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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2018-000553

GEORGE W. HUGHES,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

REPLY TO RESPONDENT'S MOTION TO STRIKE

PETITIONER'S QUESTIONS 6 - 22

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ATTORNEY FOR PETITIONER.

Petitioner in the above captioned Post-Conviction Relief Appeal comes before this Honorable Court, acting by and through his undersigned counsel, in Reply to Respondent's Petition to Strike filed on September 20, 2019. Petitioner asks that Respondent's Motion to Strike be denied for the following reasons.

Respondent has argued that the approach taken by Counsel for Petitioner in this case indicates disrespect for the Court's Order denying her Petition to Exceed the Page Limitation for Petition for Writ of Certiorari, filed on August 21, 2018. Undersigned Counsel has practiced before this Honorable Court for more than forty (40) years. In that time period she has never demonstrated anything other than the highest regard for the Court. Counsel humbly submits that her record before this Court demonstrates her consistent respect for this Honorable Court. She would never intentionally do anything to cause the Court to question that fact. Counsel would also hope, however, that her long career has reflected her faithful commitment to zealously representing her clients.

The Petition for Writ of Certiorari submitted by Counsel for Petitioner on August 14, 2018, was seventy-four (74) pages long including the cover and signature pages. That certiorari petition covered forty-three (43) Sixth Amendment allegations addressed in twenty-two (22) arguments in which those allegations were topically grouped. Undersigned Counsel exercised due diligence in attempting to adequately present all of these issues within the framework of the page limit prescribed by the South Carolina Rules of Appellate Procedure. Rule 227(e)(3), SCRAP. She would note that the Memorandum in Support of this application, filed by Petitioner in the Court of Common Pleas, was one-hundred sixty-nine (169) pages long. Therefore, Counsel respectfully submits, the reduction of the arguments on these issues to seventy-four (74) pages reflected a substantial reduction in the length of Counsel's arguments in support of these

Sixth Amendment claims and demonstrated Counsel's due diligence in trying to limit the length of the Certiorari Petition Counsel was asking this Honorable Court to review. Out of the seventy-four (74) pages of the petition initially submitted for this Honorable Court's review, eight (8) pages consisted of the Cover, the Index, the Questions Presented, the Statement of the Case and the Conclusion. In the remaining sixty-six (66) pages Counsel argued the applicable law for the review of this PCR appeal and twenty-two (22) questions presented covering forty-three (43) Sixth Amendment claims. Counsel argued the applicable law, and all these issues developed in this PCR action, in an average of three (3) pages per topical grouping.

Counsel is not presenting this data discussed above for the purpose of arguing against the denial of her request to exceed the page limit set in this case. Counsel's intent is purely to, as respectfully as possible, illustrate why Counsel was, and remains, in a very difficult position with regard to how she could fulfill her obligations to this client within the confines of the ruling of Court. To further complicate matters, Counsel has an obligation to preserve, to the best of her ability, all of her client's meritorious Sixth Amendment claims for possible federal review in the future.

Counsel has represented, as an officer of the Court, that while this case involves an unusual number of allegations, none of the arguments presented in the original petition were frivolous.¹ Counsel submitted in good faith her position that each of these

¹ Respondent appears to make light of Counsel's assertion that Petitioner had attempted to cull the issues original addressed in his pleading. *Petition to Strike*, p.3, fn. 2. Petitioner's Amended Application for PCR in fact presented 69 allegations. *App.p. 614 – 621*. In the original Petition for Writ of Certiorari submitted to this Honorable Court, Petitioner argued 43 of those allegations in his 74 page Certiorari Petition on 22, topically divided, Questions Presented. In the Revised Petition for Writ of Certiorari, Petitioner was only able to address 18 of those 43 allegations in the body of the 25 page petition allowed by the Court and he therefore prayed for leave of Court to incorporate by reference the arguments made in his Memorandum in Support filed in the Court of Common Pleas, and found in the *Appendix at pp. 916 – 1087*, on the remaining 25 allegations argued in his Memorandum. *See, Index to Memorandum, App.p. 1084*. In

arguments deserved review on their independent merit. In addition, however, Petitioner also noted that this appeal presents an argument for the grant of relief on the basis of the cumulative prejudice arising from Trial Counsel's many errors and omissions. Had Counsel for Petitioner attempted to argue all twenty-two (22) Questions Presented, covering forty-three (43) allegations, in the twenty-five pages allowed under this Court's rules, Counsel would have had .77 of a page per question presented to argue these questions, or, .40 of a page per PCR allegation.²

