

VOLUME II of III

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

The Honorable Grace Gilchrist Knie, Circuit Court Judge

2016-CP-42-02795

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S.C. SUPREME COURT

Manuel Antonio Marin, #343371,

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

Appellate Case No.: 2018-001157

APPENDIX

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INDEX

TRANSCRIPT OF TRIAL October 25-27, 2010.....	1
FINAL BRIEF OF APPELLANT	420
FINAL BRIEF OF RESPONDENT.....	438
OPINION 5156 OF THE COURT OF APPEALS	479
PETITION FOR REHEARING	488
ORDER DENYING PETITION FOR REHEARING.....	493
PETITION FOR A WRIT OF CERTIORARI	495
RETURN TO PETITION FOR A WRIT OF CERTIORARI.....	511
ORDER GRANTING CERTIORARI	540
BRIEF OF PETITIONER	542
BRIEF OF RESPONDENT	562
OPINION 2613 OF THE SUPREME COURT.....	586
REMITTITUR.....	599
PCR APPLICATION.....	600
AMENDED PCR APPLICATION	632
2 nd AMENDED PCR APPLICATION	650
RETURN AND PARTIAL MOTION TO DISMISS	657
MOTION FOR DISCOVERY	666
ORDER FOR DISCOVERY	671
PCR HEARING TRANSCRIPT February 1, 2018	674
PCR HEARING EXHIBITS.....	896

STATE'S MEMORANDUM OF LAW	928
APPLICANT'S MEMORANDUM OF LAW	956
ORDER OF DISMISSAL	1006
CLERK'S RECORDS	1035
SCDC RECORDS	1164

McDonald and Rodriguez were looking for someone to give the decedent a ride when petitioner offered to take him home. R. 22, l. 11 – 23, l. 10. Petitioner knew where Tabares lived. R. 22, l. 11 – 23, l. 10. McDonald remembered that he “basically carried [Tabares] out and actually put him in [petitioner’s] truck.” Petitioner reached for his laptop and typed in Tabares’ address – apparently on the GPS – that went with his laptop. R. 22, l. 11 – 24, l. 22. Tabares was “kinda like in and out” but “knew where he was at.” R. 29, ll. 12-17.

It was undisputed that petitioner drove, and that his friend Alfredo Jimenez (“Jimenez”) (petitioner’s former brother-in-law) rode in the front seat. Tabares was placed in the backseat of petitioner’s SUV. R. 243, l. 21 – 244, l. 6.

Larry Gory was apparently coming home from “personal business” early that morning when he came upon petitioner and Jimenez standing beside the road. R. 41, ll. 16 – 24. R. 44, ll. 3 – 22. Gory said it appeared they were trying to “pull something away from each other . . . one of the guys said could [you] call the police, he just – he shot him.” R. 41, ll. 3-24.

Spartanburg Police Officer Jeffery Powell (“Powell”) testified he arrived on the scene at about 4:05 a.m. and he recalled seeing petitioner and Jimenez. R. 49, ll. 15 – 21. Powell testified: “One of them [was] sitting in the intersection and one standing in the intersection of Daniel Morgan Avenue and West Main Street.” R. 49, ll. 17 – 21. He recalled that one of the men was very calm and the other was very upset. R. 49, l. 17 – 50, l. 13. Powell saw a weapon lying on the sidewalk and he picked it up and put it in his trunk. R. 51, l. 15 – 52, l. 7.

Powell remembered: “I asked him where it happened at, and he would just say Wal-Mart. He did say Wal-Mart . . . he said that the other individual [Tabares] was grabbing a hold of the steering wheel” and he was trying to wreck petitioner’s SUV. R. 56, ll. 9-18. Jimenez told Powell that they had left a club in Greenville and were supposed to be taking Tabares home. When they

apparently passed what Tabares thought was “his road,” he “got very upset and was trying to, to get them to stop the car, and the driver wouldn’t stop. He said he just wouldn’t stop. And he said that was when he started fighting with the driver.” R. 59, ll. 2-21. Jimenez never testified, and it was unclear from the record in this case if he disappeared prior to trial or why he was not called as a witness.

Petitioner later testified in his own defense. Petitioner was the marketing director for a newspaper, and he recalled the events of July 20, 2008. R. 225, ll. 4-10. Petitioner went to the Colombian Festival that evening and afterwards made his way to Bongos. R. 225, l. 8 – 226, l. 20. Petitioner was mingling with Jimenez when Rodriguez asked him to give Tabares a ride home “and I agreed.” R. 227, l. 5 – 228, l. 9.

Petitioner remembered one of the bouncers gave him Tabares’ driver’s license “and I put the address on my laptop.” The laptop included a GPS. R. 230, l. 12 – 231, l. 20. The police confirmed that Tabares’ address had been entered into the computer. R. 147, ll. 11 – 14.

Petitioner recalled as they were driving he was talking with Jimenez “about the three Americans that had been liberated that past week, I mean, yeah, the past week, and the presidential candidate that [was] kidnapped in Colombia.” R. 231, l. 23 – 232, l. 6.

While he was talking with Jimenez, Tabares jumped up from the backseat and put petitioner in a headlock: “I hit the brakes. I hit the brakes, and the car went on the oncoming lane. And it was headed towards a telephone pole. But I got the car back on the road.” R. 232, l. 11 – 233, l. 12.

Petitioner said he was very scared after he almost hit the telephone pole, and “at that point . . . I decided not to take him home. I was just trying to find a public place, you know, people where I could, you know, possibly jump out of the car and get some help . . .” R. 234, ll. 8-14. Petitioner testified that given the hour “nothing seemed to be open . . . all of a sudden, you know,

Mr. Tabares jumps up and grabs the steering wheel and he tries to run the car off the road . . . I kept pushing him, pushing him back . . .” Petitioner said Tabares continued coming after him, and “I grabbed the glove box and opened the glove box and got the pouch out which I had the gun in it . . . I pulled the gun out and I shot Mr. Tabares.” R. 234, l. 5 – 236, l. 11.

The forensic evidence corroborated petitioner’s version of events. A City of Greer police officer confirmed that there were fresh skid marks in the road where Jimenez said the incident occurred. R. 77, ll. 16 – 25. Also in the road were “particles of debris that appeared to be consistent with the vehicle’s condition that had had some damage to the front end.” R. 77, ll. 16 – 25. The front bumper of the car was missing. R. 125, ll. 1 – 4. Gunshot residue was found on the palm and the back of Tabares’ hands. R. 178, ll. 16 – 25. The crime scene investigator found Tabares’ torso between the front seats on the center console with his upper body in the front of the car. R. 127, ll. 8 – 21. All of the blood spatter was in the front of the car with none in the back. R. 127, l. 22 – 128, l. 6.

After the shooting, petitioner said Tabares fell on his knee and “I was terrified. I was really shocked.” R. 237, ll. 2 – 4. Petitioner continued to look for a public place where he could stop the car and ended up in downtown Spartanburg. R. 236, l. 2 – 237, l. 18.

Petitioner testified that Jimenez was also in shock when the men got out of the car. R. 238, ll. 1 – 3. They were both talking “fairly loud”: “[W]hy was he trying to kill me? Why was he trying to run us off the road?” R. 238, ll. 6 – 9. Petitioner said Jimenez “grabbed the gun, and I let him have it.” Petitioner did not recall where Jimenez put the gun. R. 238, ll. 1-21. However, as seen above, the gun was found nearby by the police officer and placed in his trunk. Petitioner testified, “I sat down and waited for the police to come . . . I sat down on the median.” R. 239, ll. 7-20.

On cross-examination, petitioner explained to the solicitor that it was very dark as he was driving that night and he was trying to keep the decedent from “killing us” by wrecking his SUV. R. 248, l. 1 – 251, l. 4. When the solicitor asked petitioner on cross-examination why there were *two shots* fired, petitioner answered: “It just happened within seconds.” R. 250, l. 22 – 252, l. 16.

The Defense’s Request to Charge

Defense counsel requested and the trial court agreed to charge self-defense. R. 259, l. 13 – 260, l. 9. R. 263, ll. 19 – 21. Then, during her closing, the solicitor made the highly inflammatory argument that the jury could infer malice because two shots were fired. The solicitor said, “Ladies and gentlemen, I submit this is malice. Two shots, not one, two shots to the back of the head. One of them tight contact, barrel up against the head.” R. 298, ll. 22 – 24. The solicitor also argued, “So when you shoot somebody in the head and they stop struggling with you, if that’s what they’re doing, you don’t have—you won’t shoot them a second time unless you pull that trigger a second time.” R. 293, ll. 15 – 22. The solicitor said, “Would a reasonable person shoot someone twice in the back of the head?” R. 301, ll. 2 – 3.

