Manuel A. Marin
Perry Corr. Inst.
430 Oaklawn Rd.
Pelzer, S.C. 29669

Feb. , 2019

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, S.C. 29201

**Re:** Manuel A. Marin, #343371 v. State
Appellate Case No. 2018-001157

Dear Mr. Shearouse:

Enclosed you will find the original copies of a motion for petition for writ of certiorari for filing with your office In Forma Pauperis.

Can you please return a copy of the clocked in/filed copy of said motion to the above address.

Thank you for your assistance in this matter.

Respectfully submited,

Manuel A. Marin, #343371

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
FEB 26 2019
S.C. SUPREME COURT

Certiorari to Spartanburg County

Grace Gilchrist Knie, Circuit Court Judge

Manuel Antonio Marin, #343371

PETITIONER

V.

State of South Carolina

RESPONDENT

Appellate Case No. 2018-001157

# PETITION FOR WRIT OF CERTIORARI

1. A Spartanburg County Grand Jury indicted Petitioner on Aug. 25, 2008 for murder and possession of a firearm during the commission of a violent crime. His case was called to trial on Oct. 25, 2010 before the Honorable J. Derham Cole, and a jury. Assistant Solicitors Jennifer Jordan and Susan Reese represented the State, and Tanya R Jones represented Petitioner. Petitioner was convicted and sentenced to life without parole

2. The Court of Appeals affirmed Petitioner's convictions and sentences State V. Marin, 404 S.C. 615, 745 S.E. 2d 148 (Ct. App. 2013). this Court granted certiorary and affirmed as modified. State V. Marin, 415 S.C. 475, 783 S.E. 2d 808 (2016). Chief Appellate Defender

Robert M. Dudek and Appellate Defender David Alexander represented Petitioner on appeal.

3. On July 28, 2016 Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of trial counsel, Tanya R. Jones; ineffective assistance of appellate counsel, Robert M. Dudek; suppression of evidence, Susan Reese; prosecutorial misconduct, Russell D. Ghent.

The matter proceded to an evidentiary hearing on Feb. 1, 2018 before the Honorable Grace Gilchrest Knie. Assistant Attorney General Valerie Giovanoli represented the State, and James H. Price represented Petitioner.

4. At the PCR Hearing Petitioner presented testimony from Detective Dale Arterburn of the Greer City Police Dept. and Don Girdnt, a forensic consultant. Respondent presented the testimony of Tanya R. Jones ("Counsel") and Assistant Solicitor Russell D. Ghent ("Solicitor"). Notably, Dudek was not present at the PCR Hearing to answer to the allegations presented against him.

5. By order filed June 5, 2018, Judge Knie denied Petitioner relief.

6. Petitioner filed a notice of appeal to the denial of his post-conviction relief.

7. Petitioner submits that he was entitled to relief for the reasons stated on this brief pg. 1-38; the PCR application with attachments; amended PCR application; and briefs filed with Spartanburg County Clerk of Court.

# I

Trial counsel was inefective in failing to object to prosecutor's cross-examination and closing argument that defendant would not stop the vehicle while being attacked by the decedent.

The State's only argument that defendant was not entitled to self-defense is the fact that defendant would not stop while being attacked by the decedent. Thereby negating defendant's no duty to retreat.
Although the trial judge gave defendant a jury charge that defendant had no duty to retreat (Tr. pg. 382). This charge to the jury was made moot by the prosecutor's highly prejudicial comments that defendant would not stop while being attacked by decedent, without any objection by trial counsel and Negating defendant's no duty to retreat.
This was not an isolated comment by the prosecutor. In fact the prosecutor mentioned the words "would not stop" or "refused to stop" etc. (26) twenty six times and continually drilled this to the jury in her cross-exam. and closing argument.
Self-defense has been proven in this

case as a matter of law. There are four elements required by law to establish self-defense in this case.

