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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO Horry COUNTY
WILLIAM H. SEALS, Jr. CIRCUIT COURT JUDGE

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JUL 16 2019

S.C. SUPREME COURT

RICHARD B. NILES, Jr.

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-000396

PETITIONER'S PRO SE BRIEF FOR WRIT OF CERTIORARI

RICHARD B. NILES, Jr.
PRO SE PETITIONER

MACDOUGALL CORR. INST. CYPRESS
1516 OLD GILLIARD RD.
RIDGEVILLE, SC 29472

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ISSUES PRESENTED

DID THE PCR COURT ERR IN FAILING TO FIND TRIAL COUNSEL INEFFECTIVE FOR NOT OBJECTING TO THE TRIAL COURT'S RESPONSES TO THE JURY'S QUESTIONS?

DID THE PCR COURT ERR IN FAILING TO FIND APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO RAISE ISSUE THAT TRIAL COURT ERRED IN NOT PROPERLY ANSWERING THE JURY'S QUESTIONS?

STATEMENT OF THE CASE

PETITIONER WAS INDICTED AT THE AUGUST 2007 TERM OF THE Horry COUNTY GRAND JURY FOR MURDER[2007-GS-26-03363].APP.1020. PETITIONER WAS FURTHER INDICTED AT THE OCTOBER 2008 TERM FOR POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME[2008-GS-26-4116],AND ARMED ROBBERY[2008-GS-26-41 17].APP.1016-1019. ON MARCH 9,2009, PETITIONER AND HIS CO-DEFENDANT MOKEIA HAMMOND PROCEEDED TO TRIAL BEFORE THE HONORABLE BENJAMIN II. CULBERTSON AND A JURY. VERDELL BAR,ESQUIRE APPEARED ON BEHALF OF PETITIONER AND RON HAZZARD,ESQUIRE APPEARED ON BEHALF OF CO-DEFENDANT HAMMOND. THE STATE OF SOUTH CAROLINA WAS REPRESENTED BY DONNA ELDER,ESQUIRE AND BRADLEY C.RICHARDSON,ESQUIRE EACH OF THE FIFTEENTH CIRCUIT SOLICITOR'S OFF.APP.1. THE JURY FOUND PETITIONER GUILTY AS INDICTED ON MARCH 13,2009.APP.741. JUDGE CULBERTSON SENTENCED PETITIONER TO IMPRISONMENT FOR CONCURRENT TERMS OF 30 YEARS FOR MURDER; 30 YEARS FOR ARMED ROBBERY;AND,5 YEARS FOR POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME.APP.1022-1024.

DIRECT APPEAL

PETITIONER FILED A TIMELY NOTICE OF APPEAL AND A DIRECT APPEAL WAS PERFECTED BY ROBERT M. DUDEK,ESQUIRE, WHO RAISED THE FOLLOWING ISSUE:

WHETHER THE COURT ERRED BY REFUSING TO CHARGE VOLUNTARY MANSLAUGHTER BASED ON EVIDENCE APPELLANT WAS SHOT AT AND RETURNED FIRE WHERE THE COURT INCORRECTLY REASONED THAT APPELLANT WAS EITHER ACTING IN SELF-DEFENSE OR SHOT THE DECEDENT DURING THE COMMISSION OF AN ARMED ROBBERY SINCE VOLUNTARY MANSLAUGHTER AND SELF-DEFENSE ARE NOT MUTUALLY EXCLUSIVE?