When the trial court asked for exceptions after his charge, defense counsel stated he wanted an instruction that:

[I]f the defendant is justified in defending himself or others in firing the first shot, then the defendant—also continue—to continue shooting until it is apparent that the danger of death or serious bodily injury has been completed—has completely ended.

R. 332, ll. 6 – 12. For this proposition of law, defense counsel cited State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007). R. 332, ll. 11 – 12. The trial judge responded that the proposed charge “sounds like a comment on the facts to me.” R. 332, ll. 13 – 14. After argument, Judge Cole declined to give petitioner’s requested charge. R. 332, l. 15 – 336, l. 1.

The jury then requested additional instruction on the definitions of malice and voluntary manslaughter. R. 336, ll. 16 – 19. The trial judge repeated his malice charge. R. 336, l. 21 – 338, l. 23. Following the jury's confusion about malice and the additional charge, appellant again asked for the "continuing to shoot" charge, this time citing Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998) and State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). R. 341, l. 14 – 342, l. 11. The trial judge again refused to give the charge. R. 342, l. 12 – 343, l. 2. Approximately an hour later, the jurors returned with a verdict finding appellant guilty of murder. R. 343, l. 12 – 344, l. 5.

The Court of Appeals' Decision

The Court of Appeals inconsistently held that: (1) the requested charge was not a correct statement of the law, and (2) that the requested charge had been sufficiently covered by the trial judge's charge. Compare App. 4 ("We are concerned the charge [petitioner] requested is not a correct statement of law.") with App. 6 ("Considered as a whole, the trial court's charge explained this principle of law."). With respect to its first inconsistent holding, the court stated that if requested charge were correct, then defendants could continue to shoot "so long as the initial danger has not 'completely ended.'" App. 4 (emphasis in original). With respect to its second inconsistent holding, the court held that petitioner's requested charge "derives from the correct principle of law that, if no other element has been disproven, any particular act of deadly force done in self-defense is justified if the act was reasonably necessary to prevent death or serious bodily injury, under the circumstances as they existed at the time of the act." App. 6. From this late recognition that petitioner's requested charge was a correct statement of the law, the court concluded the requested charge was subsumed within the "may use such force

is reasonably necessary” charge given by the trial court. App. 6-7.

Discussion

The Court of Appeals’ fundamental error was ignoring that the trial judge had a responsibility to craft a self-defense charge tailored to the facts of this case. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). In State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989), this Court held the trial judge had a duty to craft his self-defense instruction to the facts of the case. In Fuller, the Court noted the trial judge erred in not charging a jury that in a self-defense case a defendant had the right to act on appearances. Id.

In Fuller, the judge also erred in not charging that “words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense.” Id. Finally, the judge erred in not instructing that an individual had no duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily injury. Id. See also State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Hardin, 114 S.C. 80, 103 S.E. 557 (1920).

Here, the proper jury instruction petitioner wanted was similar in content – although a different principle – to the one improperly refused in Fuller. The solicitor was urging upon the jury the incorrect sophomoric idea that you never have to shoot more than once to defend yourself. Self-defense is not an algebra problem and a defendant has the right to have the jury understand that. It was an elementary request on the law that once a defendant *properly fires in self-defense he can continue firing* until the danger is removed.

The language requested by petitioner comes directly from this Court’s decision in State v. Hendrix, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978). In Hendrix, the Court specifically held that “when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased.” Id. This Court rejected the State’s

argument that Hendrix used excessive force by firing four times. Id. The court of appeals' first inconsistent holding is in error because Hendrix shows that petitioner's requested charge was a correct statement of South Carolina law.

The court of appeals also incorrectly dissected the requested charge in order to give it an illogical meaning. App. at 4-5. The court improperly singled out the phrase "completely ended" from the remainder of the charge. The requested charge makes clear that what must "completely end" is the "danger of death or serious bodily injury." This statement of the law is correct. Hendrix at 661, 244 S.E.2d at 507. The court erred in taking this language out of context to produce the extreme result that a defendant would be justified in continuing to shoot if a "minimal danger" existed. "Minimal danger" was never the petitioner's argument. The danger to be defended against was death or serious bodily injury.

In Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998), the Supreme Court noted the judge had charged that if the defendant was justified in firing the first shot he was justified in firing in continuing to shoot until any danger to his life and body had ceased. The jury here likewise had a right and a need to know that firing more than one shot was not excessive force and that it did not remove a legitimate case of self-defense. Id.

Finally, the court of appeals erred in determining that the charge as a whole covered the requested language. It used this principle to avoid the trial court's duty to craft its instructions to the facts when fashioning a self-defense charge. State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989). The "continuing to shoot" charge was required by the facts of this case, especially after the jury's question about malice was provoked by the solicitor's argument. On cross-examination, petitioner explained to the solicitor that it was very dark that night and he was trying to keep the decedent from "killing us" by wrecking his vehicle. R. 248, l. 1 – 251, l. 4. When the solicitor asked

petitioner on cross-examination why there were *two shots* fired, petitioner answered: "It just happened within seconds." R. 250, l. 22 – 252, l. 16.

The solicitor's inflammatory closing argument highlights the necessity of the jury understanding this legal principle. The solicitor repeatedly referenced the fact that two shots were fired. The solicitor said, "So when you shoot somebody in the head and they stop struggling with you, if that's what they're doing, you don't have—you won't shoot them a second time unless you pull that trigger a second time." R. 293, ll. 15 – 22. The solicitor argued, "Would a reasonable person shoot someone twice in the back of the head?" R. 301, ll. 2 – 3. Finally, the solicitor made the extremely prejudicial argument that the jury could infer malice because two shots were fired instead of one. The solicitor said, "Ladies and gentlemen, I submit this is malice. Two shots, not one, two shots to the back of the head. One of them tight contact, barrel up against the head." R. 298, ll. 22 – 24. Once the jury requested the definition of "malice," the need for petitioner's requested charge became indispensable. See State v. Blassingame, 271 S.C. 44, 46-47, 244 S.E.2d 528, 530 (1978) (noting that a court's answers to a jury's questions receive "special consideration" since they are in response to a jury's own inquiry).

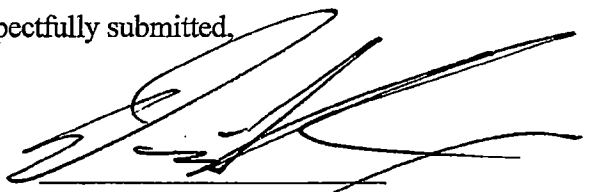
Finally, the Court erred in reasoning that petitioner's requested charge was subsumed within the "may use such force is reasonably necessary" charge given by the trial court. If this reasoning were correct, then any specific self-defense charge would be unnecessary. Fuller's charge that the defendant has the right to act on appearances could be inferred from a general self-defense charge, but the Supreme Court still held the trial judge should have given a complete appearances charge. Fuller at 443-45, 377 S.E.2d at 330-31. The court of appeals' opinion renders meaningless Fuller's command that trial courts shall tailor self-defense charges to the facts of the case.

This was a legitimate case of self-defense. Petitioner's actions were reasonable and consistent with a person acting in self-defense. He waited on the police to arrive. He was in shock and disturbed after the bizarre events that the grossly intoxicated Tabares— with a .323 blood-alcohol reading — had inflicted on him. R. 273, ll. 1-25. Petitioner described how Tabares grabbed him from the backseat and almost caused him to hit a telephone pole after his SUV was forced into oncoming traffic and the forensic evidence corroborated petitioner's testimony. The jury was confused about whether they could infer malice after the state's inflammatory closing argument. Petitioner was entitled to a fair trial with a properly instructed jury on self-defense.

CONCLUSION

For the reasons stated above, the Court should grant the petition with the ultimate result of a new trial.

Respectfully submitted,

By: 

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This 21st day of November, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5156 (S.C. Ct. App. filed 7/3/2013)
08-GS-42-05308, 05308A

THE STATE,

RESPONDENT,

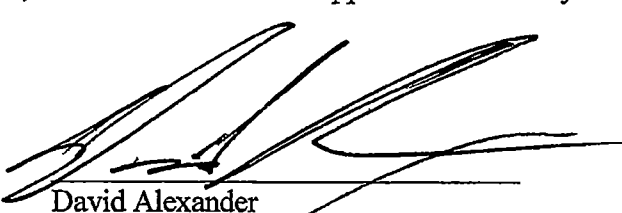
V.

MANUEL ANTONIO MARIN,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 21st day of November, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of November, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2010 - 177349

THE STATE,

Respondent,

v.