First, the defendant must be without fault in bringing on the difficulty: defendant was without fault in bringing on the difficulty because he was attacked for the first time by being placed in a headlock and causing his vehicle to almost hit a telephone pole after passing the decedent's road through no fault of his own, since the front passenger (Jimenez) who was manning the GPS on the defendant's laptop failed to tell defendant (the driver) where to turn. (Tr. pg. 293-296) Officer George Brown's testimony to exited utterance by (Jimenez): "he said that they had gone past his street and the guy got all upset and came over the seat fighting with the driver." (Tr. pg. 129). Defendant's testimony indicated that the decedent's violent behavior was an unreasonable reaction to defendant having passed his road, and that the decedent's blood alcohol level, which was 0.323 would most probably lead to decedent's aggressive behavior. If a bus driver

passes your stop and you attack the bus driver, you are committing a felony (ABIK). Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger: hitting a telephone pole, a tree, a head-on collission or any unmovable object. Going through the windshield and hitting your head on said objects at 45 or 50 MPH, would certainly constitute imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life: any reasonable prudent man of ordinary firmness and courage would certainly believe going through the windshield of a vehicle and hitting his head on a telephone pole at 45 or 50 MPH, or a tree, or a concrete wall,

or a head-on collission was in imminent danger of losing his life or sustaining great bodily injury.

Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

If however, the defendant was in his own premises he had no duty to retreat before acting in self-defense: the defendant was attacked in a dark and deserted road, and after being attacked he was looking for a public place where he could stop.

"And at that point, you know, I was really scared. I was wondering, you know, what had just happened, you know, what he had just [done] or why (sic)... I mean, he had just jumped on me, I mean, for what I--- for an unknown reason. I didn't know why he did that... at that point, you know, I decided not to take him home. I was just trying to find a public place, you know, people where I could stop." (Tr. pg. 296-99).

But the decedent attacked the defendant (driver) again before he could do so. Defendant decided not to stop. after he was attacked.

Although the law states that if defendant is attacked in his own premises (his vehicle) see Art. 6 §16-11-430 he has no duty to retreat. defendant again did try to retreat by pushing the attacker back several times, but the decedent kept coming back, again, and again, grabbing the steering wheel and trying to wreck the vehicle by running it off the road.

Once the decedent attacked defendant (the driver) he became an intruder and defendant had no duty to retreat. see State v. Wigington, 375 S.C. 25, 649 S.E.2d 185 (Ct. App. 2007), "a person need not retreat or seek to escape, even though he can do so without increasing his danger, but may lawfully resist even to the extent of taking life if necessary, where, being without fault in bringing on the difficulty, he is assaulted while in his own dwelling (his vehicle)"... see also State v. Douglas, 411 S.C. 307, 768 S.E.2d "The duty to retreat need not be shown in a murder case in which a defendant seeks immunity from prosecution under the Protection of Persons and property Act. Code 1976 §16-11-410 et seq.

The law states, and the trial judge charged the jury that: "one does not have to wait until his or her assailant gets the advantage, for one always has the right under the law of self-preservation to prevent another from getting the advantage. This charge was also made moot by the prosecutor drilling the jury 26 times that defendant would not stop: (Tr.308 Ln.9); (Tr.309 Ln.19); (Tr.309 Ln.25); (Tr.310 Ln.5); (Tr.310 Ln.14); (Tr.312 Ln.21); (Tr.315 Ln.5); (Tr.315 Ln6); (Tr.315 Ln.14); (Tr.315 Ln.21); (Tr.315 Ln.25); (Tr.349 Ln.9); (Tr.349 Ln.13); (Tr.357 Ln.11); (Tr.358 Ln.8); (Tr.350 Ln.15); (Tr.360 Ln.16); (Tr.360 Ln.20); (Tr.362 Ln.1); (Tr.363 Ln21(a)); (Tr.363 Ln.21(b)); (Tr.363 Ln.22); (Tr.364 Ln.8); (Tr.364 Ln11); (Tr.366 Ln.3); (Tr.366 Ln.4).

This was not an harmless error, for it went to the heart of the case, and it removed the most important part of Art.6. The no duty to retreat.

Therefore trial counsel was ineffective in failing to object to prosecutor's cross-exam. and closing argument that defendant would not stop the vehicle while being attacked by the decedent. Nagating his no duty to retreat.

II

Trial counsel was ineffective in failing to object to prosecutor's highly prejudicial closing argument that the jury could infer malice from two shots fired instead of one. Had it not been for prosecutor submitting erroneous law to the jury the outcome of the trial would have been different.

