IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-001067

Eugene Patterson.....Petitioner,

v.

State of South Carolina.....Respondent.

PETITION FOR WRIT OF CERTIORARI

Elizabeth A. Franklin-Best
SC Bar No. 72555
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

Other Counsel of Record:

Clay Mitchell
South Carolina Attorney General's Office
Rembert Dennis Building
1000 Assembly Street
Columbia, S.C. 29201

TABLE OF CONTENTS

Table of Authorities

Federal Cases

State Cases

Other

QUESTIONS PRESENTED

I. Did appellate counsel render ineffective assistance of counsel when he failed to raise the issue that the trial court judge erroneously presented the jury with the mutual combat jury instruction?

II. Did the PCR judge err when he found trial counsel did not render ineffective assistance of counsel when he failed to object to the trial court judge's jury instruction on transferred intent?

III. Did the PCR judge err when he found trial counsel did not render ineffective assistance of counsel when he failed to object to the trial court judge's jury instruction on proximate cause?

IV. Did the PCR judge err when he found that trial counsel did not render ineffective assistance of counsel when he failed to move for a severance?

V. Did trial counsel render ineffective assistance of counsel when he failed to contemporaneously object to the victim's family being pointed out by an investigator to the jury during trial?

VI. Did the PCR judge err when he found that appellate counsel did not render ineffective assistance of counsel when he failed to raise the issue of the trial judge's improperly allowing hearsay evidence from State's witness, Robert Portee, that he was threatened when others learned he was cooperating with law enforcement?

STATEMENT OF THE CASE

Petitioner, Eugene Patterson, was indicted by the Richland County grand jury during its April 2007 term for murder. He was represented at trial by Tivis C. Sutherland, IV. He was tried before the Honorable William P. Keesley and a jury between May 5-13, 2008. He was convicted and sentenced to 45 years in prison.

Petitioner then timely filed a notice of appeal, and the South Carolina Court of Appeals affirmed by unpublished opinion. *State v. Eugene Patterson*, 2013-UP-154 (Ct. App. *filed* April 17, 2013). Petitioner filed a petition for writ of certiorari to the South Carolina Supreme Court. This Court denied the petition by Order dated January 23, 2014.

Petitioner then filed a *pro se* application for post-conviction relief on February 25, 2014. No amended petitions were filed on Petitioner's behalf. An evidentiary hearing was held on July 15, 2015 before the Honorable G. Thomas Cooper at the Richland County courthouse. Petitioner was represented by Jonathan Waller, Esquire.

The Order of Dismissal was filed on December 23, 2015, and no Rule 59(e) motion was filed on Petitioner's behalf. This petition for writ of certiorari timely follows.

A. Statement of Relevant Facts

The facts of this tragic killing of a young man outside of a Waffle House in Columbia, South Carolina are uncomplicated. The State's theories pursuing these convictions against two young men, unknown to one another but both present when the victim was killed, however, were highly complicated. Indeed, the State switched theories of criminal liability midstream during the trial, morphing from a theory of accessory liability during its opening argument to one of mutual combat by the end of the case. The erroneous jury instructions given by the trial judge provide the basis for three of Petitioner's claims below.

On February 19, 2007, the victim, Brian Wright, was shot once in the back of the head outside of the restaurant in Columbia, South Carolina where young people had congregated to watch a fight between two young men, Corey Sanders and Chad Robinson. Eyewitnesses identified three people who were shooting that night-- Petitioner, Eugene Patterson, Andre Tayson Boone, and Oliver Feldman. Boone admitted that he fired the first shot. "I shot two times in the air just to stop the fighting." App. 1421, l. 15. Feldman testified that he and Petitioner fired at Boone in self-defense. App. 826. Other witnesses corroborated Feldman's account. App. 747-765. Petitioner did not testify.

The projectile that killed the victim was never recovered, and at the beginning of the trial, the State conceded that it would be unable to identify "who fired the shot that actually killed" the victim. App. 313. The State conceded that the victim's death was unintentional, but claimed that the "[t]he gun battle itself killed" the victim. App. 1344. Based on this, all three men were charged with murder.