THE PARTIES PROCEEDED TO ORAL ARGUMENTS ON FEBRUARY 14,2012, MR.DUDEK

AND REID T.SHERARD, ESQUIRE, REPRESENTED PETITIONER. BRENDAN J.McDONALD, OF THE SOUTH CAROLINA ATTORNEY GENERAL'S OFF., APPEARED FOR THE STATE. BY OPINION DECIDED SEPTEMBER 12, 2012, AND SUBSTITUTED NOVEMBER 14, 2012, THE SOUTH CAROLINA COURT OF APPEALS REVERSED PETITIONER'S CONVICTIONS, FINDING THE CIRCUIT COURT ERRED IN REFUSING TO CHARGE THE JURY ON VOLUNTARY MANSLAUGHTER. STATE V. NILES, 400 S.C.527, 735 S.E.2d 240[Ct.A pp.2012]. THE STATE PETITIONED THE SUPREME COURT OF SOUTH CAROLINA FOR A WRIT OF CERTIORARI, WHICH WAS GRANTED BY ORDER DATED FEBRUARY 6, 2014. THE PARTIES PROCEEDED TO ORAL ARGUMENTS IN THE SUPREME COURT ON JUNE 25, 2014, WITH THE SAME ATTORNEYS APPEARING. BY OPINION DECIDED MARCH 25, 2015, AND SUBSTITUTED JUNE 10, 2015, THE SUPREME COURT REVERSED THE COURT OF APPEALS, FINDING THE EVIDENCE DID NOT WARRANT A VOLUNTARY MANSLAUGHTER CHARGE. STATE V. NILES, 412 S.C.515, 772 S.E.2d877[2015]. THE REMITTITUR WAS ISSUED ON JUNE 10, 2015.

POST-CONVICTION RELIEF HEARING

PETITIONER FILED A TIMELY NOTICE FOR POST-CONVICTION RELIEF[PCR] IN THE HORRY COUNTY COURT OF COMMON PLEAS. PETITIONER ALLEGED INEFFECTIVE ASSISTANCE OF BOTH TRIAL AND APPELLATE COUNSEL. SPECIFICALLY, PETITIONER ALLEGED THAT TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY: [1] FAILING TO OBJECT TO THE SOLICITOR'S IMPROPER CLOSING [2] FAILING TO OBJECT TO THE SOLICITOR'S IMPROPER BOLSTERING OF ITS WITNESSES; [3] FAILING TO OBJECT TO THE PROSECUTION'S INTRODUCTION OF VOID INDICTMENTS TO THE TRIAL COURT; [4] FAILING TO OBJECT TO THE TRIAL COURT'S INADEQUATE RESPONSE TO THE JURY'S QUESTIONS. PETITIONER ALLEGED THAT APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO

RAISE ON APPEAL WHETHER THE TRIAL COURT ERRED IN CHARGING THE JURY THAT IT COULD INFER MALICE FROM THE USE OF A DEADLY WEAPON; AND, FAILING TO RAISE ON APPEAL WHETHER THE TRIAL COURT ERRED IN NOT PROPERLY ANSWERING THE JURY'S QUESTIONS.

AN EVIDENTIARY HEARING ON PETITIONER'S PCR APPLICATION WAS HELD BEFORE THE HONORABLE WILLIAM H. SEAL, Jr. ON NOVEMBER 27, 2017, IN THE Horry COUNTY COURTHOUSE. JAMES FALK, ESQUIRE, APPEARED ON BEHALF OF PETITIONER AND JOHNNY ELLIS JAMES, Jr. ESQUIRE, OF THE SOUTH CAROLINA ATTORNEY GENERAL'S OFFICE APPEARED ON BEHALF OF THE STATE. ROBERT DUDEK, OF THE SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE TESTIFIED AT THE HEARING VIA TELEPHONE. APP. pg. 976 [LINE 9]. PETITIONER'S TRIAL COUNSEL VERDELL BARR, [WHO IS DECEASED, THE STATE DID NOT CALL A WITNESS TO TESTIFY IN HIS STEAD.] APP. pg. 973 [LINE 22- pg. 974 [LINE 8]. THE PARTIES AGREED THAT THE STATE WOULD NOT TRY AND ASSERT THAT ANY OF THE TRIAL COUNSEL'S DECISIONS WERE SUPPORTED BY A VIABLE TRIAL STRATEGY. APP. pg. 974 [LINE 9-12].

AT THE EVIDENTIARY HEARING PCR COUNSEL RAISED THE FOLLOWING ISSUES [1] TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S USE OF THE "GOLDEN RULE" ARGUMENT IN ITS CLOSING. APP. pg. 971 [LINE 23- pg. 972 [LINE 3]. [2] TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S BOLSTERING OF ITS OWN WITNESSES. APP. pg. 972 [LINE 4-9]. [3] TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S RESPONSE TO THE JURY'S QUESTION. APP. pg. 973 [LINE 11-14]. [4] TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S INFERRED MALICE INSTRUCTION. APP. pg. 992 [LINE 5-8]. [5] APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL WHETHER THE TRIAL COURT ERRED IN CHARGING THE INFERRED MALICE INSTRUCTION. APP. pg. 972 [LINE 22- pg. 973 LINE 3]. [6] APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON

APPEAL ISSUE THAT TRIAL COURT ERRED IN NOT PROPERLY ANSWERING THE JURY'S
QUESTIONS.APP.pg.995[LINE8-16].