The prosecutor enumerated: "so the question is is this malice." (Tr. pg. 362). "Ladies and gentlemen, I submit this is malice. Two shots, not one, two shots to the back of the head." (Tr. pg. 361). Absent an objection by trial counsel, and absent an ex-mero motu curative instruction by the trial judge, the jury took this submission of wrongful law by the prosecutor into deliberations with the assertion that the defendant was guilty of malice murder because two shots were fired instead of one. Therefore negating defendant's entitlement to self-defense in a case in which there was no malice except for the firing of two shots, instead of one, being malice. What this entails is that if a police officer is involved in a shooting, and the officer shoots a suspect more than once, he is guilty of malice murder for

firing more than once. That if an officer is being shot at, he can only shoot once, and wait to see if the assailant is disabled before he can shoot again.
In this case, evidence showed that the defendant shot twice in rapid succession, and that the decedent, then, fell on defendant's knee. This is proven by the fact that one of the two bullets exited high up on the windshield, and the second bullet hit the GPS unit, which was attached to the rear view mirror, and shattered on impact. Had this not had been so, slugs, or bullet holes would have been found elsewhere inside the vehicle. Since the wounds were through and through. see State v. Hendrix, 244 S.E.2d 503 (S.C. 1978). The State has argued that appellant used exessive force in his case by firing more than once because, under the testimony, in the light most favorable to the state, the first shot disabled the deceased. The rule is that ordinarily one is not justified in shooting or employing a deadly weapon after the adversary has been disarmed or disabled. 40 C.J.S. Homicide §131 at 1020 (1944), and see State v. Jackson, supra.

However, the rule is also that "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased". 40 C.J.S. Homicide § 131 b at 1020 (1944). In the light most favorable to the state, appellate fired four times in rapid succession and the deceased did not hit the ground until after the last shot was fired. Under this circumstances the force used was not exessive". Just like Hendrix defendant fired in rapid succession. Just as in Hendrix the deceased did not fall on defendant's knee until after the second shot was fired (Tr. pg. 299-300). In many ways, the prosecutor's extremely prejudicial argument that the jury could infer malice because two shots were fired mirrors the error inferring malice from the use of a deadly weapon when mitigating circumstances exist. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). In Belcher, the Supreme Court recognized the danger inherent in allowing a jury to infer malice. Id. at 609-10, 685 S.E.2d at 808-09. Belcher recognized that inferences can lead a jury to an incorrect verdict when the inference

of malice is allowed to override the State's burden of disproving self-defense or proving malice beyond a reasonable doubt. Id. Just like a Belcher error, the state in this case invited the jury to infer malice from multiple shots. Similar to Belcher the error from the invited inference explains the jury's verdict where the state had no theory of motive or malice other than the firing of two shots. The defendant testified at trial that he shot the decedent twice in rapid succession and the decedent, then, fell on defendant's knee. It was apparent at that point that the danger had dissipated.

Absent any malice, the prosecutor, then, resorted to misinforming the jury, and to appeal to their bias, and arouse their passion, and prejudice:

"So when you shoot somebody in the head and they stop struggling with you, if that's what they're doing, you don't have--you won't shoot them a second time unless you pull that trigger a second time." (Tr. pg. 356).

And again: "And he tells you I got the gun and I shot him. Where did you shoot

him? In the back of the head. Once? I shot him twice. Was he still struggling after the first shot? Well, it was bam, bam." (Tr. pg. 361). And again: "And what is aforethought. We said malice... And this guy made his decision in more than an instance, because he admits he has to get a gun from somewhere. I submit to you it's not in the glove compartment. But it's somewhere. He has to unhook the pouch, he has to pull the slide back and he has to fire twice" (Tr. pg. 362).

Not only did trial counsel not object to defendant "firing twice" equaling malice aforethought, but defendant testified that the weapon was in the glove box: "At that point I pushed him off, and I grabbed the glove box and I opened the glove box and got the pouch out, which had the gun in it" (Tr. pg. 299). Therefore prosecutor calling defendant a lier was highly prejudicial, and shows that prosecutor was knowingly and intentionally inserting malice, creating bias, and arousing jury's prejudice against defendant.

And again: "Would a reasonable person shoot someone twice in the back of the head? Everything he said is true? (Tr. pg. 364).