In the course of Counsel's forty year career as an appellate lawyer she believes she has presented fewer than ten (10) requests to exceed the page limits set by the rules for a Certiorari Petition in a Post-Conviction Relief appeal. In what is an unfortunate coincidence, Counsel has had the occasion to request permission to exceed the page limit for Certiorari Petitions set forth in by Rule 227 (e) (3), SCRAP, in an unusual number of cases in the last two years. If anything, the number of cases in which this has been necessary in recent years may reflect how seriously Counsel has taken this Honorable Court's repeated admonitions concerning the requirement that a PCR Applicant very narrowly define the Sixth Amendment claims raised and her commitment to giving PCR Applicants their full and fair bite at the apple in their first, and likely only, chance at collateral review.

response to the testimony heard at his two day PCR proceeding, Petitioner has therefore culled more than a third of the 69 allegations raised in his pleadings

² Twenty-Five (25), minus the eight (8) pages taken up by the Cover, the Index, the Questions Presented, the Statement of the Case and the Conclusion, would have left seventeen(17) pages to cover the Questions Presented. Seventeen (17) pages divided by twenty-two (22) equals .77 of a page per question presented and only .40 of a page per PCR allegation. Petitioner acknowledges that the 15 page projection found on p.7 of the Revised Certiorari Petition failed to take into account the fact that the nearly two pages of legal authorities submitted in reference to all the issues presented by Petitioner, should properly have been counted as part of the portion of the 25 page limitation available to be used for argument of the questions before the Court.

Counsel is equally mindful of the fact that, if certiorari is granted, Petitioner will have the opportunity to flesh out his arguments in a full briefing of one or more of his Questions Presented. The Catch 22, however, is realistically that if a Petitioner is not able to present enough of his case in his Certiorari Petition, he may never get that far. Thus, the dilemma Counsel faced in determining how to proceed in this case, hopefully, becomes clearer. Counsel essentially had a choice between cutting up the Certiorari Petition originally submitted in this case so badly that the twenty-two (22) individual arguments resembled text messages lacking in depth and clarity, doing the best she could with a select few issues and abandoning issues she felt bound to present inasmuch as they were not meritless, or, as she ultimately decided to do, present the best arguments she could on five issues under the page limitations imposed and ask this Honorable Court exercise its authority to allow her to incorporate by reference the very detailed arguments presented in the lower court on the remaining questions presented. In doing so, Counsel was mindful of the fact that the rules for PCR appeals require that the entire record below be included in the Appendix submitted with the Petition for Writ of Certiorari. Rule 243(f)(1), SCACR. At the conclusion of the two day PCR hearing held in this case, Counsel for Petitioner asked that, in lieu of closing arguments, the parties be allowed to present written submissions.³ Petitioner's Memorandum was filed with the Orangeburg County Clerk of Court and provided to Judge Hood and opposing Counsel. It is therefore, a part of the record below.

The records of this Honorable Court indicate that Respondent did not file a response to Petitioner's request to enlarge the page limitation for the certiorari petition. In fairness, Counsel for Petitioner recognizes that if the seventy-four (74) page Petition for Writ of

³ The record actually does not reflect Counsel's full statement to the Court on this subject, however, Counsel's request was granted. App.p. 868, ll. 13 – 22.

Certiorari originally submitted by Petitioner had been accepted for filing by this Honorable Court, then logically Respondent would likely have been granted equal latitude in filing their Return. Respondent's Return, filed along with their Motion to Strike, is twenty (20) pages long. In that Return, Respondent made no attempt to respond to the merits of Petitioner's Questions 6-22. Petitioner most respectfully submits that this fact further demonstrates the improbability that Counsel for Petitioner could have presented all twenty-two (22) of Petitioner's Questions presented within the twenty-five (25) page limitation for a certiorari petition pursuant to Rule 243 (e)(3), SCACR.