Captain Stan Smith of the Richland County Sheriff's Office testified before the jury to the State's theory of the case:

> In essence what I'm referencing when I wrote that was that I had three individuals that came to a fist fight, a premeditated fist fight, that was supposed to be a fist fight, they were armed. In my view, that demonstrated premeditation. At some juncture in this fist fight, one individual pulled out a firearm. There was returned fire after shots were fired in the air that were directed at that individual.
>
> In the previous part of that paragraph shows the phrase transferred intent. Those individuals were shooting back at the person who first fired and the person who first fired then changed his course from firing into the air to back at those individuals. And even though I wouldn't contend that any of them meant to kill Brian Wright, Brian Wright became the victim of all three of them's intent in their firing methods and that is, in essence, why the gun battled killed Brian Wright.

App. 1343-44.

At trial, it was revealed that law enforcement failed to interview a number of witnesses who were present at the scene and who may have had information pertinent to the investigation. App. 1248-1251. Law enforcement even had information that another person, Rob Portee, may have fired a weapon that night. App. 1259-60. Or someone with "pigtails." App. 1260-61. Feldman turned State's witness,[1] and Petitioner and Boone were tried together. Petitioner and Boone did not know one another. Petitioner's defense was self-defense. The trial judge appropriately instructed the jury on that defense. App. 1665.

The critical defect in this case that denied Petitioner his right to due process is the State's use of a novel theory upon which it based Petitioner's criminal culpability. The State's changing its theory midstream is evidence that it lacked a cohesive legal basis for pursuing its cases against two young men, without any prior relationship, for the crime of murder. Petitioner raises two sets of claims for this Court's consideration in his petition for writ of certiorari—claims related to the jury instructions given by the judge which empowered the jury to consider the State's ill-conceived legal theory, and then general claims of ineffective assistance of counsel.

---

[1] Despite being equally culpable of murder under the State's theory, Feldman pleaded guilty on October 30, 2008 to reduced charges and received a sentence of 10 and 15 years suspended to 3 years of probation.

B. Jury Instruction Claims

The State's theory of this case changed-- midstream-- from the time of its opening argument to its closing argument. As outlined in its opening argument, its theory was this:

> I mentioned it to you earlier, the hand of one is the hand of all. **If you have two people who join together for some sort of criminal purpose, such as robbing a store, and during the course of that, you, person A, are liable for everything done by person B that is incidental to that act.** So if person A and person B agree to commit a robbery, person A hauls off and beats the clerk, person B is just as responsible as person A even though he never threw a punch. That's the law in this state.
>
> And along those same lines, if two people **combine together** to commit an unlawful act, again like arming yourself with a firearm and engaging in a gun battle with a rival gang member and in the process a homicide is committed, then all of the participants in that act, all of the participants in that gun battle are as guilty as the person who actually killed the victim. That's the law in this state.

App. 320-21 (emphasis added).

As previously mentioned, Petitioner and Boone did not know one another. And the State never offered any evidence to show that they planned the shoot-out that occurred that night. Sensing its weaknesses because the judge clearly informed the State of the problems he saw in their case, the State changed its theory. The trial court judge informed the State that it was "really struggling" with the State's theory of criminal liability. App. 1040.

> I'm really struggling with the aiding and abetting, hand of one hand of all, accomplice liability, things that were argued in the opening statement. I have read the most recent cases all the way back to whatever I could find till about 1920... Generally, people that are aiding and abetting and assisting each other are people who are accomplices from which the term hand of one hand all typically stems, those people are acting in concert... I guess what I need to tell ya'll is that you need to get your folks that you can working on getting me cases that are similar in nature to the one we have before us. I've even read lynching in first degree cases where there's mob violence that results in a death. I've read everything I could think of and I need your help on these concepts of how you can hold two people responsible for the death of a person. I know you can. I know there are many instances when you can... Those are the things that are concerning me. Those are the things ya'll need to be looking at and any help you can give me, I'd appreciate it.

App. 1040-42.

After defense counsel for both defendants made their motions for directed verdict based, in part, on the State's novel theory of legal liability, the judge, in denying their motions, stated: "All right. I'm going to read everything you all have supplied, but at this stage, I'm going to deny the motions for a directed verdict.

