed that the victim, who tested positive for alcohol, marijuana, and cocaine, was released after 23 hours with stitches and ointment and a recommendation that he seek substance abuse counseling. Given this testimony, there exists a significant possibility that the jury verdict may have been impacted by this hearsay claim that the Victim had been "cut severely". For that reason, Petitioner asserts that the lower court erred in failing to grant him relief on the ground that Trial Counsel was ineffective for neglecting to object to this hearsay testimony from Investigator McCracken. Petitioner further submits that there is no way to

conclude that the introduction of this testimony was harmless. Petitioner asserts that the lower court should have found that he was entitled to relief on this ground as well as on other grounds addressed herein.

## SIX

### Questions IX and X

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, by failing to provide Petitioner reasonable professional assistance of counsel in that he neglected to introduce testimony, and employment records, which would have demonstrated that the Petitioner was gainfully employed the week the incident resulting in these charges occurred, and that he had been at work just prior to going to Finley Park and further, by to obtain and introduce motel records which would have proven that at the time of this incident Petitioner had been living in a motel and was not homeless as the State and its witnesses claimed.**

**Amended Application for PCR, Allegations 18 and 19**

Petitioner has alleged the Trial Counsel failed to provide him with reasonable professional assistance of counsel when he neglected to introduce readily available employment records which would have demonstrated that he was gainfully employed the week the incident which led to Petitioner's charges occurred, and that he worked all day on the date of this incident and had gotten off work shortly before going to Finlay Park where this altercation occurred. Throughout Petitioner's trial, the State portrayed him as a homeless drunk and implied that he had the opportunity to have changed clothing after this assault because he had clothing hidden in the woods near the park as was the habit of the homeless population in the area.

Petitioner's PCR testimony, and the employment records introduced by him during his evidentiary hearing, could have been used by Trial Counsel to demonstrate that Petitioner was

gainfully employed at the time of this incident. **Petitioner's Exhibits No. 7 and 8.** Trial Counsel's PCR testimony confirms that he was aware that Petitioner's employment records from Action Labor demonstrated that he was gainfully employed during the general time period of this incident. He further acknowledged that the time records established that Petitioner had worked an eight hour day on the date of this incident and had gotten off work shortly before this altercation was alleged to have taken place. Trial Counsel acknowledged that throughout the prosecution's case the State characterized Petitioner as a homeless man, and further that he was described by State witnesses involved in this case as being grossly inebriated at the time of this altercation. When asked to explain why he would not have introduced readily available documentation to refute the claim that Petitioner was a homeless man, Trial Counsel simply asserted that it was not worth losing the closing argument to the jury to introduce this evidence. **App. p. 641, l. 5 – p. 647, l. 20.** Likewise, Trial Counsel asserted no tactical or strategic reason why it would not have been beneficial to establish that Petitioner, who was being portrayed as extremely drunk, has not been off work long at all when this incident was alleged to have occurred.

In addition, Trial Counsel testified that he did not consider introducing hotel records from the hotel where Petitioner had been staying during this time period to demonstrate that Petitioner had not been living on the street that week and had been staying in a hotel. He admitted ***"talking to people at the hotel"*** in preparation for trial, but admitted that he did not obtain any sort of records to document the fact that Petitioner had been staying at the hotel. **App. p. 647, l. 21 – p. 649, l. 1.** Thus, it is apparent from the record that Trial Counsel knew that Petitioner had been staying at a hotel during this time period and was aware of the name and location of that motel.

PCR Counsel proffered on the record that she and her staff had made every possible effort to locate hotel records dating back to the time period involved in the incident for which Petitioner was charged. PCR Counsel stated for the record that she had determined that the hotel in question was no longer in business at that location. She advised the Court that she and her staff had been unable to determine who currently had dominion and control over the hotel's old records from that point in history. Counsel asserted that while those records were not available at the time of the PCR hearing, it was Petitioner's position that they likely would have been available at the time of the trial since, Trial Counsel's own testimony confirmed that the hotel was in business at the time of Petitioner's trial.

Petitioner has asserted that he would have wanted Trial Counsel to introduce this evidence in order to challenge the State's position that he was a homeless drunk at the time of this incident. It is clear from the testimony presented below that Petitioner wanted Trial Counsel to use this readily available evidence to combat the negative image of him the State presented to the jury. Petitioner argued that Trial Counsel was ineffective for failing to present this evidence on his behalf at trial. Given the fact that the State promoted the image of Petitioner as a homeless person with access to his possessions hidden in a nearby homeless camp, it was impossible for the lower court to conclude that Trial Counsel's errors in this regard were harmless. For that reason, Petitioner respectfully asserts that the lower court erred in denying him relief on this ground.

