

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas  
Post Conviction Relief

S.C. SUPREME COURT

Honorable Walton J. McLeod, IV, Circuit Court Judge

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App. Case No: 2019-001060

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Andrew E. Torrence,

Petitioner,

vs.

State of South Carolina,

Respondent.

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PETITION FOR  
WRIT OF CERTIORARI

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## ISSUES PRESENTED

- I. Whether the lower court erred by failing to find that that trial counsel was deficient in how he handled the matter of Petitioner's mental health to the degree that the outcome of the trial cannot be relied upon as having produced a just result.
- II. Whether the lower court erred by not finding that trial counsel rendered ineffective assistance of counsel when he failed to conduct a proper independent investigation into State's position regarding Petitioner's whereabouts in the hours prior to the incident.

## STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. Smalls v. State, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. During the August 2010 term of the Lexington County Grand Jury, Petitioner was indicted for murder (2010-GS-32-02318). During the May 2011 term of Lexington County Grand Jury, Petitioner was indicted for possession of a weapon during the commission of a violent crime (2011-GS-32-01440) and for carrying a firearm onto the premises of a business selling alcohol for on-premises consumption (2011-GS-32-01444).

On May 31, 2011, Petitioner proceeded to trial in front of the Honorable Knox R. McMahon and a jury. Petitioner was represented by Wayne Floyd, Esquire. The State was

represented by D. Shawn Graham, Assistant Solicitor, and Alton H. Eargle, Assistant Solicitor. On June 3, 2011, the jury returned a guilty verdict on voluntary manslaughter and the weapons charges. The Honorable Knox R. McMahon sentenced Petitioner to a term of twenty-five years for voluntary manslaughter and concurrent terms of five years for each weapons charge.

A timely notice of appeal was filed on Petitioner's behalf and was perfected by the Honorable Blake A. Hewitt and John S. Nichols, Esquire.<sup>1</sup> The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Torrence, 2013-UP-152 (S.C. Ct. App. filed April 10, 2013). Certiorari was sought in the South Carolina Supreme Court and denied on November 7, 2014.

On June 1, 2015, an Application for Post Conviction Relief was filed. Respondent filed a Return on July 12, 2017. Petitioner through counsel filed an Amendment to Application for Post Conviction Relief on July 13, 2017. Petitioner, through counsel, filed a superseding Amendment on October 26, 2018, which stated the following:

By and through his undersigned counsel, Applicant would move to amend his Application for Post Conviction Relief. In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial. Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of trial and appellate counsel:

1. Ineffective assistance of trial counsel regarding Applicant's mental health:
  - a. Trial counsel was ineffective for failing to properly utilize mental health experts prior to and during trial.
  - b. Trial counsel was ineffective for failing to develop a mental health defense and/or utilize experts in mitigation in a plea and/or trial.
  - c. Trial counsel was ineffective for utilizing Applicant as a witness at trial without a mental health expert.
2. Trial counsel was ineffective for failing to prepare and investigate prior to trial. Specifically, but not limited to:

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<sup>1</sup> The Honorable Blake A. Hewitt was elected to the South Carolina Court of Appeals in February 2019.

- a. Trial counsel was ineffective for failing to obtain the incident report and/or video surveillance from Applicant's place of employment to refute and/or impeach the State's witnesses regarding Applicant's whereabouts during the hours prior to the shooting at issue.
  - b. Alternatively, prosecutorial misconduct if said report was available or known to the prosecution and not turned over to the defense.
3. Ineffective assistance of counsel for the handling of the defense prior to and during trial:
- a. Trial counsel was ineffective for failing to question and/or obtain additional video footage from the scene.
  - b. Trial counsel was ineffective for failing to properly prepare to utilize the in car video at trial.
  - c. Trial counsel was ineffective for failing to fully cross-examine the State's witnesses at trial.
  - d. Trial counsel was ineffective for failing to address the matter of bias at trial.<sup>2</sup>
  - e. Trial counsel was ineffective for failing to ensure that the court gave a curative instruction following his objection to the State's closing argument. Transcript p. 678, 680-82. Additionally, ineffective assistance for not making an objection to the Solicitor's characterization of the victim as a "hero." Transcript p. 579, 678.
  - f. Trial counsel was ineffective regarding the Court's charge, for the following but not limited to:
    - 1) for failing to obtain an accident and involuntary manslaughter charge;
    - 2) for failing to object to the contemptuous language charge;
    - 3) for failing to request a more detailed charge on citizen's arrest; and
    - 4) for failing to request a jury charge on the difference between "acting lawfully" and being "lawfully armed in self-defense."
4. Trial counsel was ineffective for failing to properly address the issues of docket manipulation and the use of Applicant's prior conviction at trial.
5. Appellate counsel was ineffective for, but not limited to, the following:
- a. Failing to raise all meritorious issues on appeal:
    - i. The trial court's denial of the defense's request to question Mr. Narang about the aggressive nature of the victim. Transcript p. 201.
    - ii. Trial counsel's arguments regarding the issues of docket manipulation and the use of Applicant's prior conviction. Transcript pp. 451-64.
    - iii. The trial court's denial of the directed verdict motion. Transcript p. 408-10.
    - iv. Trial court's denial of the admission of the in car video. Transcript pp. 440-43, 460, 584-86.

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<sup>2</sup> This issue was abandoned on the record at the evidentiary hearing. App. p. 1192.

- v. Trial court's refusal to charge accident. Transcript pp. 616-617.
- vi. Trial counsel's motions and arguments regarding prosecutorial misconduct.

- 6. Pursuant to Rule 15(b), SCRCF, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

On November 5-6, 2018, an evidentiary hearing was convened at the Lexington County Courthouse in front of the Honorable Walton J. McCleod, IV.<sup>3</sup> Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Kelly Oppenheimer, Assistant Attorney General, and Sherri Butterbaugh, Assistant Attorney General.

During the hearing, Petitioner called Dr. Tora Brawley, Dr. Donna Maddox, Wayne Floyd, Esquire, the Honorable Blake A. Hewitt, Pete Skidmore, and Brenda Torrence to the stand. Respondent called Shawn Graham, Esquire, and recalled Wayne Floyd, Esquire. Petitioner introduced thirteen exhibits, and Respondent introduced one exhibit.