> I read what had been supplied to me and looked at that over the weekend and, obviously, I'll look at this that's just been handed up today. And we're still trying to get some resources that we don't have a subscription for, but we're trying to get them, one thing in particular.
>
> And I don't know if I can explain to you what I think is the applicable law right now. It's kind of an evolving process... Now, here's how I'm boiling it down in my head right now. I don't think you've got an accomplice situation. I don't think you've got aiding and abetting and assisting. What I think you've got is a proximate cause issue. I think you've got two people allegedly engaged-- three people allegedly engaged in improper activity. And the question is can you hold all three responsible when you don't know which bullet went through Mr. Wright's head?
>
> I think the answer to that question is, yes, you can hold all three responsible, but I don't think it's of the theory that they were joining together as confederates or that they were in some sort of common scheme, though I realize, going back to that twisting logic around stuff I talked about earlier and last week, that one can sit there and think about a situation where you say, okay there wouldn't be a gun fight except for the two of the combining to do it, so they are acting in combination. The thing is I think that gets us adrift of what the legal theory is... It's a long winded explanation to tell you where I am right now, but basically I think you have more of a proximate cause issue, which is typically something we struggle with in civil court not in criminal court, but you have a proximate cause issue and whether two people can be held responsible or three people can be held responsible for the death of an individual when clearly only one bullet struck that individual. And, again, I think the answer to that question is yes.

App. 1382-1386.

Based on that admonition and insight from the judge, the State reemerged with its reified "mutual combat" theory. In closing argument, the State argued:

> Ladies and Gentlemen, they've got a sign up here, which they've put in, Captain Smith, the nature of the room prevents the actual determination of the murder weapon to ever be made; therefore, **all parties involved in the gun battle will be held accountable for Wright's death...the gun battle itself and each contributor to that gun battle killed the victim**...I submit, ladies and gentlemen, when Tayson Boone started shooting, when Eugene Patterson and Oliver Feldman went back to their car and got their guns and started shooting, those acts combined together as a proximate cause. Those three people combined, in rival gangs, to cause the death of Brian Wright and that is the law of our state. Listen to the judge.

App. 1502, l. 25- 1504, l. 8.

In other words, the State's theory of the case transformed from one of accessory liability to one more expressly of "mutual combat." The judge instructed the jury as to mutual combat, transferred intent, and proximate cause. The judge's giving of these instructions amounted to legal error that denied Petitioner his right to due process. There was no "mutual combat" because Eugene Patterson and Andre Boone did not 1) know one another or 2) plan to fight one another. They were present at the crime scene to observe a fight between <u>two other</u> young men, Corey Sanders and Chad Robinson. If anyone is guilty of "mutual combat" it is Sanders and Robinson.

During his charge to the jury, the judge instructed the jury as to self-defense. App. 1665. In connection with this affirmative defense, the judge also charged mutual combat: "If a defendant voluntarily participated in mutual combat for purposes other than protection, **the shooting would not be in self-defense.**" App. 1666. ll. 10-12 (emphasis added). In other words, the judge instructed the jury that the if they found "mutual combat" then Petitioner did not have a defense to this crime.

The trial court judge erred in charging the jury with the instructions for mutual combat, transferred intent, and proximate cause. As to the mutual combat issue, trial counsel repeatedly objected to this charge, but the trial judge overruled the charge. App. 1361-66, 1478. Appellate counsel failed to raise the issue. As to transferred intent and proximate cause jury charges, trial

counsel did not object. Appellate counsel's failure to raise the issue of mutual combat rendered his performance deficient. Additionally, trial counsel's failure to object to transferred intent and proximate cause rendered his performance deficient.

C. Arguments

I. Appellate counsel rendered ineffective assistance of counsel when he failed to raise the issue that the trial court judge erroneously presented the jury with the mutual combat jury instruction.

Trial counsel repeatedly objected to the judge's instructions on mutual combat App. 161-66, 1478, 1507-08. The PCR court found this issue was preserved for direct appeal, even though appellate counsel failed to raise it. App. 1861 ("This Court agrees with Counsel and finds that he did properly object and preserve for appeal the issue of whether the jury should have been charged with mutual combat. Counsel objected to the mutual combat charge, and Judge Keesley ruled there was ample evidence supporting the charge").