MANUEL ANTONIO MARIN,

Petitioner

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
APPELLANT'S STATEMENT OF ISSUE ON APPEAL	ii
RESPONDENT'S STATEMENT OF THE CASE.....	1
RESPONDENT'S STATEMENT OF FACTS	1
Requests to Charge	9
ARGUMENT	
I. The trial court did not err in its charge to the jury on the law of self-defense.....	10
CONCLUSION.....	25
CERTIFICATE OF SERVICE	

APPELLANT'S STATEMENT OF ISSUE ON APPEAL**I.**

Whether the court erred by refusing to instruct the jury on self-defense that a defendant acting in self-defense had the right to continue shooting until it was apparent that the danger of death or serious bodily injury had ended since this was a widely accepted correct instruction on the law, and appellant had a right to have the instruction crafted to the facts of the case?

RESPONDENT'S STATEMENT OF THE CASE

Petitioner, Manuel Marin, murdered Nelson Tabares on July 21, 2008 in Spartanburg County. Petitioner was arrested the same day. Petitioner was subsequently indicted by the Spartanburg County grand jury for murder and possession of a weapon during a violent crime. (Ind. # 2008-GS-42-5308). Beginning October 25, 2010, Petitioner was tried by a jury before the Honorable J. Derham Cole. (R. 1). At the trial's conclusion on October 27, 2010, Petitioner was found guilty of murder and the weapon charge. (R. 343-44). Judge Cole sentenced Petitioner to life for murder. (R. 346). Petitioner appealed. On July 3, 2013, the Court of Appeals affirmed Petitioner's convictions. State v. Manuel Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). A petition for rehearing was denied August 22, 2013. This petition followed.

RESPONDENT'S STATEMENT OF FACTS

Petitioner claims reversible error arising from a single issue concerning self-defense. The claim is made against a backdrop of overwhelming proof Petitioner shot the victim twice in the back of the head at point blank range during the early morning hours of July 21, 2008.

The victim, Nelson Tabares, was a well-known celebrity in the Latino community of Greenville. He was a computer professor at Greenville Technical College, who also advertised Latino events on his commercial web-page, Crazylatino.com. (R. 2-4). July 20 was Colombian Independence day, a day that ended in his brutal murder, which included an Independence Day celebration he attended where he took photos for his website. Afterwards, he attended an after-party at Bongo's restaurant and bar on East North Street in Greenville. (R. 3-5).

The victim's wife was Colombian, a working mother who assisted her husband in his web-site business as a translator because she was more proficient in Spanish than victim. (R. 8). The evening of the murder, she remained home and went to bed after turning down the volume on her telephone. (R. 10).

The owner of Bongo's testified that on the night of the murder the victim stayed until closing, was not feeling good and that he, the owner, tried to help the victim phone home, without success. (R. 12-15). One of the bouncers at the club testified that during the course of the evening the victim became intoxicated to the point the bar cut him off, that he was "pretty much just stumbling everywhere, couldn't really stand up," (R. 20), but he was not at all aggressive with anyone. (R. 20). The victim was then seated by staff in the kitchen, where he remained. At some point, Petitioner and his former brother-in-law, Alfredo Jimenez, (R. 21-22, 244), joined them and when the owner and other promoters began discussing how to get the victim home "for some reason [Petitioner] spoke up and said I will... [h]e said he knew where he lived." (R. 22, ll. 16-25).

Though Petitioner had at first said he knew where the victim lived, once the victim had been carried to Petitioner's car, the victim was too intoxicated to give information. Petitioner actually did not know the victim's address. Instead, the victim's address was obtained from his driver's license. (R. 22-26). Petitioner drove away with the victim apparently passed out in the back seat and Mr. Jimenez riding in the passenger front seat. (R. 23-26). The victim was found later at an intersection in Spartanburg in the same car, shot to death. Mr. Jimenez was at the scene with Petitioner, whose pants were covered in the victim's blood.

Ms. Traci Bodner testified that later on that same evening/early morning, she was with friends outside an apartment in downtown Spartanburg at the corner of Daniel Morgan and Main Street when they saw two men arguing heatedly in the street, outside a vehicle; one of the men was in a black shirt [Jimenez], the other in a white shirt [Petitioner]. One of the men [Jimenez] pulled what appeared to be a handgun out of the other man's [Petitioner's] pocket and threw it down in the street. (R. 31-33).

Larry Gory testified he came by the scene described by Ms. Bodner. He saw the two men described by Bodner arguing in the street. He stated the one in the black shirt [Jimenez] told him [Gory] to call the cops, and that "he [petitioner] just shot him [victim]." (R. 41-42). Gory saw the gun the two men [Jimenez and Petitioner] had been fighting over and then called 911. (R. 42-43).

Officer Jeffery Powell of the Spartanburg Police Dept. responded to the call. At the scene, he found Petitioner wearing white and covered in blood. He was "sitting there calm," while the other individual in the black shirt was "very upset." (R. 49 - 50). The individual in the black shirt [Mr. Jimenez] "moved away from the other individual, and he's just very upset... he [Jimenez] kept saying, 'Dude shot him, dude shot him,' and he [Jimenez] would point down the road towards the guy with the white shirt on [Petitioner]." (R. 51, ll. 10-20.). The man in the black shirt [Jimenez] said "he took the gun from [Petitioner], and then he pointed towards the sidewalk just a little ways on down. And there was a weapon laying on the sidewalk." The gun was taken into custody and secured by the officer. (R. 51, ln. 22 - 52, ln. 21).

Officer George Brown of the Spartanburg Police Dept. was the shift supervisor on the scene. There he found Petitioner wearing a "white shirt, with blood covering the shirt,

sitting across the intersection from where I had pulled up.” (R. 58, ll. 12 - 22). Brown also attempted to calm down an individual in a black shirt [Jimenez]. (R. 58, ll. 19-25). This person remained very upset, “crying...bouncing all over the place,” and told Officer Brown “[Mr. Jimenez] just kept saying, ‘Dude, dude shot him,’ and kept pointing over towards the male in the white shirt... he said that he had taken the gun away from him [Petitioner] and that Officer Powell had taken that – that it was the gun that Officer Powell had taken.” (R. 59, ll. 4-11) Brown further testified the man [Jimenez] told him “they had left a club over in Greenville and that they were supposed to be taking the victim—supposed to be taking him home. And they had gone past his road and he [victim] got very upset and was trying to, to get them to stop the car, *and the driver wouldn’t stop. He said he just wouldn’t stop. And he said that was when he started fighting with the driver of the car.*” (R. 59, ll. 15-21)(emphasis added).

Officers found the victim’s body inside the vehicle in the intersection where the two men had been arguing. (R. 60).

At trial, Petitioner’s attorney used the out of court statements of Mr. Jimenez in an effort to place a prior written report of the incident before the jury, an effort to discredit Officer Brown with prior inconsistencies between the report and his testimony. It suggested to the jury a theory of defense based on a struggle in the car but had the collateral effect of highlighting the fact that, if any struggle took place, it occurred *solely* between the victim and Petitioner. The passenger in the front seat, who was supposedly as much in danger, remained inexplicably detached from the “fight”. According to Mr. Jimenez’s words at the scene, the struggle would have taken place after Petitioner’s car

continued moving further and further away from the victim's home, into Spartanburg County, and over the victim's protests. (R. 61-67).

Officer Dale Arterburn of the Greer Police Dept. retraced the route taken from Bongo's with the other passenger, Jimenez. The location of the shooting was determined to have taken place on Highway 29 in Spartanburg County, across from U.S. Lumber Company, far removed from the victim's street address in Greer. This was approximately 6 to 10 miles from downtown Spartanburg where the vehicle finally stopped. (R. 76-80).

Gunshot residue examination and other evidence regarding Mr. Jimenez, including fingerprints, blood spatter, placement of relevant physical evidence within the car, and location of road debris on Highway 29 corroborated Jimenez' story and eliminated him as being the shooter. (R. 88-92; 131-35; 137-42; 143-53; 175-82). It tended to establish Petitioner was the shooter, using a Luger 9mm automatic which belonged to him. This was the gun taken from Petitioner by Jimenez during their argument in downtown Spartanburg, and thrown by Mr. Jimenez to the curb where it was found and retrieved by investigating officers. (R. 93-128; 135; 153-58; 175-98).

The pathologist testified the victim was 5'3" tall, 180 pounds, and died from two gunshot wounds to the back of the head. The shots "came close together because they were closely approximated" and one of which was immediately fatal. (R. 163-64).

The first wound was "irregular in shape, and it had splitting of the skin and underlying beveling of the, of the bone outwards, so indicated there was an exit gunshot wound...that [entry] wound appeared in the right—into the left occiput region, the back of the head. It was 6 inches from the top of the head and a half inch to the left of midline. And it was split horizontally, and it—the horizontal dimensions were 5.5 centimeters, and

it was half a centimeter wide. You could ap--re-approximate that wound, and it was 1 centimeter in diameter. And the entrance was medially. Now, *the reason it was like that is because it was essentially a contact gunshot wound...* That wound passed into the base of the brain – of the skull. It passed through a large drainage area called the sagittal sinus. It went through the cerebellum, which is an inferior portion of the brain, went through the cerebrum and came out anteriorly... So the path of that bullet was back to front. It was upward at about probably 15 or 20 degrees from the horizontal. And it was almost sagittal, meaning that if you drew a perpendicular line through the face and through the body, that's the sagittal plane. *So it was going from back to front and slightly upward and almost straight through.*" (R. 164, ln. 22 - 165, ln. 21)(emphasis added).