## SEVEN

### Question XI

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and**

**Fourteenth Amendments to the United States Constitution, by failing to object to a portion of the State's closing argument in which the prosecution argued matters not in evidence. App. p. 394, 11.11-19.**

**Amended Application for PCR, Allegation 20.**

In Petitioner's Amended Application for Post-Conviction Relief he asserted that Trial Counsel was ineffective for neglecting to object to an improper closing argument by the State in which the prosecution argued matters not in evidence. Specifically, Petitioner asserted that Trial Counsel should have objected to the portion of the prosecutor's closing argument wherein she implied that the absence of blood on Petitioner's clothing could be readily explained by the fact that he had changed clothing because he had access to clothes hidden in a backpack down in the woods. **App. p. 394, ll. 11-19**. There was absolutely no evidence introduced during Petitioner's trial which tended to prove that he had any possessions stored in the woods near Finley Park.

In his PCR testimony Trial Counsel admitted that he never even considered objecting to this line of closing argument. In the lower court Petitioner asserted that Trial Counsel should have objected to this argument on the ground that it argued matters not in evidence, and therefore was highly improper. This line of argument by the prosecution was prejudicial to Petitioner in that it sought to provide the jury with an explanation of how Petitioner had the opportunity to quickly change his clothing after he allegedly cut the Victim severely in a bloody altercation Petitioner asserts that he met his burden of proof concerning this allegation in the lower court and therefore, he should have been granted relief on this ground in addition to other grounds discussed herein.

## EIGHT

### Question XII

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of**

**counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, by neglecting to remind the jury that, not only was there no blood visible on the shirt the State alleged belonged to the Applicant, but the State's own witness testified that no DNA was found on the shirt when it was analyzed? App. p. 295, 1. 15-296, 1. 1 and App.p. 404, 1.23- p. 405, 1. 7.**

**Amended Application for PCR, Allegation 9.**

Petitioner has asserted that Trial Counsel provided him with less than reasonable professional assistance of counsel in the manner in which he presented closing arguments to the jury at Petitioner's trial. Specifically, Trial Counsel neglected to review for the jury the evidence presented by the State's own witnesses that established not only that there was no visible sign of blood on the shirt the State alleged to have been worn by Petitioner a the at the time of the altercation, but further, that the State's own witness testified that there was no DNA evidence found on that shirt when it was analyzed. ***See,*** **App. p. 295, 1. 15 – p. 296, l. 1 and App. p. 404, l. 23 – p. 405, l. 7.**

The trial record reflects testimony from State witnesses that the alleged Victim was virtually on top of Petitioner when the Victim was cut and that he bled profusely. A State witness, who previously dated Petitioner, identified a shirt found in a trashcan at the park as the one worn by Petitioner at the time of the altercation. Trial Counsel clearly missed a readily available opportunity to emphasize to the jury that the eyewitness accounts presented by the State's witnesses were not credible in light of the fact that the shirt in question not only didn't have any blood splatter visible to the naked eye, but also failed upon laboratory testing to reveal any DNA evidence belonging to the Victim.

Ordinarily this Court would be reluctant to find ineffective assistance of counsel based upon what evidence Trial Counsel chose to emphasize in closing argument. On the facts of this

case, however, this evidence presented an undeniable opportunity for Trial Counsel to point out that the physical evidence did not corroborate the claims of the State's eyewitnesses. This opportunity was particularly crucial where one of the witnesses was a female who used to "keep company" with Petitioner and the victim was, according to medical testimony presented by the State's own witness, under the influence of both drugs and alcohol. That being the case, any opportunity to challenge their testimony with concrete physical evidence inconsistent with their stories, was crucial to Petitioner's cause. For that reason, this Court is constrained to find that Trial Counsel was ineffective for failing to summarize and emphasize this crucial evidence during his closing argument on the half of Petitioner.