"Mutual combat" was an erroneous instruction in this case. As this Court has held in *State v. Taylor*, 356 S.C. 227, 589 S.E.2d 1 (2003), the case law in this state establishes that there must be "mutual intent and willingness to fight" to constitute mutual combat. *State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). The doctrine has most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed. *State v. Porter*, 269 S.C. 618, 239 S.E.2d 641 (1977). See *Graham*, *supra* (finding mutual combat charge proper where appellant and deceased had quarreled prior to the killing, each knew that the other was armed with a pistol, and each fired his gun at the other); *State v. Mathis*, 174 S.C. 344, 177 S.E.318 (1934) (finding mutual combat charge proper based on testimony that appellant and deceased were on the lookout for each other, that each was armed in anticipation of meeting the other, and that each drew and fired his pistol at the other). In *Taylor*,

this Court expressly adopted the restrictions on the applicability of mutual combat by the courts in Georgia, Colorado, and Texas. In those jurisdictions, a pre-existing dispute is a prerequisite for mutual combat to be charged. In other words, an "antecedent agreement to fight" must be present.

The danger with giving a mutual combat instruction when it is not warranted is that it places a "heavier burden than required" for self-defense. See *Grant v. State*, 120 Ga. App. 244, 170 S.E.2d 55, 56 (1969). The Court found in *Taylor* that:

> mutual combat acts as a bar to self-defense because it requires mutual agreement to fight on equal terms for purposes other than protection. This is inherently inconsistent with the concept of self-defense, and directly conflicts with the "no fault" finding necessary to establish self-defense. As such, it is only logical that the evidence of agreement to fight be plain...

Here, as in *Taylor*, "there is no evidence, and the State does not contend, that there was any pre-existing ill-will or dispute" between the two parties, nor was there "evidence that [Kevin] was willing to engage in an *armed* encounter with Petitioner (emphasis in original). In short, the circumstances present in this case do not warrant giving the jury instruction of "mutual combat." There was no ill-will between Patterson and Boone because they did not know one another. They were both present at a location where **others** were engaged in mutual combat.

The judge's erroneously giving this charge vitiated Petitioner's defense. Petitioner was harmed by this legal error, and he respectfully asks this Court to grant his petition for writ of certiorari and allow additional briefing on the issue.

This Court should grant the petition and allow briefing on this issue even though PCR counsel did not raise this issue because the issue is meritorious, and no further factual development by way of an evidentiary hearing is needed to develop the claim.

On direct appeal, appellate counsel raised one issue: The trial court erred by denying Patterson's motion for a directed verdict of acquittal as the State's circumstantial evidence against

Patterson was too insubstantial to rise above a mere suspicion that he was guilty. The argument on this claim was 1 ½ pages long. Even though trial counsel properly objected to the judge's giving the mutual combat instruction, appellate counsel failed to raise the argument. PCR counsel, a contract attorney under the Office of Indigent Defense's contract system, then failed to raise the issue.[2] This Court is capable to assessing the strength of this claim versus the one that appellate counsel raised on direct appeal to determine whether Petitioner is entitled to a new trial. See *Tisdale v. State*, 357 SC. 474, 594 S.E.2d 166 (2004) (court addressed merits of appellate claims even though they were not properly preserved); *Southerland v. State*, 337 S.C. 610, 617, 524 S.E. 2d 833, 836 (Southerland "met his burden by demonstrating both that appellate counsel's performance was deficient and that, but for the deficient performance, the result of his appeal would have been different") *See also Simpkins v. State,* 303 S.C. 364, 401 S.E.2d 152 (1991) (where appellate counsel fails to raise a meritorious issue on appeal that constitutes reversible error, the appropriate relief is a new trial), *overruled on other grounds by State v. Stokes,* 381 S.C. 390, 673 S.E.2d 434 (2009); *see also Ezell v. State,* 345 S.C. 312, 548 S.E.2d 852 (2001) (where the result of an appeal would have been different had appellate counsel not been deficient, the appropriate remedy is to grant a new trial).

This Court should overlook the procedural bar and address the claim on the merits because the claim is sufficient on its face for resolution. No additional factual development is needed because this Court can simply review the pleadings to discern whether appellate counsel should have raised the issue that was properly preserved and is supported by abundant case law, and whether failure to raise the issue prejudiced Petitioner. Since the improper jury instruction prevented the jury from considering Petitioner's defense, it is clear that Petitioner was harmed by

---

2 PCR attorney's employer was the elected Solicitor of Richland County when this case was tried by his office.

the error. For these reasons, Petitioner respectfully asks this Court to grant his petition for writ of certiorari and allow additional briefing on the claim.