At the close of the evidentiary hearing, the lower court allowed the parties time to obtain the evidentiary hearing transcript. While the request for the transcript was pending, the court requested proposed orders from both parties. Thereafter, the lower court issued an Order of Dismissal on April 22, 2019. On May 6, 2019, Petitioner through counsel filed a Motion Pursuant to Rule 59 (a) & (e), SCRCF. On May 28, 2019, Respondent filed a Return. On May 31, 2019, an Order Denying Applicant's Motion Pursuant to Rule 59(a) & (e), SCRCF, was issued and filed. A timely Notice of Appeal was filed, from which this Petition follows.

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<sup>3</sup> On April 16, 2018, a motion and/or scheduling hearing was held in front of the Honorable William A. McKinnon at the Lexington County Courthouse. App. p. 918. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Sherri Butterbaugh, Assistant Attorney General. During the hearing, testimony was offered by Dr. Donna Maddox. The transcript of this hearing was provided to the lower court for his review. App. p. 953.

## ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of counsel, applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. 466 U.S. at 686; see Butler v. State, 286 S.C. 441 (1985). The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. Bell v. State, 321 S.C. 238 (1996).

A two-pronged test is applied in evaluating allegations of ineffective assistance of counsel. First, applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117 (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18.

- I. The lower court erred by failing to find that that trial counsel was deficient in how he handled the matter of Petitioner's mental health to the degree that the outcome of the trial cannot be relied upon as having produced a just result.

By way of an Amendment, Petitioner alleged ineffective assistance of trial counsel regarding matters related to his mental health. Via a proposed Order and Rule 59, SCRPC, Motion, Petitioner argued that trial counsel was deficient in how he handled the matter of mental health to

the degree that the outcome of the trial cannot be relied upon as having produced a just result. Nevertheless, the lower court errantly denied relief regarding Petitioner's mental health allegations and held that trial counsel offered a valid trial strategy for not properly utilizing a mental health expert prior to and during trial. App. pp. 1551-1556.

To establish how the lower court's findings are not supported by the evidence, the pertinent testimony must be addressed as it is largely omitted from the standing Order. As Petitioner's first witness, Dr. Tora Brawley was called to the stand, and she was qualified as a neuropsychology expert. App. pp. 958-61. She briefly explained neuropsychology, and she acknowledged that she conducted a neuropsychological examination on Petitioner at the request of Dr. Maddox to assess his cognitive function. App. pp. 961-2. Dr. Brawley detailed the clinical interview she conducted during which Petitioner informed her that he was "under remote neuromonitoring and this was affecting the way he was thinking." App. p. 963, lns. 17-25. Specifically, she quoted him as saying: "They're doing inserts on me right now." App. p. 962, ln. 1-2. She explained he reported concentration loss, memory loss, word finding difficulties, forgetting recent conversations, repeating himself, irritability, decreased tolerance and not believing his mother that his father had recently died. App. p. 964.

Dr. Brawley detailed the tests she administered and her findings. App. pp. 964-66. She testified that Petitioner performed "perfectly" on the test of memory malingering, and she determined that he was not malingering or exaggerating. App. pp. 966, 969-70. She further testified that no inconsistencies were noted in her testing, so she did not have concerns with the validity of her test results. App. p. 966. In summary, she provided her findings, as follows: "He's having moderate to severe deficits in several cognitive domains, which is suggestive of brain organicity. He's also reporting some unusual symptoms that I talked about, as well as some vegetative

symptoms.” App. p. 967, ln. 23 – p. 968, ln. 2. She further explained that the term “brain organicity” means “it appears that there may be some areas of brain damage or areas of the brain that aren’t working as well as they should.” App. p. 968, ln. 23 – p. 969, ln. 3.

She agreed that she would have been willing to work on Petitioner’s case if contacted prior to his trial. PCR. p. 29. When asked if she could determine if Petitioner’s deficits were present at the time of the crime, she responded: “Yes. It’s highly likely that, yes, those were present at the time. He has – he had – he had a history of several concussions as well as spinal meningitis, so, certainly, those could have impacted brain function.” App. p. 970, lns. 7-19.

On cross-examination, she agreed that she could not say to “a degree of medical certainty that he did exhibit these deficits at the time of the crime.” App. p. 972, lns. 6-9. Yet, she explained that there are “certain areas of functioning that are considered crystalized, meaning they hold through early dementia or head injuries and things like that.” App. p. 972, lns. 17-23. Thereafter, she again went through the battery of tests she administered to Petitioner. App. pp. 972-74. When asked if it was possible that Petitioner could have declined in functioning while incarcerated, she responded:

- I usually do not see that. Usually they get better in prison because they’re in a structured environment, they’re getting three squares a day. It’s usually just the opposite. They either stabilize or get a little bit better. It’s highly, highly unusual that they decline, unless they’ve been in fights or, you know, had some kind of injury or illness.

App. p. 974, ln. 23- p. 975, ln. 5.

Following Dr. Brawley, Dr. Donna Schwartz Maddox was called to the stand, and she was qualified as forensic psychiatry expert. App. pp. 978, 981. She recalled being originally retained by Wayne Floyd, Esquire, to evaluate Petitioner at the Lexington County Detention Center in

2010.<sup>1</sup> App. p. 982. She recalled speaking with Brenda Torrence after the evaluation and learning about Petitioner's "significant" history, which she explained. App. pp. 982-3. She recalled recommending counsel utilize Dr. Brawley for neuropsychological testing since she identified "symptoms consistent with organicity."<sup>2</sup> App. pp. 982-3, 1018. She did not recall having further contact with Mr. Floyd, but she did recall being contacted by Mrs. Torrence following Petitioner's trial. App. 983. When asked by Mrs. Torrence about her absence from Petitioner's trial, she recalled responding that she was unaware that his trial had commenced. App. pp. 983-4. If she had known about Petitioner's trial, she responded that she "absolutely" would have been willing to assist Mr. Floyd, which would have included having testing done by Dr. Brawley. App. p. 984. She said she would have been "glad" to assist and felt she would have been "helpful." App. p. 1006, Ins. 13-17.