And again: "that's when I submit to you, ladies and gentlemen, he was shot twice in the back of the head, because that makes no sence. This is malice". (Tr. pg. 366).
And again: "so the question is is this malice". "Ladies and gentlemen, I submit this is malice. Two shots, not one, two shots to the back of the head". (Tr. pg. 361). see State v. Day, 535 S.E.2d 431 (S.C. 2000) "A prosecutor's comments deprive the accused of due process of law where the comments so inffected the trial with unfairness as to make the resulting conviction a denial of due process"; State v. Tubbs, 333 S.C. 316, 509 S.E.2d 815 (1999) (Quoting) Donelly v. DeChristoforo, 416 U.S. 637, 643, 945 S.Ct. 1868, 1871, 401 L.Ed.2d.
Homicide ⇨ 146
Under South Caralina law, malice may be presumed in the absence of circumstances of excuse or justification, and if presumption is permissible, e.g.; absence of circumstances of excuse, the presumption satisfies state's burden to prove malice aforethought beyond a reasonable doubt; however, when all circumstances of the case are fully developed, and defendant produces evidence to show justifi-

cation for killing any presumption as to malice will vanish S.C. Code 1976§16-3-10. The defendant in this case did not shoot the decedent again once the decedent fell on defendant's knee and it was then apparent that the danger had dissipated. Which is what the prosecutor continually insinuated and drilled to the jury: "so when you shoot somebody in the head and they stop struggling with you, if that's what they're doing, you don't shoot them a second time... And" so the question is is this malice. Ladies and gentlemen, I submit this is malice. Two shots, not one, two shots to the back of the head". (Tr. pg. 361).

Trial counsel was ineffective in failing to object to prosecutor's highly prejudicial closing argument that the jury could infer malice from "two shots fired instead of one". This issue went to the heart of the case and it removed from the jury any and all considerations to any mitigating circumstances.

## III

## Prosecutorial Misconduct/Suppression of Evidence

Applicant in this matter raised as an issue of his PCR that the prosecutor suppressed evidence. During PCR hearing Applicant's counsel brought the following to the attention of the court: (1) Chain of custody forms sending a steering wheel cover to SLED which requested DNA analysis of the cover; (2) A response from SLED to the effect that the sample did not comply with SLED regulations and referred the matter back to Spartanburg County Sheriff's Office.

At the request of Aplicant's counsel the PCR court issued an Order of Discovery requiring SLED to provide written confirmation to both the Applicant and the State as to whether any DNA analysis of the steering wheel cover was ever performed. Pursuant to the Order SLED provided a letter to the effect that the matter was sent back to Spartanburg County Sheriff's Office's Inv. Demetric Glen, requesting that a blood sample be submitted: "Please submit a bucal swab (preferred) or liquid blood sample from the subject(s) for comparison purposes. If the requested DNA standards are not submitted within three months, the evidence will

be returned to the submitting agency without analysis."

Which is exactly what occurred. No further action was taken. The State neglected to or failed to submit the requested samples for DNA analysis.

Applicant and his trial counsel were provided with the Chain of Custody forms sending the steering wheel cover to SLED and requesting DNA examination of same. Applicant was <u>not</u> provided with the letter from SLED informing Spartanburg County that its protocol was not followed nor was Applicant provided with documentation that no DNA analysis of the steering wheel cover was performed. Applicant, in his testimony and Second Amended PCR Application, argues that this omission is tantamount to prosecutorial misconduct due to a number of reasons, primarily the fact that Applicant nor his attorney were given the opportunity to specifically request DNA examination of the cover for exculpatory evidence (i.e.), evidence confirming the deceased did grab the steering wheel cover with his hands thereby placing Applicant in danger and in fear for his life and justifying Applicant's

self-defense shooting of the deceased. Applicant urges the Court to consider the following argument:

A prosecutor that withholds evidence which if made available would tend to exculpate an accused by creating reasonable doubt as to his guilt violates due process of law Const. Art. 3 § 14.

In order to find that defendant's due process rights have been violated by the failure to disclose evidence, so as to entitle him to a new trial, such evidence must have been exculpatory in nature Const. Art. 3 § 14.

SCRC Rule 3.4 Fairness to Opposing Party

Rule 3.4(a) A lawyer shall not: unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

Rule 3.4(d) A lawyer shall not: fail to make a reasonable diligent effort to comply with a legal proper discovery request by an opposing party.

[1] The procedure of the adversary system contemplates that the evidence in a case is to

be marshalled competitively by the contending parties.

Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim of defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, **concealed** or destroyed.

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall: make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or **mitigates the offense**, and in conection with sentencing, disclose to the defense and to the tribunal all unprivilleged mitigating information known to the prosecutor...

[1] A prosecutor has the responsibility of

a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

Jencks Act U.S.C. § 3500

Under the Jencks Act, witness statements, including reports prepared by testifying officers, must be turned over to the defense. Although an officer's "rough notes" need not be disclosed pursuant to the Jencks Act as witness statements, United States v. Anderson, 813 F.2d 1450, 1459 (9th Cir. 1987) they must be disclosed pursuant to Brady if they contain material and exculpatory information.