The pathologist went on to testify "wounds three and four were associated gunshot wounds. And as the gunshot wound exited it went through the ear, the pinna of the ear, the surface of the ear... But, nevertheless, the gunshot wound entered in the right posterior neck. It was a little bit lower, 6.75 inches from the top of the head, and it was a half inch to the right of the midline...This wound also had a little bit of splitting of the skin indicating that it was probably contact, being loose contact. And there was a little bit of charring of the skin surrounding that from the heat of the weapon. The charring was from 5:00 to 1:00 o'clock...*The, the first [wound] I described would have been almost immediately fatal.* The other one would have, like I said; only been potentially fatal. He could have lost consciousness from that one, but more than likely not." (R. 165, ln. 22 - 167, ln. 24)(emphasis added).

At the close of the State's case, Petitioner was appropriately advised of his constitutional rights not to have to prove anything in his own defense and his right not to

testify, or his right to testify should he choose to. He was thoroughly questioned by the court as to whether he wished to take the stand in his own behalf and advised the court he did not. (R. 201-04). The court denied the request of Petitioner's counsel for a directed verdict, (R. 206-09), and entertained requests by Petitioner's counsel for charges to the jury on voluntary and involuntary manslaughter, self-defense under *S.C. Code Ann. 16-11-440(c)*, and statutory immunity from prosecution purportedly under the Castle Doctrine. The court deferred rulings on these jury charge requests overnight. (R. 209-21).

The following morning Petitioner informed the court he wanted to testify in his own behalf and did so. (R. 222 - 24). Petitioner testified that at the time of the incident, he had imbibed only four drinks during the course of the entire day, (R. 226, ll. 3-14; .242, ll. 3-9), but that Mr. Jimenez was intoxicated, (R. 231, ll. 2-7) and the victim was intoxicated. (R. 229, ln. 20 - 230, ln. 5). He claimed he was asked by the club owner to give the victim a ride home, (R. 228, ll. 6-9), but knew of the victim only as an acquaintance. (R. 291, ll. 19-25). He stated the security guard helped the victim into the back seat of Petitioner's vehicle at approximately 3:00 a.m. (R. 229-30). He told the security guard initially he knew where the victim lived but then had to get his address off his driver's license; then he and Mr. Jimenez, who was riding in the front passenger seat, proceeded up East North Street in Greenville to take the victim home. (R. 230-31).

According to Petitioner, he and Jimenez were having a discussion "[a]most political in nature" about kidnappings in Colombia by FARC, a revolutionary group which opposes the government there. (R. 232). Petitioner claimed the victim then sprang from the back seat and grabbed him "[o]n my forehead." (R. 233). Prompted by constant leading from his attorney, Petitioner elaborated on his terror, his efforts "to find a public

place, you know, people where I could, you know, possibly jump out of the car, and get some help you know...I mean, I was looking for a public place with people somewhere stopped.” (R. 234, ll. 11-25).

Petitioner testified he had “been up all day”, had “[b]een drinking throughout the day,” and was tired. (R. 235, ll. 2-7). He stated the victim kept jumping forward to grab the steering wheel, and that he pushed repeatedly but that did not seem to work. (R. 235 - 236). “At that point I pushed him off, and I grabbed the, the glove box and I opened the glove box and got the pouch out which had the gun in it... I pulled out the gun and I shot Mr. Tabares... He fell on my knee.” (R. 236, ln. 2- 237).

Again, with extensive leading from his attorney Petitioner recounted his fear and shock after shooting the victim, driving from a point on East North St. in Greenville, and ending up in downtown Spartanburg. He elaborated on his confrontation with Jimenez in Spartanburg while he “still had the gun in [his] hand,” his remaining at that scene, it being “fair to say it’s traumatic” when something like this happens. (R. 238-41).

He was asked by his attorney whether he ever thought about stopping the car or slamming on the brakes. The answer was: “No. When, when, I kept pushing him back he, he pulled the car towards, you know, trying to run it off the road. And I saw we were headed towards some trees. So.” (R. 240, ll. 12-18).

Under cross-examination, Petitioner reiterated his knowledge of the extent of the victim’s intoxication before agreeing to take him home, (R. 242), and confirmed the road to the victim’s home took him in the opposite direction of his own home. (R. 243, ll. 4-20). Petitioner offered denials and then equivocations that the victim became upset because Petitioner passed by the road he lived on and because Petitioner would not stop

or turn around when told to do so. (R. 245-46). He claimed again he was looking for a public place to stop and let the victim out, “[s]ome place to stop and get some help where I could jump out and get some help, possibly let him out. And I don’t know, maybe later get a cab. But my main concern was to get some help, me jumping out of the car.” (R. 246, ln. 22 - 247, ln. 4).

Petitioner admitted the victim had no weapon, not a gun, or a knife, or even a plastic fork. (R. 247, ll. 9-13). However, he argued that he didn’t *know* that simply stopping the car would have ended the threat, retreating from his earlier testimony about the extent of the victim’s inebriation. (R. 247, ll. 14-25).

Petitioner could not deny that he had the presence of mind to reach into the glove box, extract a bag, and take a loaded and cocked gun from that bag. Then, while the victim supposedly struggled with him, and while a front seat passenger supposedly sat idly by with a threat of death clear and imminent, Petitioner moved the victim into a position of total helplessness and shot him twice, point-blank, in the back of the head, killing him instantly. (R. 248-53).

Requests to Charge

Petitioner’s counsel requested the court charge the law of self defense, the castle doctrine, voluntary manslaughter and involuntary manslaughter. (R. 255-65). In support of involuntary manslaughter Petitioner relied upon *State v. Brayboy*, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010), (R. 260 - 263). The State agreed to a charge to the jury on murder, voluntary manslaughter, and on self-defense. (R. 263).

The trial judge gave proper instructions to the jury on charges of possession of a firearm during the commission of a violent offense, (R. 324 -325), the law of murder, (R.

313 -316), of **voluntary manslaughter**, (R. 316 -319), the **Castle Doctrine**, (R. 318 - 320), and of **self-defense**, (R. 320, ln. 10-324, ln. 11). The instructions fully and correctly stated the law applicable to the facts of the case.

ARGUMENT

I. **The trial judge did not err in his charge to the jury on the law of self-defense.**

At the conclusion of the case, Petitioner requested the trial judge charge the jury that when a defendant acts in self-defense and shoots he is entitled to shoot until the threat is eliminated. Petitioner argues “[t]his is a legitimate case of self-defense. Petitioner acted consistently with a person acting in self-defense. He waited on the police to arrive, and he was in a state of shock and disturbed after the bizarre events that the grossly intoxicated decedent - with a .323 blood-alcohol reading – had inflicted on him.” (*IBOA*, p. 12). The argument is without merit.

Petitioner glosses over the actual facts of the murder and the fact the victim died of two gun-shot wounds to the back of the head. The contact bullet wounds were all but instantly fatal and were inflicted on a diminutive man who had been put into Petitioner’s car, either with Petitioner’s consent and acquiescence (his story) or at Petitioner’s request (the story of other witnesses).

The entire reason why the victim was put there was he had too much to drink and needed to be driven home. The testimony was clear he was unable to walk to the car without assistance. The tale ended with the man dead and in Petitioner’s car, Petitioner covered in his blood and in another city, miles and miles removed from the club they had departed from, and equally far removed and in the wrong direction from the home to which the victim was to have been driven. Petitioner did not “wait on the police to

arrive” so much as he was resigned to the inevitable, an impending place in the dock after a heated exchange with his former brother in law, the other passenger in the car, who had witnessed what happened and finally was able to get out of the vehicle and take the murder weapon away from Petitioner.

The elements of self-defense are: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) if his defense was based upon his belief of imminent danger, that a reasonable prudent man of ordinary firmness and courage would have entertained the same belief, or if his defense is based on his being in actual danger, that the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm, or losing his own life; and (4) the defendant had no other means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. *State v. Hendrix*, 270 S.C. 653, 657-658, 244 S.E.2d 503 (1978); McAninch, *The Criminal Law of South Carolina*, pp. 675-686 (S.C. Bar, 4th Ed., 2002).

Petitioner either agreed to (or offered) his car as a means of transit, one for taking the victim from a club where he had had too much to drink, and to deliver the victim to his home. This was the underlying cause of all circumstances which followed. It is therefore undisputed Petitioner assumed the care, custody, and control of a person whom he recognized as being too intoxicated to care for himself. He then continued to drive by the street where the victim actually lived and continued into another county over the victim's protests.