Dr. Maddox addressed the items she reviewed in 2010 and prior to the evidentiary hearing. App. pp. 985-89. She addressed a history of "two major brain insults" that predated Petitioner's offense and the most significant events from his history. App. p. 987-8. She recalled Petitioner did not present symptoms of psychosis in 2010, but she conceded she may have missed it if he was psychotic at the time. App. p. 988, Ins. 1-5. When she met with Petitioner in 2016, she found him to be psychotic. App. p. 989. She explained the "delusions" he endorsed to her, which included remote neuromonitoring and the belief that the victim and his father are not deceased. App. pp. 991-3. She went over the tests she administered to Petitioner and her findings. App. pp. 993-6. Since Petitioner was intoxicated at the time of his offense, it was her opinion he would have been

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<sup>1</sup> She explained that she was testifying from memory since her records were no longer available from 2010 since her file was turned over to appellate counsel and could not be recreated. App. pp. 982, 990-91

<sup>2</sup> On redirect, she stated that she told counsel Petitioner had impairment and needed neuropsychological testing. App. p. 1018, Ins. 16-23. She agreed that it would have been premature for her to issue a report or make a diagnosis following one meeting since she did not have the information needed for a diagnosis. App. p. 1019, Ins. 16-22.

precluded from a guilty but mentally ill defense.<sup>3</sup> App. p. 988, Ins. 17-25, 997. Yet, she explained her findings could have been utilized in plea negotiations, mitigation and sentencing. App. pp. 984-5, 997-8. Specifically, she addressed how his numerous impairments and underlying organicity affected his judgment, such as making him impulsive or irritable. App. p. 998. She clarified: “But when I say impulsive, it’s being driven by a brain disorder, not just a conscious choice.” App. p. 998, Ins. 21-23.

Turning to the matter of competency, she opined Petitioner was competent when she saw him in 2010. App. p. 999, Ins. 10-11. She stated that she would have needed to see him the morning of his testimony to evaluate him. App. pp. 1019-1020. She explained he reported suffering from hallucinations and effects of the remote neuromonitoring during his trial testimony. App pp. 999-1000. She also addressed that he was suffering from the delusion that the victim was not dead. App. p. 1000, 1006. Regarding this delusion, she explained:

My concern was more his competency to testify. To testify in court, you have to know the difference between truth and a lie. And, unfortunately, when you have delusions, you believe things that may not be true. And just similar to the hearing that we had last year, I would have had concerns about his ability to differentiate delusional thinking from the truth.

App. p. 1000, Ins. 16-23. She addressed how a delusion that the victim was not dead could have “affected his capacity to assist in his defense” and “his rational competency.” App. p. 1006, Ins. 1-7. She also addressed how hallucinating could “affect his capacity to assist in his defense because he’s listening to hallucinations instead of testimony.” App. p. 1006, Ins. 1-7. She explained that she did not hear back from Mr. Floyd after their phone call and that she would have been “glad” to assist further and felt she could be “helpful.” App. p. 1006, Ins. 13-17. As to Petitioner’s competency to testify as the evidentiary hearing, she opined that he was not competent to testify,

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<sup>3</sup> Yet, she explained how the alcohol exacerbated all of his underlying pathology. App. p. 999, Ins. 1-3.

and she had advised counsel accordingly.<sup>4</sup> App. pp. 1000-1001. In sum, she provided her diagnosis, as follows:

Your Honor, for his psychosis, I'm calling it unspecified schizophrenia and psychotic spectrum disorder. The DSM-5 -- the DSM keeps changing, so every edition, the unspecified kind of changes nuances. But what that means is I can't tell whether the psychosis is coming from his traumatic brain injury -- you can have traumatic brain injuries and develop psychosis later over time -- or if he, indeed, is very unfortunate and has both organicity and schizophrenia. So I left it in the unspecified characterization because I'm not sure. And at this point, I don't think anyone could be sure.

Then I also diagnosed him based on Dr. Brawley's testing with what's called a major neurocognitive impairment. And it's secondary to his history of meningitis, his history of closed head injuries, and also alcohol abuse over the years that he could contribute to that. And that means that he's got cognitive impairment in, I believe, it's four areas which Dr. Brawley mentioned: The concentration, the attention, the working memory, some verbal learning, those sorts of areas that she has already testified to. And then, of course, I diagnosed him with alcohol abuse disorder.

App. p. 1001, ln. 21- p. 1002, ln. 21.

Additionally, she explained that she asked Dr. Brawley to conduct a malingering evaluation prior to the evidentiary hearing. App. p. 1004. She stated that she never suspected malingering, but Petitioner had been diagnosed with malingering by the South Carolina Department of Corrections (SCDC). App. p. 1004-5. She addressed Dr. Brawley's finding that he was not malingering, which confirmed her prior opinion. App. p. 1005.

On cross-examination, Respondent admitted a portion of Petitioner's health records from SCDC. App. 1409. Regarding the records, Respondent asked Dr. Maddox about Petitioner's

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<sup>4</sup>At the beginning of the evidentiary hearing, Petitioner's counsel handed up Council v. State, Op. No. 26543 (S.C. Sup. Ct. filed Sept. 8, 2008), and indicated that she was not requesting a continuance, but counsel asked permission to revisit the issue, if needed. App. pp. 956-7. Counsel explained that she did not intend to call Petitioner due to the finding that he was not competent to take the stand. App. pp. 956-7. Prior to the conclusion of the evidentiary hearing, Petitioner affirmed that he understood the relief that could be granted and that he wanted to proceed with his Application. App. pp. 1249-51.

reports of hearing “voices or noises.” App. p. 1010-11. When asked if “it is unusual that someone who’s allegedly schizophrenic does not appear in any distress,” she referenced her experience working in a unit with schizophrenic patients and explained that often times the person can appear to be functioning and that the symptoms are not continuous. App. p. 1013, lns. 3-14. On redirect, she opined Petitioner “doesn’t show distress.” App. p. 1023, lns. 9-17. She agreed that if someone did not know Petitioner well or was not an expert in her capacity, he could appear to present normally during the trial. App. p. 1023, lns. 18-23.

On cross-examination, Dr. Maddox was asked about times when Petitioner was not compliant with his medications while in SCDC and agreed that schizophrenia is treatable with medication. App. pp. 1014-15. On redirect, she explained her concerns with the SCDC reports and the medications Petitioner was being prescribed. App. pp. 1020-22. She also identified where Petitioner was reporting symptoms to SCDC that he was reporting to her. App. p. 1022.

Finally, Respondent asked Dr. Maddox about Petitioner returning to the bar and a “cooling off period,” as follows:

Question: So that cooling-off period, would you agree that was not impulsive?

Answer: Yes and no. Not only impulsive though. You have to remember also, persons with organicity, they can be extremely irritable. And then when you combine that with alcohol – the impulse could have been at the time of the shooting. Impulse doesn’t necessarily mean that you – cooling off period is kind of a legal term and impulsivity is a psychiatric term.

So for example, is it very poor judgment that he goes and gets his gun? Absolutely. But once he came into that bar, it’s very impulsive when he’s firing. So it’s a combination of those things.

Question: And he didn’t report that he was hearing voices at his trial until after the trial, correct.