Brady v. Maryland, 373 U.S. 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); U.S. v. Alvarez, 86 F.3d 901 CA.9 (Cal. 1996) Suppression by prosecution of evidence favorable to accused upon request violated due process where evidence is material to eather guilt or punishment, irrespective of good faith or bad faith of prosecution.

United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988).

The Brady disclosure rule requires the prose-

cution to provide the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. see also State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998).

Kyles v. Whitley, -U.S.- 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), "The Court emphasized the prosecutor's personal duty to become aware of, and disclose material esculpatory information. The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case including the police". Id. at 115 S.Ct. at 1567. (emphasis added).

The prosecutor must employ whatever means are necessary to discharge her obligation... Because the government's failure to turn over exculpatory information in its possession is unlikely to be discovered and thus largely unreviewable, it is particularly important for the prosecutor to ensure that a careful and proper Brady review is done.

Delegating the responsibility to a nonattorney police investigator to review his own and other officer's rough notes whether they contain Brady, Bagley, and Gigio informa-

tion is clearly problematic...

U.S. V. Rodriguez, 917 F.2d 1286, Rule which prohibits suppression by the government of evidence that is favorable to accused and that is material to eather guilt or punishment, irrespective of good or bad faith of prosecution, applies to both impeachment evidence and exculpatory evidence. U.S.C.A. Const. Amends. 5, 14.

Regardless of whether it was the investigator's decision or negligence or the prosecutor's, whether intentional or unintentional, in good faith or in bad faith not to provide the requested samples to SLED for comparison purposes in Lab No. L08-11693 the fact remains that it was the prosecutor's responsibility.

It is clear that Applicant was **not** provided with knowledge that no DNA testing of the steering wheel cover was done. Because Applicant was not provided with this information he lost the opportunity to request the court to order DNA testing of the steering wheel cover which he feels would have provided him with confirmation that the deceased grabbed the steering wheel. This evidence would have been exculpatory in nature,

and was highly prejudicial on account of the prosecutor's immensely inappropriate closing argument in which the prosecutor repetitiously repudiated defendant's testimony:
"so when you shoot somebody in the head and they stop struggling with you, if that's what they're doing". (Tr. pg. 356).
and again: "he admits he has to get a gun from somewhere. I submit to you it's not in the glove compartment. But it's somewhere" (Tr. pg. 362).
and again: "Would a reasonable person shoot someone twice in the back of the head? Everything he said is true"? (Tr. pg. 364).
and again: "Ask, ladies and gentlemen, if that's reasonable with the defendant's story. The defendant says, oh, my gosh, we were struggling, he had me, I was trying to shove him off, back and forth, back and forth (Tr. pg. 355).

The steering wheel cover was monumental to accredit defendant's testimony. Without the cover the prosecutor was able to transcend her closing argument and depict defendant's testimony as fictitious. And without any objections by trial counsel.

IV

Prosecutorial Misconduct/Malicious Prosecution

Although Mr. Russell D. Ghent was a prosecutor for the Seventh Judicial Circuit at the time of Applicant's trial Mr. Ghent, obviously, got involved with the case and wrote the appeal for the State which was signed off by both Mr. Ghent and the Deputy Attorney General Donald J. Zelenka.

Prosecutor Ghent abused his discretion and committed prosecutorial misconduct by lying or injecting disinformation into his briefs to the Court of Appeals and to the Supreme Court in order to create bias and prejudice, in an attempt to introduce malice in a case in which there is no malice.

The evidence and testimony presented at trial clearly contradicts Mr. Ghent's apocryphal assertions in his briefs.

At the PCR Hearing Don Girdnt an expert in crime scene reconstruction testified that after reviewing the evidence in this case, the crime scene was consistent with, and corroborated Applicant's version of events.

In the Initial Brief of Respondent to the Court of Appeals Filed Aug. 6, 2012

Mr. Ghent stated in pg. 5 "The Appellant drove away with the victim apparently passed out in the back seat"... Had the decedent been passed out he wouldn't have attacked the defendant (driver).