ORDER DENYING RELIEF

ON FEBRUARY 5, 2018, HONORABLE JUDGE SEALS, Jr. SIGNED AN ORDER OF
DISMISSAL THEREIN DENYING PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE
OF TRIAL COUNSEL AND INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN
THE CASE.

PETITIONER APPEALS, AND THIS PETITION FOLLOWS.

ARGUMENTS

PCR COURT ERRED IN FAILING TO FIND TRIAL COUNSEL INEFFECTIVE FOR NOT OBJECTING TO THE TRIAL COURT'S RESPONSES TO THE JURY'S QUESTIONS.

PCR COURT ERRED IN FAILING TO FIND APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO RAISE ON APPEAL ISSUE THAT TRIAL COURT ERRED IN NOT PROPERLY ANSWERING THE JURY'S QUESTIONS.

RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION GUARANTEES CRIMINAL DEFENDANTS THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL. [U.S.CONST.AMEND.VI]. TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL, PETITIONER MUST ESTABLISH THAT COUNSEL'S REPRESENTATION FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS, AND THAT COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED HIS DEFENSE. STRICKLAND V. WASHINGTON, 466 U.S. 668 [1984]; JOHNSON V. STATE, 325 S.W.2d 182, 480 S.W.2d 733 [1997]. THE BENCHMARK FOR JUDGING ANY CLAIM OF INEFFECTIVENESS MUST BE WHETHER COUNSEL'S CONDUCT SO UNDERMINED THE PROPER FUNCTIONING OF THE ADVERSARIAL PROCESS THAT THE TRIAL CANNOT BE RELIED ON AS HAVING PRODUCED A JUST RESULT. STRICKLAND, 466 U.S. 686. TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL, "THE DEFENDANT MUST SHOW THAT COUNSEL'S PERFORMANCE WAS DEFICIENT" AND, "THAT THE DEFICIENT PERFORMANCE PREJUDICED THE DEFENSE." Id. "WHEN A CONVICTED DEFENDANT COMPLAINS OF THE INEFFECTIVENESS OF COUNSEL'S ASSISTANCE, THE DEFENDANT MUST SHOW THAT COUNSEL'S REPRESENTATION FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS." Id. AT 687-688. "[T]HE PERFORMANCE INQUIRY MUST BE WHETHER COUNSEL'S ASSISTANCE WAS REASONABLE CONSIDERING ALL THE CIRCUMSTANCES." Id. AT 688. CONCERNING PREJUDICE, "A DEFENDANT

NEED NOT SHOW THAT COUNSEL'S DEFICIENT CONDUCT MORE LIKELY THAN NOT ALTERED THE OUTCOME IN THE CASE." RATHER, "THE DEFENDANT MUST SHOW THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT. A REASONABLE PROBABILITY IS A PROBABILITY SUFFICIENT TO UNDERMINE CONFIDENCE IN THE OUTCOME." Id AT 694.

THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL EXTENDS TO A CRIMINAL DEFENDANT'S RIGHT TO EFFECTIVE APPELLATE COUNSEL. EVITTS V. LUCY, 469 U.S. 387, 105 S.Ct. 830 [1985]. THE TWO-STEP STRICKLAND TEST USED TO EVALUATE CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IS ALSO USED TO EVALUATE CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. ANDERSON V. STATE, 354 S.C. 431, 434, 581 S.E.2d 834, 835 [1984]. WHERE THE RESULT OF AN APPEAL WOULD HAVE BEEN DIFFERENT HAD APPELLATE COUNSEL NOT BEEN DEFICIENT, THE APPROPRIATE REMEDY IS TO GRANT DEFENDANT A NEW TRIAL. EZELL V. STATE, 345 S.C. 312, 548 S.E.2d 852 [2001].

JURY'S QUESTIONS

THE RECORD BEFORE US ESTABLISHES THAT DURING DELIBERATIONS THE JURY POSED SEVERAL QUESTIONS TO THE COURT. THE INITIAL QUESTION: "CAN THE DEFENDANT BE FOUND GUILTY OF ARMED ROBBERY IF DOUBT EXISTS AS TO HIS ACTUAL KNOWLEDGE OF IT PRIOR TO THE ACT OF ROBBERY?" SEE APP. pg. 729 [LINE 21-23].