Even assuming for argument the events were as Petitioner claimed at trial, Petitioner was not “without fault” in bringing on the difficulty which ultimately led to a man’s death. There was simply no question that the State had negated the first element of self-defense in its case in chief through all of the circumstances proven; *see, State v. Santiago*, 370 S.C. 153, 634 S.E2d 23,27 (Ct. App. 2006)(*taking a loaded gun to the site of a prior confrontation with the victim, and where the fatal encounter occurred, repudiated a claim defendant was without fault in bringing on the confrontation*); *State v. Wigington*, 375 S.C. 25, 649 S.E.2d 185(Ct. App. 2007)(“[a] person need not retreat or seek to escape, even though he can do so without increasing his danger, but may lawfully resist event to the extent of taking life if necessary, where, being without fault in bringing on the difficulty, he is assaulted while in his own dwelling house... *However, the rule is predicated on the absence of aggression or fault on his part in bringing on the difficulty; the doctrine is for defensive, and not offensive, purposes*) (emphasis added).

A defendant must be without fault in bringing on the difficulty, meaning “[o]ne who provokes or initiates an assault cannot escape criminal liability by invoking self-defense...*Any act of the accused in violation of the law and reasonably calculated to produce the occasion* amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide.” *Wigington*, 375 S.C. at p. 32. In *State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007), this Court held the defendant was not entitled to a self-defense charge, having approached an altercation that was already underway with a loaded weapon by his side, such activity being reasonably calculated to bring on the difficulty that arose.

Petitioner here offered/consented to take the victim home under conditions that gave him notice the victim was intoxicated. The State's case established that Petitioner's conduct clearly showed his own fault in provoking or initiating circumstances leading to the fatal assault by ignoring the victim's protest to stop or turn around, violations of the law which were reasonably calculated to produce the occasion and amounting to his having brought on the difficulty.

Furthermore, it cannot be credibly argued that, once Petitioner took the stand in his own behalf, anything he said demonstrated his lack of fault in those underlying circumstances. He could have stopped the car, but he did not. He could have let the victim out, but he did not. Instead he chose to reach in a glove box, remove a gun contained in a bag, remove the gun from the bag and then he shot the victim twice in the back of the head.

The State's proof demonstrated by the facts and circumstances offered in its case in chief that Petitioner could have resorted to other means of avoiding danger. Even after taking the stand, Petitioner did not point to, and could not point to any evidence that he had *no other means* to avoid the danger presented, other than to shoot the victim twice in the back of the head.

The danger posed by a car in motion, which Petitioner's counsel argued "going down the road is a missile", (R. 271, ln. 15-19), could have been negated far short of taking a man's life. The car could have simply been stopped. The victim could have been removed. The matter should have been ended without resorting to deadly force.

A life would not have been taken had the response to this "danger," allegedly that of a small, inebriated man wanting to get out of a car and get home, been one other than

using deadly force to kill him. Even in a time and place that venerates the right “for law-abiding citizens to protect themselves, their families, and others from intruders and attackers,” reasonableness and proportionality still remain “the key to self-defense.” See *McAninch, The Criminal Law of South Carolina, 4th Ed., p. 674 (S.C. Bar, 2002), citing State v. Wood, 1 S.C.L. (1 Bay)(1794).*

There was neither a perceived nor actual imminent danger under which a man of ordinary prudence, firmness, and courage would have acted as Petitioner did under these circumstances. There could be no reasonable belief that a person of ordinary prudence, firmness, and courage would have entertained any notion that using deadly force was the only way he could have saved himself.

It is further respectfully noted that shooting a man in the back, or here more specifically the back of the head, is generally construed by “law-abiding citizens” as being an oxymoron when describing acts which are of either “firmness” or “courage.” The fact that the victim was not even facing Petitioner at the time he was shot further negates any claim of self-defense and underscores his helplessness when he was murdered.

Petitioner’s reliance on *State v. Hendrix* is totally misspent. In *Hendrix*, the defendant and the deceased had a confrontation during a lake outing on undeveloped property. The hostilities continued until both were armed with shotguns and defendant fired four times in rapid succession, killing the victim. The Court concluded the defendant was entitled to a directed verdict of acquittal *as a matter of law*. The defendant was on his own property, attempted to avoid the encounter and made this known to the victim, had done nothing to provoke the altercation, and the facts were conclusive the

defendant was actually in immediate danger of losing his life. The rule as stated in *Hendrix* was that one is *not* justified in shooting or employing a deadly weapon after the adversary has been disarmed, but a confrontation with shotguns which resulted in firing four shots in such rapid succession that the last was fired before the deceased "hit the ground...[showed] that "[u]nder these circumstances the force used was not excessive." *Hendrix*, 270 S.C. at 661.

In the instant case, Petitioner had secured the release of the victim into his care and custody, knowing the victim was inebriated, with an understanding with bar personnel that he would take him home. The victim was not armed with any type of weapon whatsoever. Petitioner drove past the street where the victim lived, and continued on for miles in another direction, and this was done over the victim's objections, continued as Petitioner murdered him and continued on until the car finally stopped in another city, downtown Spartanburg. The victim died face down, shot twice in the back of the head. The facts, the position of the body, the victim's head resting on Petitioner's knee and leg, the blood that covered Petitioner's pants, the testimony of witnesses including Petitioner, as well as the location of the lethal wounds, all of this evidence did not support a charge from the trial judge of a right to keep shooting until danger had ceased. Rather, the rule that offset such an instruction, one taken from the same paragraph in the same case, *id*, was that "*ordinarily one is not justified in shooting or employing a deadly weapon after the adversary has been disarmed or disabled.*" *Id*. (emphasis added).

The victim was never armed in the instant case. Petitioner was not without fault in bringing on the circumstances of the murder. The facts and circumstances fully

established that the victim had been disabled (facing down and away from Petitioner and his gun), and Petitioner never denied shooting the man twice in the back of the head. He could not explain this, because there was no valid excuse or explanation. Any answer was a matter of credibility and the indefensibility of what he had done was overwhelmingly supported by the facts.

The fact that both shots were in the back of the head speaks inevitably to whether “[u]nder these circumstance the force used was... excessive,” *Id.* and whether Petitioner was in the first instance “justified in shooting or employing a deadly weapon.” *Id.*

Assuming that trial judges should tailor their self-defense charges to the facts of a case, as they should, and where, as here, it is a given that the victim was shot twice in the back of the head, the jury instruction requested by Petitioner was simply not proper to the facts of the case. One shot to the back of the head of a prostrate, intoxicated, and unarmed man was excessive *per se*, as likewise would have been the second one.

The trial judge tailored the charge to what was before the jury to decide: “[A] person may use such force as is reasonably necessary even to the point of taking human life if such is reasonable to prevent death or great bodily injury to himself or to another person...The law recognizes the right of every person to defend himself or herself or a friend, relative or another from death or from sustaining serious bodily harm. To do this a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable. The right of self-defense is founded upon necessity, either actual or reasonably apparent necessity... The law does not hold someone to a refined assessment of the danger as might be accomplished having an adequate time to reflect, provided however that the defendant has acted as a person of ordinary reason, firmness

and courage would have acted or should have acted in meeting the appearance of danger. In other words, one does not have to wait until his or her assailant gets the advantage, for one always has the right under the law of self-preservation to prevent another from getting an advantage.” (R. 318-19; 323).

Petitioner’s reliance on *Douglas v. State*, 332 S.C. 67, 504 S.E.2d 301 (1998) is without merit. *Douglas* was a post-conviction relief action resulting in the grant of a belated appeal. The case arose from conviction of the applicant for voluntary manslaughter and possession of a firearm during the commission of a crime of violence. The applicant and another individual had begun shooting into a crowd at a Waffle House after, according to the applicant, a group of people in the crowd rushed them. Douglas claimed the trial judge erred in rejecting a proposed jury instruction that “the defendant, if without fault, has the right to use such necessary force as required for his complete protection from loss of life or serious bodily harm and cannot be limited to the degree or quantity of attacking opposing force.[citing *State v. Campbell*, 111 S.C. 112, 113, 96 S.E. 543, 544 (1918)].” In *Campbell*, the defendant shot a man who attacked him with a bottle and claimed self-defense. The trial judge instructed the jury that the defendant was limited in his response to one which used force, essentially measure for measure. In *Douglas*, this Court applied the “dictates” of *Campbell* which had rejected the trial judge’s conclusion that a defendant acting *without fault* could use *the same force and no more* than that with which he was threatened. *Douglas*, 332 S.C. at p. 72. The charge in *Douglas* instructed the jury that (1) a justified firing of a first shot could justify a subsequent shot until it appears any danger to life and body had ceased, and (2) that the defendant does not have to wait until “the deceased gets the drop on him or the deceased

begins to shoot him. He has the right to act upon the law of self-preservation and prevent this.” *Id.* at 72-73. The Court in *Douglas* held the refusal of the trial judge to give the requested instruction, and the instruction as actually given was, again, “consistent with the dictates of *Campbell*” and was therefore not error. *Id.* at p.73.[citing *State v. Hicks*, 305 S.C. 277, 407 S.E. 2nd 907 (1991) as unstated support, but following from the proposition that “*although charges requested by a party may be a correct statement of law, a judge does not err by refusing to deliver the charges verbatim.*”](emphasis added).