II. The PCR judge erred when he found trial counsel did not render ineffective assistance of counsel when he failed to object to the trial court judge's jury instruction on transferred intent.

As the PCR court found, trial counsel did not join co-counsel's objection to this charge. However, the PCR court found that, even if he had, the jury charge would still have been properly given to the jury. This is error. The trial court judge should not have charged the jury with transferred intent, and trial counsel rendered ineffective assistance of counsel by failing to object. The Court held, "The charge was clearly applicable as a bystander to the fighting was shot and killed." App. 1861. The PCR judge erred because this is not the standard by which a judge should charge a jury.

The trial court judge stated why he thought the jury charge was appropriate:

> I really didn't know what I was going to get into transferred intent because I thought, once again, that I was dealing with a situation where you were advancing a depraved heart, malignant heart theory, but there is evidence in this record of specific intent. And if there's specific intent to kill a person and the perpetrator mistakenly, or just because of whatever reason, misses that person that they intend to kill and kill somebody else, then the doctrine of transferred intent applies and the intent goes to hold the perpetrator responsible for the death of the other person.

App. 1506.

This jury instruction is inappropriate because the State never sought to prove that Petitioner was attempting to murder anyone. The State's theory seems to have been that their participation, in which the death of the victim was *not even intentional*, was the basis for their criminal culpability. The State is seeking to have its cake and eat it too, by asserting both that it did not believe the killing of the victim (or anyone) was intentional but also claiming Petitioner is guilty of murder under a theory of transferred intent. See *State v. Smith*, 337 S.C. 27, 522 S.E.2d 598

(1999); *State v. Gandy*, 324 S.E.2d 66 (1984); and *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984). This Court should grant the petition for writ of certiorari and allow additional briefing on this claim.

III. The PCR judge erred when he found trial counsel did not render ineffective assistance of counsel when he failed to object to the trial court judge's jury instruction on proximate cause.

The PCR court found that this charge was properly given to the jury. App. 1861 ("Finally, as to the proximate cause charge, Applicant has similarly failed to meet his burden"). Again, this was error, and trial counsel rendered ineffective assistance of counsel when he failed to object. The trial court judge erred when he found this charge was properly given to the jury because there was no evidence that the bullet from Petitioner's gun caused the death of the victim, and the State's theory of culpability was too attenuated to support the jury charge.

The State's theory of the case was that, since law enforcement could not identify the person who actually killed the victim, that anyone at the scene who discharged a gun was therefore guilty of murder. For a defendant to be convicted of murder, his act must be the proximate cause of the victim's death. *State v. DesChamps*, 126 S.C. 416, 420, 120 S.E. 491, 493 (1923). Proximate cause is defined as "that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Id.* In the South Carolina cases that have addressed the issue, there has not been any question as to who caused the harm, but rather those cases focus on whether some other event broke the chain of events. See *State v. Burton*, 302 S.C. 494, 397 S.E.2d 90 (1990) (jury instruction to clarify the role of medical treatment), *State v. Dantonio*, 376 S.C. 594, 604, 658 S.E.2d 337, 343 (2008) ("The defendant's act need not be the sole cause of death, provided it is a proximate cause actually contributing to the death of the deceased"); *State v. Patterson*, 367 S.C. 219, 625 S.E.2d 239 (2006)

(removal of victim from life-support not an independent intervening cause). It cannot be said that Petitioner's use of his weapon "proximately caused" the death of the decedent without some evidence that it did, in fact, cause the harm. Here, it may have been Andre Tayson Boone's bullet that killed the victim. It may have been another party, not charged by the State in connection with this death. It is purely speculative to assume that Petitioner fired the fatal bullet. This indeterminacy does not mean, however, that both (or more) "proximately" caused the victim's death. The fact is, law enforcement, in this case, cast an extraordinarily wide net to make any person who discharged a gun-- even in self-defense-- accountable for the murder of the victim. Under this theory, in future cases, law enforcement could arrest anyone who is present at a location where someone is shot, even if there is no evidence to show a connection between a particular individual and a resulting death. Gun ownership is legal in South Carolina, and persons are legally allowed to stand their ground in this state.[3] Under the State's expansive theory of criminal liability here, a person could be held accountable for murder simply because a gun was fired and someone was killed. Respectfully, the PCR court judge erred, and this Court should grant Petitioner's petition for writ of certiorari.