Answer: I didn't see him until – I don't know when he originally reported them. He reported them to me in 2016 in March when I first saw him and told me at that time.

Question: But he did not report that to you in 2010 that he was hearing voices?

Answer: That's correct. I only saw him the one time. So what happened after the time I saw him, I have no idea.

App. p. 1017, ln. 10 – 1018, ln. 9. On redirect, the following testimony was elicited:

Question: Dr. Maddox, just there towards the end, the State was asking you a series of questions. You were asked if you had no concerns that you shared with Mr. Floyd. You did actually share concerns with Mr. Floyd, didn't you, after that first evaluation?

Answer: Yes; that he had impairment and the he needed neuropsychological testing.

Question: And you recommended further testing by Dr. Tora Brawley?

Answer: Correct.

App. p. 1018, ln. 16 – p. 1019, ln. 1

When Wayne Floyd, Esquire, took the stand he recalled being retained by Mrs. Torrence, prior to Petitioner's initial bond appearance. App. p. 1028. He recalled Mrs. Torrence mentioning Dr. Maddox's name and retaining her services. App. p. 1028-9. Following her evaluation of Petitioner, he recalled communicating with Dr. Maddox over the phone, but he did not think he got a report. App. p. 1029. He could not recall her recommending the utilization of Dr. Brawley, but he also responded that he could not deny it either. App. p. 1029.

When asked why he did not further utilize her services, he responded: "If my recollection is correct, she was unable to provide us information that I thought would be useful at the trial on the issue of guilt or innocence. Nor on competency to stand trial." App. p. 1029, ln. 17- p. 1030, ln. 2. He acknowledged that he did not have any notes, but he recalled her findings being consistent

with her evidentiary hearing testimony. App. p. 1031, lns. 2-17, p. 1039. He also acknowledged that Dr. Maddox was listed on the Defense Witness List. App. pp. 1030, 1373.

Mr. Floyd explained how he worked to obtain a plea offer and identified the written plea offer dated February 15, 2011, which was “a straight up plea to voluntary manslaughter.” App. pp. 1031-2, 1375. After acknowledging the wide range in the sentencing discretion with a voluntary manslaughter plea and sentence, he admitted he did not consider using Dr. Maddox to assist with mitigation or even with plea negotiations. App. p. 1033. He acknowledged that he only utilized a lay witness in sentencing mitigation. App. p. 1115.

Mr. Floyd reviewed where Petitioner told the court he was on Zoloft. App. p. 456. Mr. Floyd admitted it was the first he heard about Petitioner being on medication since he did not discuss it with him. App. pp. 456, 1033. He explained he determined Petitioner was competent to testify based upon his meetings with him. App. p. 1034, 1088. When asked about specific portions of Petitioner’s testimony, he admitted that he did not consider Petitioner’s decision making ability, impulse control or the impact of a traumatic event. App. p. 1035.

When the Honorable Blake A. Hewitt took the stand, he acknowledged that he handled Petitioner’s direct appeal. App. pp. 1167-8. He recalled Mrs. Torrence telling him that Dr. Maddox had been retained but not utilized at trial. App. p. 1168. When asked about his “gauge regarding Petitioner’s mental health,” he admitted he was not a mental health expert, but he detailed serious concerns based upon his interactions with Petitioner right after the trial. App. p. 1170-71. He stated: “He said some strange things, things that struck me as strange, and gave the impression of sometimes of just not being completely with it.” App. p. 1170, lns. 20-22.

When Mrs. Torrence took the stand, she detailed the events of September 27-28, 2008, which concluded with her contacting Attorney Wayne Floyd to meet with and represent her son.

App. pp. 1217-1220. From that date forward, Mr. Floyd represented Petitioner, and she recalled asking him several times if he needed help. App. pp. 1221, 1233. Regarding Petitioner's mental health, she explained that she had sought treatment for him as a child and she addressed a history of brain injuries that she informed defense counsel about in person and by email. App. pp. 1222, 1234-5, 1247. While on the stand, she addressed an email that was sent to Mr. Floyd's office regarding concerns she had about her son's case and his mental health, whereby she discussed the utilization of Dr. Donna Schwartz-Watts (Maddox). App. pp. 1223-4. 1230, 1406.

She paid a retainer for the services of Dr. Maddox, and she was aware that Dr. Maddox went to the detention center to meet with Petitioner. App. p. 1225. She recounted Dr. Maddox calling her after leaving the detention center and explained her understanding that Dr. Maddox knew what was wrong with her son, which gave her hope. App. pp. 1226-7. She believed that Dr. Maddox was going to be utilized for trial and was confused when she was not. App. pp. 1227-28.

When asked about the trial, she stated that she "particularly" remembered Petitioner being on the stand. App. p. 1235, lns. 10-14. She said it was apparent he was struggling, and she provided her perception of him. App. p. 1235 ln. 16- p. 1236, ln. 1.

Following the trial, she contacted Dr. Maddox to find out why she was not at trial. App. p. 1228. She was informed that Dr. Maddox was unaware that the trial had taken place, and she connected her with Petitioner's appellate attorneys. App. p. 1228. She detailed the concerns she raised to appellate counsel regarding Petitioner's mental health and trial counsel's handling of the issue. App. pp. 1229-1233. On cross-examination, she was asked about counsel's testimony that Dr. Maddox could not be utilized in the guilt or innocence phase of the trial. App. p. 1244. She did not recall counsel ever telling her that information. App. p. 1244.

The uncontroverted testimony and evidence offered established that after being provided information regarding Petitioner's mental health and brain injury history by Mrs. Torrence, Mr. Floyd utilized the services of Dr. Maddox. The testimony further established that Dr. Maddox met with Petitioner at the detention center and discussed Petitioner's case with his mother and trial counsel following that meeting. While on the stand, Mr. Floyd testified that he determined that Dr. Maddox could not be utilized in regards to guilt or innocence; therefore, he did not utilize her at trial. What is troubling with Mr. Floyd's testimony, which the lower court chose to rely upon, is that such information was not provided to Mrs. Torrence, Dr. Maddox was placed on the witness list, and Dr. Maddox did not recall reaching such a conclusion with Mr. Floyd. Even though Dr. Maddox could not recall evidence of Petitioner's psychosis from their initial meeting, she could recall informing counsel that Dr. Brawley needed to conduct neurocognitive testing, and questioning why she was not utilized further prior to and during trial. As a result of the testimony and evidence offered, Petitioner submits that the lower court erred for failing to find that trial counsel was deficient in how he handled Petitioner's mental health to the degree that the outcome of the trial cannot be relied upon as having produced a just result.