As in *Douglas*, in the instant case the trial judge in no way limited the force that Petitioner could use to a *measure for measure* equivalence, as Petitioner suggests in his brief. (*IBOA*, p.11). Instead, the charge was a correct statement of law carefully crafted to the evidence put before the jury, without invading the province of the jury to find the facts: “The law of self-defense encompasses preventive action taken to protect one’s own life without another if such action is taken in anticipation of imminent danger of losing one’s life or sustaining serious bodily injury. A defendant has a right to act upon appearances. He may be mistaken. The law does not hold someone to a refined assessment of the danger as might be accomplished having an adequate time to reflect, provided however that the defendant has acted as a person of ordinary reason, firmness and courage would have acted or should have acted in meeting the appearance of the danger. In other words, one does not have to wait until his or her assailant gets the advantage, for one always has the right under the law of self-preservation to prevent another from getting an advantage.” (R. 322-23).

The requests made by Petitioner for charges included “self-defense as it relates to the Castle Doctrine in terms of that he can meet force with force, it’s his vehicle, he has

no duty to retreat, as well as self-defense.” (R. 259, ll. 16-23). As indicated above, the trial judge gave a proper instruction regarding the use of force and self-defense. The charge given on the Castle Doctrine was proper under both *S.C. Code Ann. Sec. 16-11-440(C)* and the common law: “Section 16-11-440 (C) provides that a person who is not engaged in an unlawful activity and who is attacked in a place where he has a right to be, including his home, business, or motor vehicle, has no duty to retreat and the right to stand his ground and to meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or to another person.” (R. 319, ll. 10-19). The charge was a correct statement of the law and gave Petitioner every benefit that could be accorded to him under the facts of the case. Again, as in *Douglas*, the charge was “consistent with the tenets of *Campbell*” and provided the jury with a proper and fair statement as to the exercise and use of deadly force.

Furthermore, the charge, the statute and the common-law are all consistent in stating that there is no duty to retreat in a place where one has a right to be, *provided he is not engaged in an unlawful activity while he is there.*

When Petitioner chose to continue on instead of taking the victim back to the club, or instead of releasing him by the side of the road, or instead of taking him to his home, Petitioner was no longer even arguably within the ambit of *S.C. Code Ann. Sec. 16-11-440 (C)* (“[a]person who is not engaged in an unlawful activity”); and *cf. S.C. Code Ann. Sec. 16-3-910, Kidnapping*, (“Whoever shall unlawfully ...confine...or carry away any other person, by any means whatsoever without authority of law...is guilty of a felony”); *Lynch v. Toys “R” Us- Delaware, Inc.*, 375 S.C. 604, 615; 654 S.E.2d 541, 547-48 (Ct. App. 2007)(“The essence of the tort of false imprisonment consists of depriving a

person of his or her liberty without lawful justification... To establish false imprisonment under South Carolina law, the plaintiff must show that the defendant restrained the plaintiff; the restraint was intentional and the restraint was unlawful.”).

The victim in this case was not trying to force his way *into* any dwelling, habitation, or vehicle of Petitioner. According to the account of the only other passenger in the vehicle, the victim just wanted *out of the vehicle* because Petitioner was taking him away from his home, while Petitioner ignored his protests. The car had only to be stopped by Petitioner and the victim allowed to get out of it or to be removed from it.

Petitioner’s reliance on *State v. Fuller*, 297 S.C. 440, 377 S.E.2d 328 (1989) is also misplaced. Unlike in *Fuller*, here the trial judge did not use the charge set forth in *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984) as “an exclusive charge...to eradicate the body of common law self-defense.” *Fuller*, 377 S.E.2d at p. 330. And the trial judge here satisfied this Court’s language as to the law of appearances in his charge. *See Fuller*, 297 S.C. at 444-45; and *cf. R. 321, ln. 20-323, ln. 15*. The trial judge’s instruction on the law of appearances was equally consistent with language from *State v. Hardin*, 114 S.C. 280, 103 S.E. 557, 558-59(1920), and neither precedent offers any support for a claim as to deficiency in the charge based upon “words accompanied by hostile acts.” *Fuller*, 297 S.C. at 445; *Hardin*, 103 S.E. at 559.

Petitioner complains that the instructions requested by his trial counsel were not granted. To a great extent, this glosses the record of what took place in the lower court proceedings, and the issues first invited and then almost as quickly laid to rest by Petitioner’s own words and testimony.

Petitioner claimed in his initial brief that the reliance of his counsel on *State v. Rye*, 375 S.C. 119, 651 S.E.2d 321 (2007), “might not be the case on point” for the principle of law that one may continue shooting until the threat is ended but “that that was a correct proposition of law.” (IBOA, p. 10). He then claims that the matter ended when “the judge maintained that he considered this instruction a comment on the facts and he ruled was not going to charge it.” (IBOA, p. 10).

The issue was first raised by counsel who was in fact clearly relying at that time on *State v. Brayboy*, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010), not upon *Rye*, and the primary issue Petitioner’s attorney was arguing over was whether a charge of involuntary manslaughter was proper; Petitioner’s counsel argued it was proper, because “as far as the involuntary manslaughter charge goes, Your Honor, we believe that he armed himself in self-defense.” (R. 212, ll. 14-16). The trial judge agreed that “if you lawfully arm yourself in self-defense and you act criminally negligent, then you could be guilty of involuntary manslaughter. But you have to arm yourself appropriately in self-defense. I’m not certain that there’s been any evidence of self-defense.” (R. 213, ll. 12-17). Petitioner’s counsel then asked for and was granted leave to lay out her case for Petitioner’s having acted in self-defense. (R. 213-21). The trial judge did *not* at that time reject the request, but clearly stated on the record that the matter remained open: “Okay. All right. Any other requests? I’ll reflect upon those overnight as to involuntary manslaughter and self-defense.” (R. 220, ll. 23-25). As noted above, the next morning Petitioner invited the trial proceedings to continue by making his own decision to testify and show the jury he acted in self-defense. (R. 222-24). The effort obviously failed both in the facts he testified to, as well as in the verdict which resulted. Most significantly,

Petitioner's own testimony established there was no struggle for the gun, no accidental shooting, but rather only a deliberate firing of two shots from Petitioner's pistol, by Petitioner, to the back of victim's head, which killed the victim almost instantly.

The decision in *Brayboy* involved a question of fact over whether the firing of the fatal shot during an argument and the handling of the gun was accidental or not. 287 S.C. 174, 178. The Court of Appeals held "under the facts of this case, there is evidence from which the jury could determine Brayboy was lawfully armed in self-defense and negligently handled the loaded gun causing it to discharge, and he was therefore entitled to a charge on involuntary manslaughter." Petitioner does not now argue the application of *Brayboy*, a claim for a charge on involuntary manslaughter, even though it was the first authority cited by his attorney at trial so as to argue his having been lawfully armed in self-defense. Instead, Petitioner argues the applicability of *Rye*. However, the decision in *Rye* offers even less support than *Brayboy* for Petitioner's efforts to rework his claim on appeal.

Petitioner here did not also claim a defense of habitation, as was the case in *Rye*, but rather only asserted self-defense, which "our precedents properly recognize... are analogous [but] the defenses are not identical." *Rye*, 375 S.C. 119, 124. As the Court noted in *Rye*, "the defense of habitation provides that *where one attempts to force himself into another's dwelling*, the law permits an owner to use *reasonable force to expel the trespasser*." *Id.* Petitioner never requested a charge on habitation nor on the reasonableness of the force used under a theory of defense of habitation, nor could he under the statute; by definition, the scene of the murder was a car, not a dwelling. S.C. Code Ann. Sec. 16-11-430 (1) &(4); *Black's Law Dictionary* p. 505 (West 6th Ed. 1990).