## NINE

### Question XIII

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, where Trial Counsel failed to take adequate measures to insure that Applicant understood that if he accepted a plea offer to plead guilty to ABWIK with a negotiated sentence, he would not face potential interpretation of his sentence as a mandatory life without parole sentence pursuant to §17-25-45?**

**Allegation 22, Developed by PCR Hearing Testimony**

Based upon the evidence adduced during Petitioner's Post-Conviction Relief proceedings, Petitioner has asserted that Trial Counsel failed to adequately explain the potential consequences of accepting a plea offer from the State for a negotiated sentencing cap of 10 years for a plea of guilty to Assault and Battery with Intent to Kill. Petitioner submits that he was afraid to accept the plea offer in question, despite being told that there would be a sentencing cap

of 10 years. His testimony specifically reflects that he had previously been told that under South Carolina law a second conviction for a most serious offense would result in a mandatory life without parole sentence. His PCR testimony indicates that he understood that a second conviction for a most serious offense pursuant to SC Code Ann. Section 17–25–45 (A) would result in a mandatory life without parole sentence. He testified that he was afraid that even if the judge gave him a sentence other than life without parole, SCDC might subsequently interpret his sentence as a mandatory term of life without parole due to the fact that his judgment for Assault and Battery with Intent to Kill would constitute a second most serious strike. Petitioner testified that he had known people who got one sentence in court and then later found out that their sentence was going to be applied differently than was indicated in court. He expressed concern that, ***"they don't have to except it."*** **App. p. 728, l. 16 – p. 730, l. 19.**

Trial Counsel testified that he was certain that Petitioner understood that if he pleaded guilty to Assault and Battery with Intent to Kill pursuant to a negotiated plea bargain, he would not get a life sentence. He testified that Petitioner understood that the reason for entering a plea would be to alleviate the threat of a life without parole sentence. **App. p. 650, l. 18 – p. 652, l. 19.**

Petitioner understands that Trial Counsel believes that he understood all the potential consequences of entering a negotiated plea to a second most serious strike. Trial Counsel, from the perspective of his own education and experience, apparently believes that his explanation to Petitioner was sufficient to explain this critical point. Having heard Petitioner's testimony, and having had the opportunity to observe his demeanor in the court room, Petitioner submits that the lower court should have recognized as credible the Petitioner's assertion that he believed that if he accepted the negotiated plea to a crime that would constitute a second most serious strike,

there was a realistic threat that once incarcerated that sentence would be interpreted as a mandatory life without parole sentence pursuant to §17–25–45.

Petitioner asserts that had Trial Counsel taken appropriate measures to have this issue explained it to Petitioner more thoroughly, perhaps to include assurances from the Solicitor's Office and the presiding judge, Petitioner's decision with regard to accepting or rejecting the State's plea offer would have been different. It is clear from Petitioner's testimony that he would have accepted the plea offer in question had his fears concerning a life without parole sentence been sufficiently addressed.

The Sixth Amendment guarantee of effect of assistance of counsel has been extended to require effect of representation of counsel during the guilty plea negotiation process. Trial Counsel was deficient in his representation of Petitioner during that process. Petitioner does not question Trial Counsel belief that he explained this critical information well enough to alleviate Petitioner's concerns and fears. He urges this Court to recognize however, that in the face of a statute which clearly says a life without parole sentence is mandatory where a judgment and sentence on a second most serious strike are entered on separate and subsequent dates, Petitioner should not be blamed for failing to grasp the nuances of a system that allows the State to agree to not enforce that provision pursuant to agreement of the parties. The record before the lower court does not establish that Trial Counsel took appropriate measures to insure Petitioner was given reason to believe that his fears were not legitimate. Petitioner could not be expected to know, without thorough explanations and assurances, that SCDC could not turn around and treat the sentence being offered with a ten (10) year cap as an LWOP term based upon the clear language of the statutory law governing those convicted of multiple most serious offenses not connected so closely in time as to be fairly treated as one offense for purposes of sentencing.

This is not an example of the old legal rule that ignorance of the law is no excuse. Here Petitioner knew the law and had been warned about its application to the facts in his case. He simply had not been adequately counseled concerning *why* he could trust that law would not ultimately be applied to him regardless of the verbal assurances he was being given. Accordingly, Petitioner most respectfully asserts that he has met his burden of proof with regard to this allegation and that the lower court should have granted him relief on this ground in addition to the other grounds address herein.