Petitioner submits that this Honorable Court certainly has it within its authority to review all the arguments made by Petitioner in his Memorandum, duly filed as part of the circuit court record below, as part of his showing that trial counsel failed to provide him reasonable professional assistance of counsel below. Petitioner argues that this is particularly crucial to his ability to receive due process of law in his PCR appeal where he was not allowed a reasonable opportunity to present all these issues in his certiorari petition. Furthermore, consideration of this additional seventeen (17) Questions Presented is important to any analysis of cumulative prejudice this Honorable Court may deem it appropriate to engage in on the facts of this case.⁴ Counsel notes, however, that Respondent did not file a responsive pleading to this Memorandum filed in the circuit court. Petitioner recognizes that this Court may elect to give Respondent the opportunity to respond to these arguments at this time.

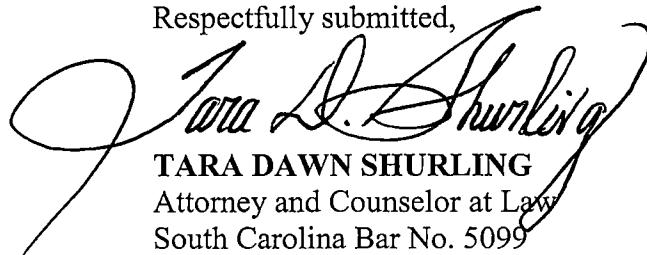
CONCLUSION

⁴ *Green v. State*, 351 S.C. 184,196, 569 S.E.2d 318,324 (2002). See also, *Nance v. Frederick*, 358 S.C. 480, 596 S.E.2d 62 (2004); *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988).

CONCLUSION

Petitioner asks that Respondent's Motion to Strike be denied and that Petitioner's arguments with regard to Questions Presented 6-22 from his original Petition for Writ of Certiorari be reviewed based upon the arguments made in his Memorandum in Support, as filed in the circuit court, which are part of the record below. If this Honorable Court is inclined to order Petitioner to submit another Revised Petition for Writ of Certiorari, rather than permit Petitioner to incorporate these arguments by reference, Petitioner most respectfully beseeches this Court to reconsider its decision to limit the Certiorari Petition in this matter to twenty-five (25) total pages. Petitioner asks that the Court allow the filing of the seventy-four page Petition for Writ of Certiorari originally submitted to the Court as his Second Revised Petition for Writ of Certiorari and asks that Respondent be given the same page limitation for any Revised Return the State may be given leave to file. Petitioner once again wishes to emphasize that in making this prayer, he and his Counsel in no way intend to be disrespectful of the Court previous order, but rather humbly seeks only the opportunity to properly present for consideration all the issues developed in the circuit court.

Respectfully submitted,



TARA DAWN SHURLING
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South Carolina Bar No. 5099

ATTORNEY FOR PETITIONER

This 7th of November, 2019

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
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Robert E. Hood, Circuit Court Judge

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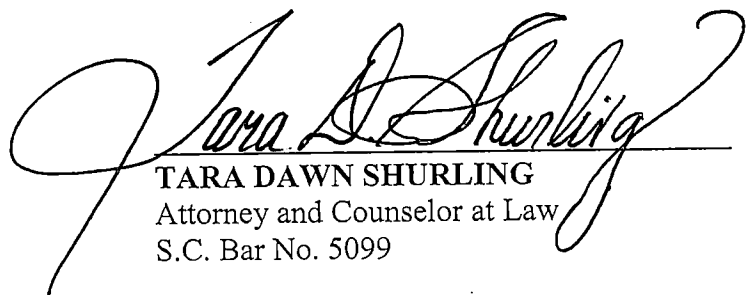
STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Reply to Respondent's Petition to Strike in the above-entitled case has been served upon opposing counsel this the 7th day of November, 2019 by mailing one (1) copy in a stamped envelope properly addressed to:

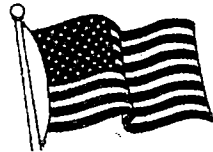
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