In page 15 Mr. Ghent stated: "Even assuming for argument the events were as Appellant claimed at trial, the Appellant was not "without fault" in bringing on the difficulty which ultimately led to a man's death. There was simply no question that the State had negated the first element of self-defense in its case in chief through all of the circumstances proven; see, State v. Santiago, 370 S.C. 153, 634 S.E.2d 23, 27 (Ct. App. 2006) (taking a loaded gun to the site of a prior confrontation with the victim, and where the fatal encounter occurred, repudiated a claim defendant was without fault in bringing on the confrontation)... In State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (S.C. 2007), our Supreme Court held that the defendant was not entitled to a self-defense charge, having approached an altercation that was already underway with a loaded weapon by his side, such activity being reasonably calculated to bring on the difficulty

that arose." This is a perfect example that in any absence of malice in this case, Mr. Ghant must fabricate it in order to negate defendant's entitlement to the first element of self-defense. The defendant in this case did **not** take a loaded gun, or approached an altercation already underway with a loaded weapon. The weapon in this case was already in the glovebox of the defendants vehicle where it is lawful for the defendant to keep, since the weapon was legaly registered to the defendant. **Therefore defendant was without fault in bringing on the difficulty.** In pg. 23 Mr. Ghent accused the defendant of "kidnapping" the decedent. The defendant in this case was **not** indicted or charged with "Kidnapping". There was no mention of the word "Kidnapping" in the trial. The defendant did not force the decedent into his vehicle, and after being attacked by the decedent, the decedent became an attacker, an intruder, an aggressor. If you are a passenger in a bus, and the bus driver passes your stop you cannot charge the bus driver with "Kidnapping". After being attacked by the decedent, the defendant was looking for

a public place to stop, but was attacked again before he could do so. Regardless. There was nothing in the trial record, and defendant was not charged with "kidnapping."

In the Brief of Respondent for Writ of Certiorari to the Supreme Court, Filed on Jan. 12, 2015, Mr. Ghent submitted in his brief that: "The Petitioner claimed he was attacked by the victim from the back seat while trying to drive him home, turning the car into a 'missle' and justifying that he put a gun to the victim's head **as the victim was prone and face down in his lap.**" (pg. 12). If this had been the case, Petitioner would have shot himself on his lap, since the wounds were through and through, and back to front.

And again in (pg. 15) "but which admittedly did not tell jurors that having once shot an unarmed man **who was pinned face down.**"

And again in (pg. 16) "This was evidence of pulling a gun from the glove compartment **while holding the victim face down.**"

While the crime scene photographs clearly shows that one of the two bullets exited high up on the windshield and the other

impacted the GPS unit which was attached to the rearview mirror and shattered upon impact. Which proves that the decedent was upright (and this is why this also makes the suppression of lab No. L08-11693 steering wheel cover critical and prejudicial) and proves that at the time of the shooting the decedent was upright and holding on to the steering wheel and trying to wreck the vehicle by running it off the road.
Further contradicting prosecutor Ghent's apocryphal writings on his briefs is the fact that no slugs or bullet holes were found anywhere on the floor-board or anywhere else in the vehicle exept high up on the windshield and the shattered GPS unit. There was nothing in the record to confirm that Applicant held the decedent's head down as described by Mr. Ghent. On cross-examination at the PCR Hearing by the Applicant's counsel, Mr. Ghent admitted that these were conclusions on his part and there was nothing in the record to confirm this. He also admitted that there was nothing in the record concerning the trajectory of the bullets and that his testimony about

Applicant holding the decedent's head down was speculation and conjecture. What Mr. Ghent has done constitutes prosecutorial misconduct, malicious prosecution, and unlawyerly conduct. SCRC Rule 210 Record on appeal (c). Content. The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 338. The Record shall not, however, include mater which was not presented to the lower court or tribunal. See U.S. V. Sherlock, 865 F.2d 1069 (Ariz. 1989), Reversal of conviction will be required when prosecution knowingly presents false testimony.

Petitioner was prejudiced and his due process was violated by Prosecutor Russell D. Ghent submitting apocryphal briefs.

Unless Petitioner's bullets defied the law of gravity Mr. Russell D. Ghent presented false testimony.

V

Appellate counsel was ineffective in failing to claim the issue of the directed verdict on self-defense, since trial counsel requested it, and it was ruled on by the trial judge, and preserved for appellate review. And since this was a dispositive issue on this case.

See: Gray V. Greer, 800 F.2d 644, 646 (7th Cir. 1986), Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger that those actually raised on appeal. Id.