Even assuming for argument that the charge had been requested and given, the only scenario under which it might in theory have been claimed to apply, that of standing upon the right of self-defense while claiming immunity from a duty to retreat, *id.*, would still have been to no avail to Petitioner under the tenets of *Rye*. In *Rye*, trespassers upon the defendant's business property stole his tools, damaged the property and made sport of killing his pets. A confrontation between the defendant and some of these trespassers resulted in one of the victims being shot and killed by the defendant. 375 S.C. 119, 121-123. The trial judge refused the defendant's proposed request on the defense of habitation. *Id.* at p. 124. In his charge to the jury, the trial judge differentiated habitation from self-defense "with the sole caveat that "[a] person defending his or her home or premises...has no duty to retreat." Though this was most of the picture, it was not the complete picture." *Id.* The Court in *Rye* held that "the charges in the instant case incorrectly implied that habitation requires a defendant to establish that his person or property was in some danger of injury or harm." *Id.*

Petitioner in this case never sought a charge on defense of habitation; his argument at p. 10 of his initial brief was merely an effort to now reconfigure and raise an issue via the back door. The question put to the jury was whether the killing of the victim was self-defense, murder, or voluntary manslaughter. Petitioner's counsel did not, and again could not, claim the car was a habitation in which Petitioner was lawfully armed and acting reasonably to *expel* a trespasser. The vehicle was claimed by Petitioner *as a weapon*, a "missile" against which Petitioner was acting in self-defense when he used deadly force upon the victim.

After the charge to the jury, Petitioner's counsel argued *Rye* only as support for the proposition that if a defendant is justified in shooting once, he is justified to continue until the threat is completely ended. (R. 332-35). Later on, at the jury's request during their deliberations, the judge recharged on the law of murder and voluntary manslaughter. (R. 336). After that, Petitioner argued *Douglas* and *Hendrix* in support of the one shot warranting another shot argument, which had been raised before without supporting precedent. The argument for that charge has been refuted herein.

Here, the jury requested only to be recharged on the law of murder and voluntary manslaughter at that point in the proceedings. For the trial judge to have added the improper charge of "shoot him once and you can shoot him again" at that point in time would have potentially confused the jury, or improperly suggested some particular weight to be given to a charge that was properly refused in the first place.¹

The trial judge gave a properly crafted charge to the jury on the law of self-defense. During the incident in question, the facts at trial clearly established there was no danger present that would justify shooting the victim and continuing to shoot him.

Even assuming the charge as it was requested, that Petitioner could continue shooting the victim after the first shot, was a correct proposition of law, a trial judge is not required to give a charge, as requested, verbatim, and the charge actually given to the jurors in this case properly covered the issue of a reasonable use of deadly force in defense of self or of others. *State v. Brandt*, 393 S.C. 526, 713 S.E.2d 591 (2011). The

¹The jury did not request to be recharged on self-defense or that self-defense be further explained or defined. It is clear the jury had already determined shooting someone in the back of the head under these circumstances, much less shooting someone twice in the back of the head under these circumstances, was not reasonable. The jury was trying to determine if Petitioner had committed murder or voluntary manslaughter, i.e. which crime Petitioner had committed.

request to charge was not properly raised and supporting authority was not offered to the court in timely fashion.

There was no error, there was no prejudice, and the denial of the request to charge was harmless, if constituting error at all. *See State v. Hicks, Douglas v. State and discussion above. See also State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013); Brandt, 393 S.C. at 549, 713 S.E.2d at 603* (in reviewing charges for error, this Court will review the charge as a whole in light of the evidence and issues presented at trial); *Priest v. Scott, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976)* (an alleged error in a portion of a charge must be considered in the light of the whole charge and must be prejudicial to warrant a new trial).

CONCLUSION

Based upon the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Senior Assistant Deputy Attorney General

ANTHONY MABRY
Assistant Attorney General
S. C. Bar # 11973

BY: _____

Anthony Mabry

April 23, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

THE STATE,

Respondent,

v.

MANUEL ANTONIO MARIN,

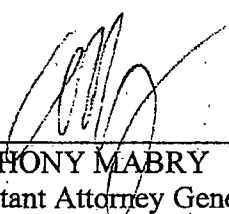
Petitioner

CERTIFICATE OF SERVICE

I, Anthony Mabry, certify that I have served the *Return to Petition for Writ of Certiorari* on Petitioner by depositing two (2) copies of same in the InterAgency mail addressed to his attorney of record:

Robert M. Dudek,
Chief Appellate Defender for Capital Appeals
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

This 23rd day of April, 2014.



ANTHONY MABRY
Assistant Attorney General

The Supreme Court of South Carolina

The State, Respondent,

v.

Manuel Marin, Petitioner.

Appellate Case No. 2013-002001

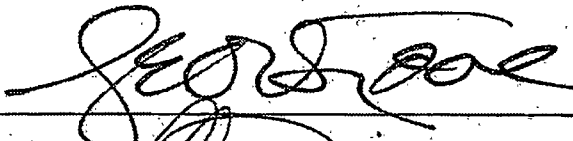
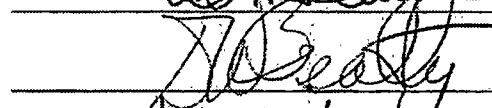
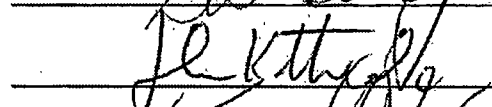
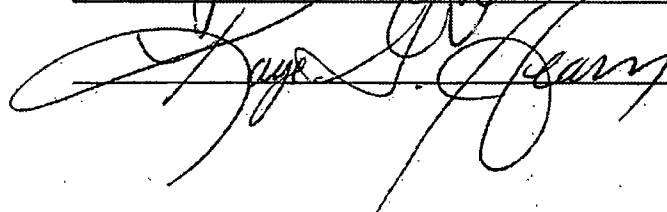
Lower Court Case No. 2008-GS-42-05308

OCT 23 2014

SC OFFICE OF
APPELLATE DEFENSE

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Marin*, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

 C.J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

October 23, 2014

cc:

The Honorable Jenny Abbott Kitchings

The Honorable M. Hope Blackley

Robert Michael Dudek, Esquire

David Alexander, Esquire

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

J. Anthony Mabry, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MANUEL ANTONIO MARIN,

PETITIONER

APPELLATE CASE NO. 2013-002001

BRIEF OF PETITIONER

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INDEX

INDEX.....1

TABLE OF AUTHORITIES 2

ISSUE PRESENTED 3

STATEMENT 4

 Procedural History.....4

ARGUMENT

 Petitioner was entitled to a jury charge on a correct statement of law
 fitting the facts of this self-defense case: that one acting in self-defense
 has the right to continue shooting until it was apparent that the danger of
 death or serious bodily injury had ended. 5

 Introduction 5

 Relevant Facts 5

 The Defense’s Request to Charge.....9

 The Court of Appeals’ Decision 10

 Discussion 11

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

<u>Douglas v. State</u> , 332 S.C. 67, 504 S.E.2d 307 (1998).....	10, 16
<u>People v. Guzman</u> , 567 N.E.2d 500 (Ill. App. Ct. 1990).....	13
<u>People v. Patterson</u> , 250 N.Y.S.2d 715 (App. Div. 1964).....	16, 17
<u>State v. Belcher</u> , 385 S.C. 597, 685 S.E.2d 802 (2009)	15
<u>State v. Blassingame</u> , 271 S.C. 44, 244 S.E.2d 528 (1978).....	15, 16
<u>State v. Brandt</u> , 393 S.C. 526, 713 S.E.2d 591 (2011).....	11
<u>State v. Davis</u> , 282 S.C. 45, 317 S.E.2d 452 (1984)	12
<u>State v. Fuller</u> , 297 S.C. 440, 377 S.E.2d 328 (1989)	11, 12, 13
<u>State v. Hardin</u> , 114 S.C. 280, 103 S.E. 557 (1920).....	12
<u>State v. Harvey</u> , 220 S.C. 506, 68 S.E.2d 409 (1951).....	12
<u>State v. Hendrix</u> , 270 S.C. 653, 244 S.E.2d 503 (1978).....	10, 13, 14, 16
<u>State v. Jackson</u> , 277 S.C. 271, 87 S.E.2d 681 (1955).	12
<u>State v. Marin</u> , 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013).....	4
<u>State v. Rye</u> , 375 S.C. 119, 651 S.E.2d 321 (2007)	10

ISSUE PRESENTED

Whether petitioner was entitled to a jury charge on a correct statement of law fitting the facts of this self-defense case: that one acting in self-defense has the right to continue shooting until it was apparent that the danger of death or serious bodily injury had ended?

STATEMENT

Procedural History

Petitioner was indicted by the Spartanburg County Grand Jury for the offenses of murder and possession of a weapon during a violent crime. His case was called to trial on October 25, 2010 before the Honorable J. Derham Cole, and a jury. Tanya Jones represented petitioner. Jennifer Jordan and Susan Reese were the assistant solicitors. R. 1

On October 27, 2010, the jury found petitioner guilty on both counts. R. 343, l. 25 – 344, l. 3. Judge Cole sentenced petitioner to life imprisonment for murder. R. 346, ll. 1-6. Petitioner filed a timely appeal with the Court of Appeals.