D. General Ineffective Assistance of Counsel Claims

IV. The PCR judge erred when he found that trial counsel did not render ineffective assistance of counsel when he failed to move for a severance.

The State tried Petitioner along with a co-defendant, Andre Tayson Boone. Petitioner did not know Boone. Trial counsel did not move to have his client's case severed from Boone's. He should have, and he rendered ineffective assistance of counsel for failing to make the motion.

---

[3] See S.C. Code 16-11-440(C): A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

The PCR judge erred when he found that trial counsel did not render ineffective assistance for failing to move for a severance. The PCR court found

> Counsel hoped to highlight that Boone was very likely the one who shot the fatal round that killed the victim. He emphasized in closing that it was impossible for Applicant to have fired the fatal round and that he was not responsible for the murder. This Court further finds no specific trial right was violated by trying Applicant and co-defendant Boone together. The confrontation issue regarding Boone's statement did not become an issue because Boone testified in his defense. Furthermore, the incident clearly arose out of the same circumstances, the charges were proved by the same evidence, and the charges are of the exact same nature...Regardless, Applicant was not prejudiced by the joint trial with Boone.

App. 1860.

As an initial matter, the PCR court failed to take into account the trial judge's concern that trial counsel did not move for a severance. During the course of jury discussions, the trial judge forthrightly stated he was concerned a severance motion had not been made in this case:

> And one of the things that concerned me about all that is there's never been a severance motion in this case. And these two folks are on trial and if I start telling that jury you can consider self-defense with one of these co-defendants, but not the other co-defendant, I'm just really concerned about what that's going to express to that jury, what they may try to read into it. And I think the more limiting instructions I might try to give or explanations I might try to give, the worst I would make it.

App. 1500-01.

The judge then stated how he had earlier:

> [T]alked about the fact that it seemed pretty preposterous or it could be interpreted as being pretty preposterous that he [Boone] was claiming that he had to fire back when he walked away from what he considered to be the threat to himself and nobody pulled a gun and nobody shot at him. It also seemed to be a stretch to claim that he had no other reasonable means to avoid the danger of death or serious bodily harm except to act in the manner in which he [Boone] did.

Id.

Trial counsel rendered ineffective assistance of counsel when he failed to make a motion to sever Petitioner's trial from his co-defendant's trial. A severance should be granted when there

is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt. *State v. Harris*, 351 S.C. 643, 572 S.E.2d 267 (2002); *State v. Dennis*, 337 S.C. 275, 523 S.E.2d 173 (1999). As the trial judge recognized, giving a self-defense instruction for both co-defendants was completely confusing to the jury. Clearly, Petitioner had the right to the instruction and Boone did not. App. 1498 ("Now, yesterday, I expressed that I could see Mr. Patterson having a claim of self-defense under some view of the evidence much more than I could see Mr. Boone having any claim of self-defense"). But the judge, it appears, believed he was obligated to give the instruction for both defendants. This harmed Petitioner, and he was denied his right to due process.

Petitioner was also prejudiced by the non-severance because the judge gave the "mutual combat" instruction (See Argument I). The judge specifically gave jury instructions to the jury for them to consider Petitioner's actions in conjunction with Boone's. The "mutual combat" instruction referred to both Petitioner and Boone. If Boone had not been tried with Petitioner, a jury would have been much less inclined to find him guilty of that offense since he would not have been physically present with him at the trial. Petitioner would have received a more favorable result at a separate trial. *Hughes v. State*, 346 S.C. 554, 552 S.E.2d 315 (2001). Petitioner received ineffective assistance of counsel, and he was harmed by his attorney's substandard performance. *Strickland v. Washington*, 466 U.S. 668 (1984). Respectfully, Petitioner asks this Court to grant his petition for writ of certiorari and allow further briefing on this issue.

V. Trial counsel rendered ineffective assistance of counsel when he failed to contemporaneously object to the victim's family being pointed out by an Investigator to the jury during trial.