The lower court seems to excuse counsel's conduct as trial strategy, but it is clear that the lower court erred since the evidence does not establish a reasonable trial strategy to weigh against counsel's failure to properly address Petitioner's mental health. See Reeves v. State, 415 S.C. 366, 782 S.E.2 747 (Ct. App. 2015) (Reversing the denial of post conviction relief reasoning that trial counsel was deficient for failing to discuss with Reeves hiring a medical expert to more thoroughly challenge the State's medical evidence presented at trial and finding that trial counsel did not present a legitimate trial strategy for failing to consult with an expert before trial or call an expert at trial.). Here, trial counsel's failure to properly address Petitioner's mental health infected every

aspect of Petitioner's defense in such a way that it was not reasonable trial strategy and is unreasonable to deny Petitioner relief.

In South Carolina, the body of case law involving the handling of mental health issues by trial counsel is rather limited, but precedent does support the granting of relief. In Ramirez v. State, 419 S.C. 14, 795 S.E.2d 841 (2017), counsel was found to be deficient for failing to obtain an independent competency evaluation prior to the entry of a guilty plea. Here, Dr. Maddox found Petitioner was not competent to testify at the evidentiary hearing. App. pp. 1000-01. She also opined that when she saw Petitioner in 2010, "he was competent," but she did not evaluate his competency prior to his trial commencing. App. p. 999. She stated that she would have needed to see him the morning of his testimony to evaluate his competency. App. pp. 1019-20. She explained Petitioner reported suffering from hallucinations and effects of the remote neuromonitoring while on the stand. App. pp. 999-1000. She also addressed how he was suffering from the delusion that victim was not dead, she explained:

My concern was more his competency to testify. To testify in court, you have to know the difference between truth and a lie. And, unfortunately, when you have delusions, you believe things that may not be true. And just similar to the hearing that we had last year, I would have had concerns about his ability to differentiate delusional thinking from the truth.

App. p. 1000, lns. 16-23. She addressed how a delusion that the victim was not dead could have "affected his capacity to assist in his defense" and "his rational competency." App. p. 1006, lns. 1-7. She also addressed how hallucinating could "affect his capacity to assist in his defense because he's listening to hallucinations instead of testimony." App. p. 1006, lns. 1-7. She explained that she did not hear back from Mr. Floyd after their phone call and that she would have been "glad" to assist further and felt she could be "helpful." App. p. 1006, lns. 13-17. It appears the lower court must have simply ignored the credible testimony of Dr. Maddox.

Furthermore, Dr. Maddox recalled recommending testing by Dr. Brawley, which was not done prior to trial but was done before the evidentiary hearing. As summarized above, Dr. Brawley testified about the neurocognitive testing she conducted, and her findings that were “suggestive of brain organicity” meaning that “it appears that there may be some areas of brain damage or areas of the brain that aren’t working as well as they should.” App. p. 968, ln. 23 – p. 969, ln. 3. When asked if she could determine whether Petitioner’s deficits were present at the time of the crime, she responded: “Yes. It’s highly likely that, yes, those were present at the time. He has – he had – he had a history of several concussions as well as spinal meningitis, so, certainly, those could have impacted brain function.” App. p. 971, lns. 7-19. As noted by the lower court, she could not say to “a degree of medical certainty that he did exhibit these deficits at the time of the crime.” App. p. 972, lns. 6-9. Yet, she explained that there are “certain areas of functioning that are considered crystalized, meaning they hold through early dementia or head injuries and things like that.” App. p. 972, lns. 17-23. As the lower court must have also ignored, the failure to utilize Dr. Brawley was never explained by trial counsel. The lower court relied upon Mr. Floyd’s excuse that he did not further utilize Dr. Maddox since she could not address guilt or innocence, but he never addressed why he did not utilize Dr. Brawley. Furthermore, in justifying his failure to utilize Dr. Maddox, Mr. Floyd qualified his excuse by saying “if my recollection is correct.” App. p. 1029.

Additionally, Petitioner submits the instant case is analogous to Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001). In Gill, this Court found the trial court did not err in refusing to charge diminished capacity because it is not recognized in South Carolina and the instructions properly presented the elements of malice. See State v. Fuller, 229 S.C. 439, 93 S.E.2d 463 (1956). Yet, in Gill, Dr. Morgan, a forensic psychiatrist, was allowed to testify regarding Gill’s

intellectual capacity, his personality disorder and opine regarding his inability to handle problems or think of the consequences of his behavior. Id. at 220, 552 S.E.2d at 32.

Here, trial counsel could have utilized the testimony of the mental health experts as was done in Gill to address the impulsive actions and irritability addressed by Dr. Maddox, if he was found to be competent to stand trial. App. pp. 998. Counsel admitted he did not consider Petitioner's decision making ability or impulse control. App. p. 1035. On cross, Dr. Maddox explained how Petitioner could have presented normally to someone without her expertise at trial or not shown distress.<sup>5</sup> App. p. 1023.

Dr. Maddox explained how she could have assisted in other areas of the defense that fell outside counsel's excuse that she was not helpful in the area of guilt or innocence. Dr. Maddox explained how she could have assisted in plea negotiations, mitigation and sentencing. App. pp. 984-5, 997-8. In Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009), counsel was found to be ineffective for failing to utilize mental health experts and evidence in capital sentencing mitigation. Here, counsel admitted that he did not consider utilizing Dr. Maddox in mitigation or sentencing despite the wide range in sentencing discretion with a voluntary manslaughter plea or conviction. Furthermore, he chose to only utilize a lay witness during a sentencing hearing where the trial court called his client Dr. Jekyll and Mr. Hyde. App. p. 743.

Based upon the record, it is readily apparent that counsel's performance was deficient, and his deficient performance undermined the adversarial process afforded to Petitioner to the extent that the outcome of Petitioner's trial cannot be relied upon. In Reeves v. State, 415 S.C.

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<sup>5</sup> At the evidentiary hearing, the Honorable Blake Hewitt testified regarding interacting with Petitioner while handling his direct appeal, and explained that he had serious concerns stemming from his interactions with Petitioner, which were highly close in time to Petitioner's trial. PCR pp. 229-230. This testimony directly calls into question whether Petitioner was even "presenting normally" at the time of his trial.

366, 782 S.E.2d 747 (Ct. App. 2015) and McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008), prejudice resulted from failure to refute the State's experts and failure to utilize an expert in the development of a defense, but here the deficiency and prejudice goes beyond that addressed in Reeves and McKnight. As a result, Petitioner urges this Court to find that counsel's failure to properly address Petitioner's mental health requires that a new trial be granted as both prongs of the Strickland analysis have been met.