## TEN

### Question XIV

**Did the lower court err in denying Petitioner relief where the record below establishes that he meet his burden of proof concerning his claim that Trial Counsel provided him ineffective assistance of counsel, in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, where Trial Counsel failed to advise Applicant that he had the constitutional right under the Sixth Amendment to the United States Constitution to be fully heard in his defense?**

**See, Original *pro se* Application for PCR, Allegation 2, a.**

This allegation was originally raised by Petitioner in his *pro se* application as a claim of Judicial Error, claiming that "The court failed to inform him of his right to put up a defense without having to testify, only that he could remain silent." In the lower court Petitioner amended this claim to allege that Trial Counsel was ineffective for failing to insure that he understood that he could present evidence in his defense even if he elected not to testify in his own behalf. The record below reflects that the trial judge questioned Petitioner at length concerning his right to testify as well as his right to remain silent. **App. p. 374, l. 20 – p. 378, l. 3.** Following this colloquy between Petitioner and the trial judge, the Court asked Trial Counsel

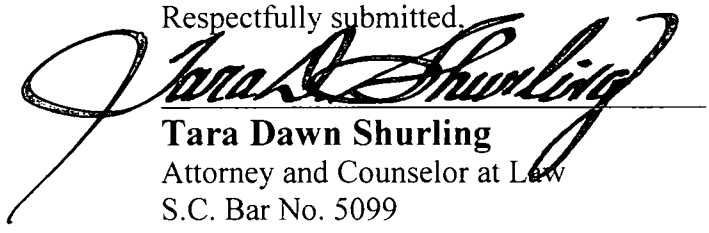
if he intended to present any further evidence. Trial Counsel responded that he did not. **App. p. 378, ll. 4-6**. Nothing in this record indicates that Petitioner was ever advised that he could present other evidence in his defense if he wished to, regardless of whether he decided to waive his right to silence under the Fifth Amendment to the United States Constitution by testifying in his trial. There was nothing in the record before the lower court to indicate that Petitioner understood this crucial right. Petitioner argued below that Trial Counsel was deficient for failing to explain the difference between deciding not to testify and deciding not to present any evidence in support of his defense. It is Petitioner's position that he would have wanted to introduce evidence, much of which has been reviewed herein, designed the discredit the prosecution's portrayal of him as a violent, weapon toting, and homeless drunk. Petitioner has asserted that he should have been granted a new trial on multiple other claims. He now respectfully asserts that the lower court erred in denying him relief on this ground as well.

## F.

## CONCLUSION

Based on all the foregoing, Petitioner asserts that he has met his burden of proof with regard his claims that his right to effective assistance of counsel prior to, and during, his jury trial, as protected by the Sixth and Fourteenth Amendments to the United States Constitution, was violated with regard to each of the allegations addressed herein. Petitioner has also clearly established that he received ineffective assistance of counsel on direct appeal. Inasmuch as the merits of the appellate issues neglected by the Appellate Counsel are obvious, Petitioner asks that he be granted a new trial on those grounds as well as on his claims involving the deficient performance of Trial Counsel. Petitioner requests that the writ be granted, that further briefing be dispensed with, that his judgment and life sentence for Assault and Battery with Intent to Kill, imposed pursuant to pursuant to §17-25-45, be vacated and that his charge be remanded to the Richland County Court of General Sessions for a new trial. Alternatively, he prays that the writ might be granted in order that he be afforded the opportunity to fully brief the issues addressed herein.

Respectfully submitted,



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

Law Office of Tara Dawn Shurling, PA
3614 Landmark Drive
Suite A
Columbia, South Carolina 29204

(803)738-8622 Phone
(803)738-1600 Fax
tdslaw@shurlinglaw.com
ATTORNEY FOR PETITIONER

This 4th day of October, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

---

Appellate Case No. 2016-000415

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CLINTON FOLKES, 216506,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a copy of the Appendix in the above-entitled case has been served upon opposing counsel this the 4th day of October, 2016 by mailing one (1) copy in a stamped envelope properly addressed to:

Megan H. Jameson
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 4th day of October, 2016.

Sharon H McAllister (L.S.)
Notary Public for South Carolina
My Commission Expires: Jan. 16, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
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The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari the above-entitled case has been served upon opposing counsel this the 4th day of October, 2016 by mailing one (1) copy in a stamped envelope properly addressed to:

Megan H. Jameson
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

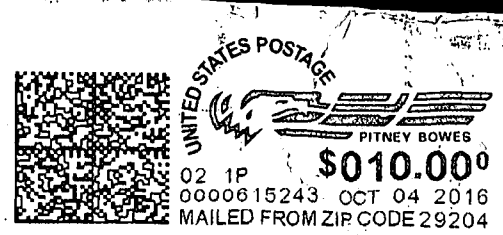
Tara D. Shurling

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

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 4th day of October, 2016.

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




Law Office of
**TARA DAWN SHURLING, PA**
3614 LANDMARK DRIVE, SUITE A
COLUMBIA, SOUTH CAROLINA 29204

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

Re: L. Folkes