THE RECORD FURTHER SHOWS THE LEVEL OF UNCERTAINTY OF BOTH THE TRIAL JUDGE AND THE SOLICITOR WITH REGARD TO THIS QUESTION. AS THE TRIAL JUDGE'S OWN ARGUMENT ALERTS US TO THE CONFUSION CREATED BY THIS QUESTION, "IT JUST SAYS DOUBT. CAN THE DEFENDANT BE GUILTY OF ARMED ROBBERY IF DOUBT EXISTS AS TO HIS ACTUAL KNOWLEDGE OF IT PRIOR TO THE ACT OF ROBBERY?" SEE APP. pg. 730 [LINE 8-10]. ALSO, THE CONFUSION IN WHICH-

THE SOLICITOR EXHIBITED CAN BE SEEN BY SOME OF THE STATE'S OWN ARGUMENT:
" YOUR HONOR, I DON'T KNOW THAT- I THINK IT IS, THERE'S CERTAINLY QUESTIONS IN MY MIND AS TO EXACTLY WHAT THEY'RE ASKING AND I THINK THAT QUESTION COULD BE INTERPRETED A COUPLE OF DIFFERENT WAYS..." SEE APP.pg. 731 [LINE 10-21].

FURTHERMORE, THE RECORD REFLECTS THAT WITHOUT CLARIFICATION AS TO THE BASIS OF THE JURY'S CONFUSION WITH REGARD TO THESE QUESTIONS, THE TRIAL COURT ULTIMATELY ELECTED TO REFER THE JURY TO THE INITIAL INSTRUCTIONS GIVEN. SEE APP.pg731 [LINE 10-21]. AND COUNSEL FOR THE DEFENDANT HAD NOT OBJECTED TO THIS RESPONSE. SEE APP.pg.732 [LINE 3-4].

ANALOGOUS TO THE ISSUE PRESENTED IN THE PETITIONER'S CASE, IN PAULING V. STATE, 350 S.C.278, 565 S.E.2d 769 [2002], THAT COURT RULED THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL JUDGE'S ERRONEOUS RESPONSE TO THE JURY'S QUESTION AS TO WHETHER GUILTY VERDICTS WOULD STAND ON ASSAULT AND BATTERY WITH INTENT TO KILL CHARGES, ARMED ROBBERY, CRIMINAL CONSPIRACY, AND POSSESSION OF A HANDGUN IF THE JURY WAS UNABLE TO REACH VERDICTS ON TWO COUNTS OF MURDER. THE JUDGE RESPONDED THAT THE ENTIRE CASE WOULD HAVE TO BE RE-TRIED AND THE JURY RETURNED A GUILTY VERDICT ON ONE MURDER COUNT AND ACQUITTED THE DEFENDANT ON THE OTHER COUNT. THE SOUTH CAROLINA SUPREME COURT RULED THAT THE RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT HAD COUNSEL OBJECTED SINCE THERE WAS NOTHING IN THE RECORD TO DISTINGUISH THE DEFENDANT'S INVOLVEMENT IN THE MURDERS.

IN THE CONTEXT OF ESTABLISHING THAT TRIAL COUNSEL IN THE CASE AT HAND RENDERED INEFFECTIVE ASSISTANCE, THE PETITIONER ADVANCES THAT PARTICULAR EMPHASIS MUST FIRST FOCUS UPON THE FACT THAT THE QUESTIONS POSED "CLEARLY" DEMONSTRATED THAT THE JURY NEEDED HELP IN APPLYING

THE SOLICITOR CAN BE SEEV °R O¼T! ¼@ QF! OQ'Q!¼O ¼YV '9>=T!VQA¿ R¼=9

THE INSTRUCTIONS TO THE EVIDENCE IN THIS CASE. AND AS COUNSEL'S OBLIGATION TO THE PETITIONER IN THIS INSTANCE IS TO ENSURE THAT THE CONSTITUTIONAL RIGHT OF THE PETITIONER "NOT TO BE CONVICTED BY THE JURY EXCEPT UNDER THE PROPER STANDARD OF PROOF", SUCH AN OBLIGATION WOULD ENTAIL REQUESTING TO THE COURT THAT WHEN THE JURY HAS INDICATED THROUGH ITS QUESTIONS THAT IT IS CONFUSED AS TO IMPORTANT LEGAL STANDARDS, THAT THE COURT "FIRST" CLARIFY THAT CONFUSION WITH CONCRETE ACCURACY.