- II. The lower court erred by not finding that trial counsel rendered ineffective assistance of counsel when he failed to conduct a proper independent investigation into State's position regarding Petitioner's whereabouts in the hours prior to the incident.

By way of the Amendment, Petitioner alleged that trial counsel was ineffective for failing to prepare and investigate prior to trial; specifically, for failing to obtain the incident report and/or video surveillance from his place of employment to refute and/or impeach the State's witnesses regarding his whereabouts during the hours prior to the shooting at issue. App. p. 904. The lower found otherwise and held: "Counsel is not required to uncover every single scrap of evidence that might be beneficial, and it is all too convenient now, after an adverse verdict, for Counsel to ask if a different strategy at trial might have been more advantageous." App. p. 1559. Petitioner submits the lower court erred by not finding that trial counsel rendered ineffective assistance of counsel when he failed to conduct a proper independent investigation into State's position regarding Petitioner's whereabouts in the hours prior to the incident at issue.

At trial, the State called Tonya Mozenka ("Tonya") to the stand. She testified about seeing Petitioner at State Street Pub before midnight on September 27, 2008. App. pp. 166-7. She testified he was getting more and more intoxicated, so she left with Stephen Smith to get away from Petitioner. App. p. 169. She testified Petitioner was calling her attractive, but she would not repeat

what he said to her. App. p. 170. She remembered sharing six shots with him while they were at the pub for about an hour and fifteen minutes. App. p. 171.

She testified about arriving at Shaggy's and seeing Petitioner. App. p. 173. She recalled his demeanor was "exactly the same way he was at State Street." App. p. 174, Ins. 11-13. She recounted Petitioner getting upset with victim and being very aggravated towards him. App. p. 175. She testified Petitioner stated several times: "I should go to my truck and get my gun and shoot him." App. p. 177, ln. 13-14, 178, ln. 4.

On cross-examination, counsel asked Tonya about her statement. App. pp. 183-4. He asked her if she remembered the right night, and she said that she was sure she had the right night. App. p. 182, Ins. 3-11, p. 190, Ins. 8-16. On redirect, she testified that she was telling the truth and she had "absolutely" no reason to make anything up. App. p. 191, Ins. 6-9.

When the State called Stephen Smith ("Steve") to the stand, he recalled meeting Tonya at State Street Pub around 12:00 a.m. or a little after, and he testified Petitioner was there. App. pp. 213, 219. When asked about his interaction with Petitioner at State Street Pub, he responded: "He was intoxicated. He said he had been drinking since six o'clock that afternoon or evening. He was all over Tonya and Zachary – he said a few derogatory remarks. I don't really recall what they were, but they kind of aggravated her." App. p. 214, Ins. 7-11. He explained that they chose to leave because of Petitioner, and they came back later after Petitioner was gone. App. p. 214.

When asked about Shaggy's, he recalled Petitioner was more drunk than at the pub, he was hitting on Tonya and upset with victim. App. p. 216. He testified Petitioner called victim "a wolverine or faggot." App. p. 216, ln. 23 – p. 217, ln. 2. He testified that Petitioner said three to five times that he should go get his gun from his car and shoot victim. App. p. 217, Ins. 3-11.

When Petitioner took the stand, he identified and counsel introduced his timesheet that reflected that he was on duty at Rush's from 9:28 p.m. to 1:50 a.m. App. p. 473. He testified that he arrived at State Street Pub around 2:25 a.m. or 3:00 a.m. App. p. 474. On cross-examination, he was questioned about his timesheet, and he was adamant that he did not leave Rush's during the time period reflected on his timesheet. App. pp. 501-3. He said there were security cameras that would have shown he was there and even volunteered to take a polygraph. App. p. 504.

Thereafter, the State began questioning him about why his signatures appeared differently, which culminated in him being asked if he was "drinking alcohol between those hours." App. p. 504, lns. 1-21. Trial counsel objected, and the jury was sent out. App. p. 504. After moving for a mistrial for prosecutorial misconduct, trial counsel called the conduct "outrageous," and explained:

They have a letter from the manager of the Rush's on Broad River Road, and they gave me a copy of it. They asked if Mr. Torrence was there and if Mr. Torrence was drinking that night, and the response was we have no record of it. If we had noticed anything like that, we would have, of course, notified the security company, and we didn't. So there is no evidence of it. The evidence is that he was there doing his job. Their witnesses are lying in their testimony that he was at State Street at midnight, and they just won't admit it. There is no basis for asking that question except to try to prejudice him in the eyes of the jury.

App. p. 504, ln. 14 – p. 505, ln. 1. Thereafter, counsel moved for dismissal and agreed to withdraw his motion for a mistrial. App. p. 506, lns. 2-6.

The trial court denied the motion for dismissal due to prosecutorial misconduct; he reasoned it was an issue of credibility. App. pp. 507-8. Trial counsel offered more argument and requested a curative instruction. App. pp. 508-510. The court responded that a curative would be a comment on the facts and proposed a stipulation regarding Petitioner not drinking while working at Rush's. App. pp. 510-11. In response, Mr. Graham explained that he was trying to show Petitioner could have left and come back not that he was drinking at Rush's, and the court noted that the State had two witnesses that testified "that they saw him in a bar." App. p. 511.

In response, trial counsel stated that he was “still at a loss to understand.” App. p. 512, lns. 7-8. He explained that he understood prior to trial that the State had no evidence Petitioner was drinking at work or left, so he did not understand how it was possible for the State to imply otherwise. App. p. 512. The State responded that the Rush’s manager said it was conceivable for Petitioner to leave and come back and the purpose of the letter to counsel was to turn over information that the manager did not notice alcohol on Petitioner’s breath. App. pp. 512-13. After further back and forth regarding the letter and a possible stipulation, the State concluded:

The only point I want to make out of this is that Tonya and Steve are not lying and that he left, went somewhere and came back during the hours, I guess, of midnight and one fifty. That’s the only point I’m trying to get out of in this cross examination.

App. p. 517, lns. 10-15.

When the jury returned, the court provided a curative instruction, and cross examination resumed. App. pp. 519-20. Petitioner testified that it was impossible for him go to State Street Pub and return to Rush’s. App. p. 521, lns. 1-12. In response to whether he saw Tonya and Steve at State Street Pub, he stated: “Not on that night.” App. p. 522, lns. 17-19. As the questions continued about seeing Tonya and Steve, he kept asking which night the State was referring to and ultimately responded that he saw them at State Street Pub in the early morning hours and invited them to Shaggy’s. App. pp. 523-4.