Self-defense has been proven in this case as a matter of law. There are four elements required by law to establish self-defense in this case First, the defendant must be without fault in bringing on the difficulty: defendant was without fault in bringing on the difficulty because he was attacked for the first time by being placed in a headlock, and causing his vehicle to almost hit a telephone pole after passing the decedent's road through no fault of his own, since the front passenger, (Jimenez), who was manning the GPS on defendant's laptop, failed to tell defendant, (the driver), where to turn onto decedent's

road. Defendant did not know at the time of the attack, why he was being assaulted. "And he jumps up and he grabs me in a headlock. I grabbed [his hands and pushed them up and off of me] (sic). I'm like, hey man, what the hell are you doing?" (Tr. pg. 296).

Officer George Brown's testimony to exited utterance by (Jimenez): "He said that they had gone past his street and the guy (decedent) got all upset and came over the seat fighting with the driver". (Tr. pg. 129).

Had (Jimenez) told defendant where to turn, defendant would have done so. No driver purposely misses a turn or an exit on the highway. So defendant was without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger: hitting a telephone pole, a tree, a head-on collission, or any unmovable object. Going through the windshield and hiting your head on said objects at 45 or 50 MPH, would certainly constitute imminent danger.

Third, if his defense is based upon his

belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm, or losing his own life: any reasonable prudent man of ordinary firmness and courage would certainly believe going through the windshield of a vehicle and hitting his head on a telephone pole at 45 or 50 MPH, or a tree, or a concrete wall, or a head-on collission was in imminent danger of losing his life or sustaining bodily injury. Fourth, defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If however, the defendant was in his own premises he had no dudy to retreat before acting in self-defense: although the law states that if the defendant is attacked in his own premises, (his vehicle, see Art. 6§16-11-430) he has no duty to retreat, defendant in this

case did try to retreat. Defendant was first attacked on a dark and deserted road, and was trying to find a public place where he could stop, and get some help for the situation, but was attacked again before he could do so. On the first attack, the decedent placed defendant in a head lock, causing defendant's car to go on to the on-coming lane, and almost hitting a telephone pole after passing decedent's road, through no fault of his own, since the front passenger, (Jimenez), who was manning the GPS on defendant's laptop, failed to tell defendant where to turn. Before the defendant could find a public place to stop, the decedent attacked Applicant again, trying to wreck the vehicle by running it off the road. Although the law states, that the defendant had no duty to retreat, defendant again did try to retreat by pushing decedent back several times, but the decedent kept on coming, again, and again. At this point defendant's survival instincts took over, and defendant believed using deadly force was necessary to prevent losing his life or sustaining serious bodily injury, and that he had no duty to retreat. See State v. Wigington, 375 S.C. 25, 649

S.E.2d 185 (Ct. App. 2007)" a person need not retreat or seek to escape, even though he can do so without increasing his danger, but may lawfully resist even to the extent of taking life if necessary, where, being without fault in bringing on the difficulty, he is assaulted while in his own dwelling (his vehicle)... see Art. 6 §16-11-430(1) "Dwelling" means a building or conveyance of any kind... mobil or imobile... §16-11-430(4) "Vehicle" means a conveyance of any kind... §16-11-420(A) It is the intent of the General Assembly to codify the Common Law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle...
§16-11-420(B) The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders, and attackers without fear of prosecution or civil action for acting in defense of themselves and others.
(Once the decedent attacked the driver, he became an intruder). (Tr. pg. 283 Ln. 16-18).
§16-11-420(D) The General Assembly finds that persons residing or visiting this State have a right to expect to remain unmolested and

safe within their...vehicles.(defendant consented to give a ride to the decedent. He did not consent to being attacked.) §16-11-420(E) The General Assembly finds that no victim of a crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.(defendant had no duty to retreat.) §16-11-440(A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:(2) who uses deadly force knows or has reason to believe that an unlawful and forcible act is occurring or has occurred. (decedent was forcing the vehicle off the road and was attacking defendant(ABIK). §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. (defendant reasonably believed he was in danger of losing his life or great bodily injury to himself and the other passenger.).

§16-11-450(A) A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force... (defendant submits that he has met all the provisions of this article.).

See also: State v. Douglas, 411 S.C. 307, 768 S.E.2nd, "The duty to retreat need not be shown in a murder case in which a defendant seeks immunity from prosecution under the Protection of Persons and Property Act. Code 1976 §16-11-410 et seq.

Self-defense has been proven in this case as a matter of law. Trial counsel requested a directed verdict and it was ruled on by

the trial judge. Therefore it was preserved for appellate review.