CONSIDERING TRIAL COUNSEL'S FAILURE IN THIS INSTANCE TO OBJECT TO THE TRIAL COURT'S RESPONSE TO THE JURY'S QUESTIONS A REASONABLE PROBABILITY EXISTS THAT THE ERRONEOUS CHARGE, AS IT OCCURRED IN A SUPPLEMENTAL INSTRUCTION LIKELY ATTAINED SPECIAL SIGNIFICANCE IN THE MINDS OF THE JURY INDICATING THAT THE CONVICTION RESTS ON A EQUIVOCAL DIRECTION TO THE JURY THEREBY PREJUDICING THE PETITIONER. SEE LOWRY V. STATE, 376 S.C.499,657 S.E.2d 760[2008] [ACKNOWLEDGING THE PROMINENCE OF AN ERRONEOUS CHARGE WHEN IT ARISES IN A SUPPLEMENTAL INSTRUCTION].

IN SUMMARY, ABSENT AN OBJECTION BY TRIAL COUNSEL TO THE TRIAL COURT'S RESPONSE TO THE JURY'S QUESTIONS GIVEN WITHOUT CLARIFICATION BEING MADE AS TO THE BASIS OF THE JURY'S CONFUSION WAS AN ERROR WHICH PREJUDICED THE INTEGRITY OF THE PETITIONER'S TRIAL THEREBY CREATING A REASONABLE PROBABILITY THAT IT AFFECTED THE OUTCOME.

WITH REGARD TO INSTANCES WHERE JURY QUESTIONS ARE POSED TO TRIAL COURTS. UNITED STATES SUPREME COURT SET PRECEDENCE IN BOLLENBACH V. U.S., 326 U.S.607,612-13, 66 S.Ct.402,405, 90 L.Ed.350, "WHEN A JURY MAKES EXPLICIT ITS DIFFICULTIES A TRIAL JUDGE SHOULD CLEAR THEM AWAY WITH CONCRETE ACCURACY."

ALSO, IN U.S. V. WARREN, 984 F.2d.325 [5cir.1997], THAT COURT REVERSED

A CONVICTION BECAUSE THE TRIAL COURT'S RESPONSES TO THE JURY'S QUERIES SIMPLY RE-ITERATED ITS PREVIOUS JURY INSTRUCTION WITHOUT DIRECTLY RESOLVING THE JURY'S APPARENT CONFUSION.

ANALOGOUS TO THE PETITIONER'S CASE, THE COURT IN WARREN EXPLAINED THAT THE JURY'S QUESTION INDICATED THAT AT LEAST SOME JURORS HAD BEEN CONFUSED BY THE ORIGINAL INSTRUCTIONS REGARDING A CRITICAL LEGAL ISSUE NOT SPECIFICALLY COVERED BY THOSE INSTRUCTIONS- WHETHER WARREN COULD BE FOUND GUILTY OF FIRST DEGREE MURDER IF HE INTENDED ONLY "TO HURT" THE VICTIM RATHER THAN "TO KILL" HIM. THE COURT'S ORIGINAL INSTRUCTION FOCUSED ON THE NATURE OF "PREMEDITATION" RATHER THAN UPON WHAT MUST BE PREMEDITATED TO ESTABLISH FIRST DEGREE MURDER.

EXPLAINING IN ITS FINALITY, THE COURT IN WARREN EXPLAINED THAT THE COURT SHOULD HAVE PROVIDED A SUPPLEMENTAL INSTRUCTION SUFFICIENT TO CLEAR UP THE UNCERTAINTY THAT THE JURY HAD BROUGHT TO THE COURT'S ATTENTION.

AS IN THE PETITIONER'S CASE, THE QUESTION INITIALLY POSED BY THE JURY: "CAN THE DEFENDANT BE FOUND GUILTY OF ARMED ROBBERY IF DOUBT EXISTS AS TO HIS ACTUAL KNOWLEDGE OF IT PRIOR TO THE ACT OF ROBBERY?"