In reply, the State called Lynn Baldwin, Rush’s manager. App. p. 605. She reviewed Petitioner’s timesheet and explained what she would have been doing that night. App. pp. 606-7. Regarding the security guard, she said she would have “no idea whether they are there are not because I’m busy doing my job.” App. p. 607, lns. 20-25. She recalled that the security guard did not walk her to her car that morning as Petitioner had stated in his testimony. App. p. 608.

In his closing argument, trial counsel addressed the statements and testimony of Tonya and Steve. App. p. 638. He argued that their statements were not accurate, and it was impossible for Petitioner to leave work and be at State Street Pub at midnight. App. pp. 638-9.

In the State's closing argument, the Solicitor argued: "This is a case about credibility, who are you going to believe. Who is lying, who is telling the truth? Why would people lie?" App. p. 652, lns. 14-16. Thereafter, the Solicitor recounted the testimony of Tonya and Steve. App. pp. 652-654. He asked the jury: "Why would they come in here and put their hands on the Bible and lie to you about something that happened? There is no reason given why they would lie." App. p. 653, lns. 13-18.

At the evidentiary hearing, Petitioner's counsel admitted an "incident detail report and supporting exhibits" via stipulation. App. p. 953, 1342. Counsel explained how the report was obtained via discovery order. App. p. 953, 1346, 1351-2.

When trial counsel took the stand, he explained the investigation he undertook: "I studied the evidence, went out to the scene, talked to potential witnesses, researched, typical things you usually do to prepare for a trial." App. p. 1041, lns. 2-4. In response to whether he utilized a private investigator, he responded: "I don't think that I did." App. p. 1041, lns. 8-10.

After going through the State's arguments and the testimony of Tonya and Steve, Mr. Floyd recalled Petitioner informed him from their pre-trial statements that the information was not accurate. App. p. 1044-45. Specifically, the following testimony was elicited:

Question: And did you have information from your client that he was not at State Street Pub at the time she was saying he was there?

Answer: Yes.

Question: And what did you do to look into that?

Answer: Well, independently of just talking to Drew about it, nothing.

App. p. 1044, Ins. 15-21. He agreed Petitioner's testimony contradicted the times given by Tonya and Steve. App. p. 1047. When asked to gauge how damaging the testimony of Tonya and Steve was to the defense, he responded: "Very damaging." App. 1046, Ins. 7-11. He explained that the State utilized their testimony to establish a motive for the shooting. App. p. 1046, Ins. 12-22.

Prior to discussing the time sheet he obtained from Rush's and the letter he received from the Solicitor regarding the interview of the Rush's manager, he acknowledged that he did not try to obtain video surveillance from Rush's. App. p. 1048. He did obtain Petitioner's timesheet, but he did not speak to the Rush's manager, who was interviewed by the State and called in reply. App. p. 1054. He explained that it was a complete surprise when the State argued Petitioner was faking his employment records and that he was drinking on the job.

When he was provided a copy of Petitioner's Exhibit One, Mr. Floyd explained he was familiar with it since he had been provided a copy prior to the evidentiary hearing. App. p. 1056. He affirmed that the address on the report was the Rush's location where Petitioner was working on September 27, 2008 and the time on the report was "11:48:30 at night." App. p. 1056, Ins. 13-24. He also noted Petitioner's name was listed as the supplemental person and the incident report stated it was closed at "42 minutes, 48 seconds after midnight." App. p. 1057, Ins. 3-16.

He admitted that he did not get the report prior to trial, and he agreed it confirmed the information he was provided by Petitioner before trial. App. pp. 1057-8, 1060-61. When asked how he would have utilized the report, he responded: "I would use it to buttress his testimony and to show that Ms. Baldwin was incorrect in her testimony and also the two individuals, Steve and that Musynski, or the lady's last name, that they were incorrect in their testimony." App. p. 1058, Ins. 5-11, 1113. He added that the report would have been "extremely important" to show that the testimony of Tonya and Steve wasn't accurate. App. p. 1059.

Mr. Floyd explained that felt the report would have been Brady material, as it was exculpatory, but he also admitted that he did not try to subpoena it. App. p. 1061. He went on to explain: “I didn’t anticipate the State Street Pub testimony or the Rush’s testimony to be – I didn’t expect it to be significant, yet it turned out to be kind of the main focus of the prosecution’s case.” App. p. 1061, lns. 9-12.

When Peter G. Skidmore, private investigator, took the stand, he acknowledged that he had been retained by Petitioner prior to the evidentiary hearing. App. p. 1121. Regarding the Rush’s report, Mr. Skidmore testified Petitioner was emphatic that a report should exist that he asked defense counsel to get that would verify that he was at Rush’s and not State Street Pub at the time testified to by Tonya and Steve. App. pp. 1138-9. When asked what Petitioner was emphatic about, he explained: “That he could not have been at State Street Pub because he had been taking care of an incident that happened at his employment where there were police officers called, first responders called, as well as ambulance.” App. p. 1139, lns. 2-7. He further recalled Petitioner remembered that the person at the scene choked on something. App. p. 1139.

After addressing the steps taken to obtain the report, Mr. Skidmore recalled reviewing it and opined it “absolutely” confirmed the information from Petitioner. App. pp. 1139-40. He explained how it could have supported Petitioner’s testimony at trial. App. p. 1160-1162. He referenced the response received prior to the evidentiary hearing that a full incident report was not available, and he explained the steps he could have taken to further investigate the incident if utilized by Mr. Floyd before trial. App. pp. 1140-1143. After being asked about counsel’s reliance on the State’s interview of the Rush’s manager, he responded that his recommendation to counsel would have been: “To completely do an independent investigation so that you would have the proper materials to impeach the State’s witnesses.” App. 1145, lns. 13-22.

When Mrs. Torrence took the stand, she acknowledged that she had discussions prior to trial with her son and trial counsel about Tonya and Steve's account of Petitioner being at State Street Pub. App. pp. 1236-7. She explained that she contacted Tonya, at her son's request and recounted the conversation to him, which elicited the following response: "He said, she's lying, she's lying, I was not at the State Street Pub." App. p. 1237, lns. 5-20.

She recalled reviewing the written statement of Tonya and bringing the matter to the attention of trial counsel. App. pp. 1237-8. At her son's urging, she asked counsel to obtain the surveillance from Rush's and look into a call he made to law enforcement due to an intoxicated woman on the premises. App. pp. 1238-9. She recalled providing money for a private investigator (Chip Johnson) and questioning what he had done. App. pp. 1233, 1239-40.