On the continuing to shoot proposition which the Court of Appeals denied applicant, the appellate court stated in their opinion in State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013): "The Supreme Court approved the charge (continuing to shoot) **as a proper way to deal with a different issue than the one we face in this case.** In State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), the court faced the question of whether the trial court erred in refusing to direct a verdict for the defendant. 270 S.C. at 654, 244 S.E.2d at 504. In the course of discussing its holding that self-defense existed as a matter of law... **wich is the very issue that the appellate counsel failed to raise on this appeal.** since this was a dispositive issue, appellate counsel was ineffective in failing to raise this issue for appellate review. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "Whether appellate counsel failed to present significant and obvious issues on appeal".

# VI

Appellate counsel was ineffective in failing to file Reply Briefs SCRC, Rule 208(a)(3) Rule 209 to the Court of Appeals and to the Supreme Court. Thereby acceding to prosecutor Russell D. Ghent's apocryphal Briefs.

Appellate counsel's Reply Briefs were indispensable on account of Mr. Ghent's prevaricate Briefs. See Issue IV of this Brief, pages 22-27.

There was nothing in the record confirming any of Mr. Ghent's assertions. On cross-exam. at the PCR Hearing Mr. Ghent admitted that these were conclusions on his part and there was nothing in the record to confirm these assertions. He admitted that it was conjecture and speculations. (PCR pg. 212-218).

When Mr. Ghent testified at the PCR Hearing that the Supreme Court had upheld his conclusions he was correct--because there was no Brief from appellate counsel to dispute this! (Q.) "There was no testimony in the trial about the so called--the suppositions that you just testified to? (A.) No, Sir, but the Supreme Court...had no problem with it" (PCR pg. 218 Ln. 4-8). Without a Reply

Brief to contest these inflamatory statements against Petitioner the Supreme Court had no choice but to accept them. This was not petitioner's fault but it was prejudicial to him and violated Petitioner's Due Process of Law.
Petitioner's counsel should have filed the Reply Briefs contesting these factual conclusions which were unsupported by the record.

Therefore appellate counsel was ineffective in failing to file the Reply Briefs SCRC Rule 208(a)(3) Rule 209.

This was a legitimate case of self-defense. Self-defense has been proven in this case as a matter of law. Petitioner's actions were reasonable and consistent with a person acting in self-defense.

The decedent's violent behavior was an unreasonable reaction to Petitioner having passed his road and the decedent's blood alcohol level, which was 0.323 would most probably lead to decedent's aggressive behavior.

If you are a passenger in a bus, and the bus driver passes your stop, and you attack the bus driver, you are committing a felony (ABIK). Petitioner was in his own premises and he had no duty to retreat.

On the inference of malice because two shots were fired instead of one, what the State is insinuating is that if a police officer shoots a suspect more than once he is guilty of malice murder for firing more than once. That if the officer is being shot at he can only fire once and wait to see if the assailant has been disabled before he can shoot again.

For the aforementioned reasons the Court should grant the petition with the ultimate result of a remand to the lower Court for a verdict of aquital or a new trial.

Respectfully submited,

Feb. , 2019 Manuel A. Marin, #343371

PETITIONER

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Grace Gilchrist Knie, Circuit Court Judge

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Manuel Antonio Marin

Petitioner

V.

State of South Carolina

Respondent

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## CERTIFICATE OF SERVICE

I, Manuel A. Marin, certify that I have served a true copy of the petition for writ of certiorari on Respondent by depositing a copy of same in the Inter Agency mail addressed to Kelly Oppenheimer, Esquire, at Rembert Dennis Building, 1000 Assembly St. Room 519, Columbia, S.C. 29201.

Manuel A. Marin, #343371

PETITIONER

Feb 21, 2019

Tamara Conwell

September 25 - 2023

2/21/2019

Larin #343371

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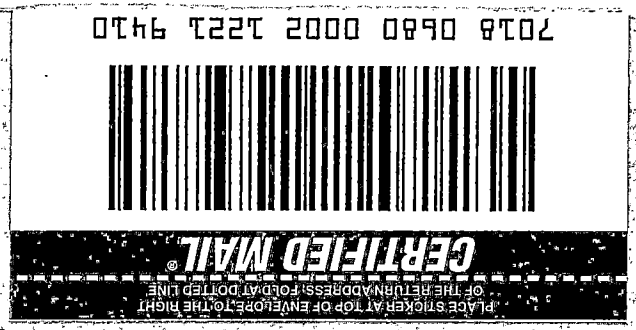


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