ON THE FACE OF SUCH A QUESTION BEING ASKED BY THE JURY, THE PETITIONER BELIEVE IT SAFE TO SAY THAT IT IMPLICATES CLARIFICATION ON THE LESSER INCLUDED OFFENSE OF ARMED ROBBERY, WHICH IS ROBBERY. AND, AS CAN BE SEEN FROM THE RECORD, THE COURT RE-ITERATED THE ORIGINAL INSTRUCTION WHICH PRIMARILY FOCUSED ON ARMED ROBBERY AND REASONABLE DOUBT. THEREFORE THE JURY, WITH REGARD TO ITS QUESTION, WAS ESSENTIALLY LEFT WITH NO GUIDANCE REGARDING IMPORTANT LEGAL STANDARD WITH WHICH TO EVALUATE THE EVIDENCE. THEREFORE, TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE TRIAL COURT'S RESPONSES TO THE JURY'S QUESTIONS.

INEFFECTIVENESS OF APPELLATE COUNSEL

AS THE PETITIONER NOW ELABORATE UPON THE ALLEGATION OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. THE PETITIONER PLACES DUE EMPHASIS UPON AN ERROR WHICH HAS PRIMARILY OCCURRED ON BEHALF OF TRIAL COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURT'S RESPONSES TO THE JURY'S QUESTIONS THEREBY PUTTING THE TRIAL COURT ON NOTICE AS TO THE ASSERTED INADEQUACY OF ITS RESPONSES. AS THIS ERROR WAS MANIFESTED IT ULTIMATELY HAD A "SPILL-OVER EFFECT" WHICH PROPORTIONATELY AFFECTED THE INTEGRITY OF OF THE JURY'S FUNCTION WHICH ULTIMATELY ENABLED THE SOUTH CAROLINA COURT OF APPEALS TO EXERCISE ITS DISCRETION TO REVIEW THE JURY'S INSTRUCTIONS "ONLY" FOR "PLAIN ERROR."

HIGHLIGHTING THE SERIES OF EVENTS TAKING PLACE ON RECORD WITH REGARD TO THE JURY'S INDICATION, THROUGH ITS QUESTION, OF BEING "CONFUSED", AND, TAKEN TOGETHER WITH THE STATE'S OWN CONSIDERABLE LEVEL OF CONFUSION EXISTING IN ITS RECEPTION OF THE QUESTION POSED, THE "FUNDAMENTAL" FACT MUST BE ACKNOWLEDGED THAT THE COURT HAD NOT CLARIFIED THAT CONFUSION THEREBY CONSTITUTING "PLAIN ERROR" FOR THE PURPOSE OF PLAIN ERROR REVIEW BY THE SOUTH CAROLINA COURT OF APPEALS.

AS THE RECORD WILL ALSO REFLECT THAT PETITIONER'S APPELLATE COUNSEL'S ISSUE WITH WHICH THE PETITIONER'S CONVICTION WAS INITIALLY OVERTURNED BY THE COURT OF APPEALS, DEALT WITH "THE TRIAL COURT'S ERROR IN FAILING TO CHARGE VOLUNTARY MANSLAUGHTER." SEE APP.pg.767

GIVEN THE "GRAVITY" OF THE ERROR COMMITTED BY TRIAL COUNSEL IN HIS FAILURE TO OBJECT TO THE COURT'S RESPONSES TO THE JURY'S QUESTIONS AND ITS GENERAL CONNECTION TO THE ISSUES WITH WHICH HE ARGUED, APPELLATE COUNSEL PERFORMANCE WAS DEFICIENT IN THAT REGARD. AND, BUT FOR APPELLATE

COUNSEL'S ERROR, THERE IS A REASONABLE PROBABILITY HE WOULD HAVE PREVAILED ON APPEAL.

CONCLUSION

BASED ON THE GROUNDS EXISTING WITHIN THIS PETITION, CERTIORARI SHOULD BE GRANTED, AND THE CONVICTIONS AND SENTENCES REVERSED, AND THE CASE REMANDED FOR A NEW TRIAL.

RESPECTFULLY SUBMITTED,

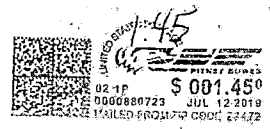
Richard B. Niles, Jr.

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