Respondent called Shawn Graham, Deputy Solicitor for the Eleventh Circuit, to the stand. App. p. 1252. When asked to address the "significance of Steven and Tonya's testimony about his [Petitioner's] whereabouts prior to being at Shaggy's that night," Mr. Graham responded, in part: "That was there story. That was the time line they gave. They admitted they'd both been drinking a lot, but that was the time line they gave." App. p. 1259, lns. 20-25. When asked about his intent in asking Petitioner about the difference in his signatures on his timesheet, he responded:

The story that Lee and Steve testified to in their time line would have had Mr. Torrence leaving the Rush's and going there and drinking. That is what they said happened in their time line. The question I had, I guess, was geared towards whether the change – because it was an obvious change in his signature. He acknowledged, and I think his testimony was, that it was because he was tuckered after his shift. My thought would be maybe because he was drinking.

App. p. 1261, lns. 3-12.

On cross-examination, Mr. Graham was asked about his closing argument that the case boiled down to credibility and his detailed review of Tonya and Steve's timeline. App, pp. 1282, 1308-9. When asked about relating Petitioner's conduct at Shaggy's back to State Street Pub and

the importance of Tonya and Steve's testimony about State Street Pub, he responded, in part: "In my opinion, it went to their whole story of seeing him that night and then how he was acting and that he had been drinking and continued to drink." App. p. 1295, Ins. 4-11. He explained that if he had been aware of Petitioner's position that there had been an incident reported at Rush's, he would have tracked down the report and turned it over in discovery. App. p. 1298. He further explained that he called Lynn Baldwin to show that Petitioner could have left Rush's during work hours as Tonya and Steve testified. App. p. 1299. He agreed he called Ms. Baldwin to show that Petitioner was not being truthful in a case that admittedly boiled down to credibility. App. p. 1300.

As stated above, a defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Without a doubt, a criminal defense attorney has a duty to investigate, but that duty is limited to reasonable investigation. When evaluating the reasonableness of counsel's conduct, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). Moreover, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), this Court reversed the lower court and granted PCR relief when counsel failed to conduct a reasonable investigation. This Court held that a reasonable investigation includes interviewing witnesses and conducting an independent investigation of the facts of the case. Lounds, 380 S.C. at 460, 670 S.E.2d at 649, See Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). In McKnight, the South Carolina Supreme

Court held: "This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (quoting Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)).

Here, the record is not clear as to whether counsel utilized a private investigator, but the record is clear that counsel failed to conduct an independent investigation into Petitioner's assertion that the witness statements that he was at State Street Pub at midnight were false. Counsel failed to obtain the incident report or surveillance footage, relied upon the State's interview of the Rush's manager, and admittedly was "at a loss to understand" the State's strategy. App. p. 512, lns. 7-8. If counsel had obtained the Rush's report, he would have been able to show that Tonya and Steve were lying instead of the State cross-examining Petitioner for the admitted purpose of showing that he was lying. The record before the lower court established that counsel failed to make the adversarial testing process work when he merely relied upon the State's summation of their interview with the Rush's manager and failed to independently investigate the matter.

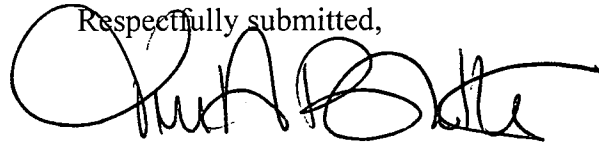
By counsel's own admission, the testimony of Tonya and Steve was "very damaging," and the report and the information contained therein was "extremely important." App. p. 1046, lns. 7-11, p. 1059, ln. 8. It is clear that the report that was introduced at the evidentiary hearing could have been utilized to impeach the timeline and testimony of Tonya and Steve, but it also could have been utilized to corroborate Petitioner's testimony and avoid the entire portion of his cross-examination that led to counsel's request for dismissal and a mistrial. Additionally, the report would have negated the reason for calling the Rush's manager in reply. By his own admission, Mr. Graham explained that he called the Rush's manager for the mere purpose of showing that Petitioner was not being truthful. App. p. 1300.

At the evidentiary hearing, counsel explained: “I didn’t anticipate the State Street Pub testimony or the Rush’s testimony to be – I didn’t expect it to be significant, yet it turned out to be kind of the main focus of the prosecution’s case.” App. p. 1061, lns. 9-12. Counsel’s failure to anticipate and investigate amounted to prejudice that counsel himself addressed during his argument for a mistrial and dismissal at the trial. Furthermore, counsel’s performance prejudiced Petitioner in the eyes of the jury when he was portrayed as a liar while the State was able to argue that Tonya and Steve would not put their hands on the Bible and lie. At the evidentiary hearing, the Solicitor acknowledged the importance of the report when he testified that if he would have known about Petitioner’s position prior to trial or about the existence of the report he would have turned it over. App. p. 1298. Unfortunately, counsel knew about Petitioner’s position prior to trial and failed to obtain the report or do any form of independent investigation to corroborate Petitioner’s position. As a result, Petitioner urges this Court to find that the lower court erred for failing to find both deficiency and prejudice resulting from counsel’s admitted failure to conduct a proper independent investigation.

CONCLUSION

Based upon the above arguments and record before this Court, Petitioner would respectfully ask that this Court grant certiorari, allow briefing of the issues addressed herein, and/or reverse the denial of post conviction relief.

Respectfully submitted,



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October 2, 2019

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

OCT 03 2019

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas  
Post Conviction Relief

S.C. SUPREME COURT

Honorable Walton J. McLeod, IV, Circuit Court Judge

App. Case No. 2019-001060

Andrew E. Torrence,

Petitioner,

vs.

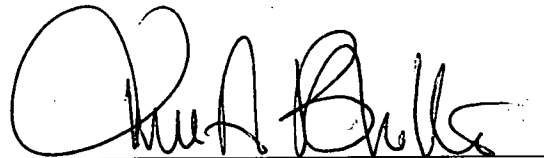
State of South Carolina

Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I served this 3<sup>rd</sup> day of October 2019 a copy of the Petition for Writ of Certiorari and four volume Appendix on Sherrie Butterbaugh, of the Attorney General's Office, via hand delivery to the Office of the Attorney General addressed as follows:

Office of the Attorney General  
Att: Sherrie Butterbaugh, Assistant Attorney General  
1000 Assembly Street, 5<sup>th</sup> Floor  
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October 3, 2019