Trial counsel rendered ineffective assistance of counsel when he failed to contemporaneously object to an investigator's pointing out the victim's family in front of the jury

because that action tended to interject an improper basis for a jury's rendering a guilty verdict. The investigator's actions interjected an emotional and prejudicial element to this case that was already highly emotionally charged. Trial counsel's failure to make a timely objection and then move for a mistrial rendered his performance wholly inadequate.

For petitioner to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective assistance. *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *Brown v. State,* 340 S.C. 590, 533 S.E.2d 308 (2000). To show prejudice, the applicant must show, but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Brown v. State, supra* (citing *Johnson v. State,* 325 S.C. 182, 480 S.E.2d 733 (1997)). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Id.*

The investigator's pointing out the victim's family members in the gallery of the courtroom to the jury was improper because it provided a basis other than the guilt or innocence of the defendant upon which to render a verdict. Specifically, it would have engendered an emotional response from the jury who would have realized that the family members were present and maybe even identifying who the individual jurors were. Given the gang overtones in this case, it may have even scared some of the jurors into convicting for fear of possible gang-related retaliation. Trial counsel should have contemporaneously objected to the investigator's actions and then moved for mistrial. Petitioner was prejudiced by his attorney's substandard performance. Petitioner asks this Court to grant his petition for writ of certiorari.

VI. The PCR judge erred when he found that appellate counsel did not render ineffective assistance of counsel when he failed to raise the issue of the trial judge's improperly allowing hearsay evidence from State's witness, Robert

Portee, that he was threatened when others learned he was cooperating with law enforcement.

Appellate counsel rendered ineffective assistance of counsel when he failed to raise the claim that the trial court judge erred in allowing hearsay evidence from witness Robert Portee that he was threatened when others learned he was cooperating with law enforcement.

> A: I mean, I didn't see anyone with a firearm. I told you why I said that. I was getting threatening phone calls before the police even came to my house. I don't want to put my family in jeopardy when I'm getting threatening phone calls saying, I know what your mom drive, I know where you live, I'm going to kill your parents, I'm going to kill your brother.

The trial court judge found that this testimony was proper under Rule 803(3) and allowed it.

The PCR court judge erred because he found that "Applicant has failed to prove that the proposed issue is stronger than the one raised." App. 1872.

Appellate counsel rendered ineffective assistance of counsel by failing to raise this issue on direct appeal because it interjected highly inflammatory and prejudicial information into Petitioner's trial in violation of South Carolina Rules of Evidence, Rule 404(b). This improper character evidence would have suggested to the jury that Petitioner's friends and family were threatening this witness's life. That testimony was highly improper and violated Petitioner's right to due process. There cannot be any strategic reason for appellate counsel to fail to raise a winning issue, and the PCR judge's order of dismissal commits an error of law when it holds that Petitioner has failed to meet his burden of proof. Since this issue is stronger than the issue raised on appeal because it is a meritorious issue, the PCR judge's ruling is error. Petitioner respectfully asks this Court to grant his petition for writ of certiorari.

CONCLUSION

For these preceding reasons, Petitioner respectfully asks this Court to grant his petition for writ of certiorari, and allow additional briefing of these claims.

Respectfully submitted,

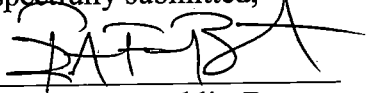
Elizabeth A. Franklin-Best
Blume Norris & Franklin-Best, LLC
900 Elmwood Avenue, Ste. 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

January 26, 2017
Columbia, SC.

CONCLUSION

For these preceding reasons, Petitioner respectfully asks this Court to grant his petition for writ of certiorari, and allow additional briefing of these claims.

Respectfully submitted,



Elizabeth A. Franklin-Best
Blume Norris & Franklin-Best, LLC
900 Elmwood Avenue, Ste. 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

January 30, 2017
Columbia, SC.

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JAN 30 2017
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-001067

Eugene Patterson.....Petitioner,

v.

State of South Carolina.....Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petition for Writ of Certiorari and Appendix was served by first class United States mail, postage prepaid, this 30th day of January, 2017, upon the following:

Clay Mitchell
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

Jill B. Abernethy