On February 5, 2013, a panel consisting of Chief Judge Few, Judge Geathers, and Judge Lockemy heard oral argument in this case. On July 3, 2013, the Court of Appeals affirmed petitioner's convictions in a published opinion authored by Chief Judge Few. App. 1. State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). Petitioner filed a timely petition for rehearing which was denied on August 22, 2013. App. 15.

The denial of the petition for rehearing was not unanimous. App. 15. Judge Lockemy voted to grant rehearing. App. 15. On October 23, 2014, this Court granted certiorari and this brief of petitioner follows.

ARGUMENT

Petitioner was entitled to a jury charge on a correct statement of law fitting the facts of this self-defense case: that one acting in self-defense has the right to continue shooting until it was apparent that the danger of death or serious bodily injury had ended.

Introduction

In a case with no motive and no real explanation other than self-defense, the state's hurdle was proving malice. Petitioner took the stand and testified he was forced to shoot the drunken decedent in self-defense when he tried to grab petitioner's steering wheel and wreck the car. The decedent's blood alcohol level was 0.323. R. 173, ll. 22-25. After the shooting, petitioner found a public place in downtown Spartanburg, parked, and waited for the police to arrive.

The state never argued that petitioner intended to rob the decedent. The state never argued that prior bad blood existed between petitioner and the decedent. No drugs, other than the decedent's excessive alcohol consumption, played any role in this crime. The state's only argument that malice existed in this case was that petitioner fired two shots instead of one. Multiple times in her closing argument, the solicitor linked malice with the fact that two shots were fired. The jury returned during deliberations and asked again for the definition of malice. Had the trial judge not refused petitioner's requested charge that a person acting in self-defense can continue shooting, the state could not have persuaded the jury that malice existed.

Relevant Facts

This shooting happened after petitioner attempted to give the highly intoxicated decedent, Nelson Tabares ("Tabares") a ride home from a bar. Late on the night of July 20, 2008, Tabares was at Bongos Nightclub in Greenville, South Carolina. R. 12, l. 13 – 14, l. 18. A bouncer at Bongos, Christopher McDonald ("McDonald"), acknowledged the bar staff had to "cut [Tabares]

off.” R. 20, ll. 15 – 16. The bouncer observed that the decedent was “just pretty much stumbling everywhere” and “couldn’t really stand up.” R. 20, ll. 19 – 22. The pathologist diagnosed Tabares’s condition at a blood alcohol level of 0.323 as “knee-walking drunk.” R. 173, ll. 8 – 13. The pathologist testified that he had seen someone die from an alcohol overdose with a blood alcohol level of 0.270. R. 237, ll. 11 – 18.

Three men—bouncer McDonald; the bar’s owner, Larry Rodriguez (“Rodriguez”); and petitioner—took Tabares into the “back kitchen” where he stayed for over an hour. R. 21, ll. 5 – 24. Rodriguez had known Tabares for a long time and noticed he was not feeling well that night. Rodriguez would be the only witness to testify Tabares was not extremely intoxicated, speculating, “He was just not feeling good.” R. 13, l. 21 – 14, l. 18.

McDonald and Rodriguez were looking for someone to give the decedent a ride when petitioner offered to take him home. R. 22, l. 11 – 23, l. 10. Petitioner knew where Tabares lived. R. 22, l. 11 – 23, l. 10. McDonald remembered that he “basically carried [Tabares] out and actually put him in [petitioner’s] truck.” Petitioner reached for his laptop and typed in Tabares’ address -- apparently on the GPS -- that went with his laptop. R. 22, l. 11 – 24, l. 22. Tabares was “kinda like in and out” but “knew where he was at.” R. 29, ll. 12-17.

It was undisputed that petitioner drove, and that his friend Alfredo Jimenez (“Jimenez”) (petitioner’s former brother-in-law) rode in the front seat. Tabares was placed in the backseat of petitioner’s SUV. R. 243, l. 21 – 244, l. 6.

Larry Gory was apparently coming home from “personal business” early that morning when he came upon petitioner and Jimenez standing beside the road. R. 41, ll. 16 – 24. R. 44, ll. 3 – 22. Gory said it appeared they were trying to “pull something away from each other . . . one of the guys said could [you] call the police, he just – he shot him.” R. 41, ll. 3-24.

Spartanburg Police Officer Jeffery Powell ("Powell") testified he arrived on the scene at about 4:05 a.m. and he recalled seeing petitioner and Jimenez. R. 49, ll. 15 – 21. Powell testified: "One of them [was] sitting in the intersection and one standing in the intersection of Daniel Morgan Avenue and West Main Street." R. 49, ll. 17 – 21. He recalled that one of the men was very calm and the other was very upset. R. 49, l. 17 – 50, l. 13. Powell saw a weapon lying on the sidewalk and he picked it up and put it in his trunk. R. 51, l. 15 – 52, l. 7.

Powell remembered: "I asked him where it happened at, and he would just say Wal-Mart. He did say Wal-Mart . . . he said that the other individual [Tabares] was grabbing a hold of the steering wheel" and he was trying to wreck petitioner's SUV. R. 56, ll. 9-18. Jimenez told Powell that they had left a club in Greenville and were supposed to be taking Tabares home. When they apparently passed what Tabares thought was "his road," he "got very upset and was trying to, to get them to stop the car, and the driver wouldn't stop. He said he just wouldn't stop. And he said that was when he started fighting with the driver." R. 59, ll. 2-21. Jimenez never testified, and it was unclear from the record in this case if he disappeared prior to trial or why he was not called as a witness.

Petitioner later testified in his own defense. Petitioner was the marketing director for a newspaper, and he recalled the events of July 20, 2008. R. 225, ll. 4-10. Petitioner went to the Colombian Festival that evening and afterwards made his way to Bongos. R. 225, l. 8 – 226, l. 20. Petitioner was mingling with Jimenez when Rodriguez asked him to give Tabares a ride home "and I agreed." R. 227, l. 5 – 228, l. 9.

Petitioner remembered one of the bouncers gave him Tabares' driver's license "and I put the address on my laptop." The laptop included a GPS. R. 230, l. 12 – 231, l. 20. The police confirmed that Tabares' address had been entered into the computer. R. 147, ll. 11 – 14.

Petitioner recalled as they were driving he was talking with Jimenez "about the three Americans that had been liberated that past week, I mean, yeah, the past week, and the presidential candidate that [was] kidnapped in Colombia." R. 231, l. 23 – 232, l. 6.

While he was talking with Jimenez, Tabares jumped up from the backseat and put petitioner in a headlock: "I hit the brakes. I hit the brakes, and the car went on the oncoming lane. And it was headed towards a telephone pole. But I got the car back on the road." R. 232, l. 11 – 233, l. 12.

Petitioner said he was very scared after he almost hit the telephone pole, and "at that point . . . I decided not to take him home. I was just trying to find a public place, you know, people where I could, you know, possibly jump out of the car and get some help . . ." R. 234, ll. 8-14. Petitioner testified that given the hour "nothing seemed to be open . . . all of a sudden, you know, Mr. Tabares jumps up and grabs the steering wheel and he tries to run the car off the road . . . I kept pushing him, pushing him back" Petitioner said Tabares continued coming after him, and "I grabbed the glove box and opened the glove box and got the pouch out which I had the gun in it . . . I pulled the gun out and I shot Mr. Tabares." R. 234, l. 5 – 236, l. 11.

The forensic evidence corroborated petitioner's version of events. A City of Greer police officer confirmed that there were fresh skid marks in the road where Jimenez said the incident occurred. R. 77, ll. 16 – 25. Also in the road were "particles of debris that appeared to be consistent with the vehicle's condition that had had some damage to the front end." R. 77, ll. 16 – 25. The front bumper of the car was missing. R. 125, ll. 1 – 4. Gunshot residue was found on the palm and the back of Tabares' hands. R. 178, ll. 16 - 25. The crime scene investigator found Tabares' torso between the front seats on the center console with his upper body in the front of the car. R. 127, ll. 8 – 21. All of the blood spatter was in the front of the car with none in the back. R. 127, l. 22 – 128, l. 6.

After the shooting, petitioner said Tabares fell on his knee and “I was terrified. I was really shocked.” R. 237, ll. 2 – 4. Petitioner continued to look for a public place where he could stop the car and ended up in downtown Spartanburg. R. 236, l. 2 – 237, l. 18.

Petitioner testified that Jimenez was also in shock when the men got out of the car. R. 238, ll. 1 – 3. They were both talking “fairly loud”: “[W]hy was he trying to kill me? Why was he trying to run us off the road?” R. 238, ll. 6 – 9. Petitioner said Jimenez “grabbed the gun, and I let him have it.” Petitioner did not recall where Jimenez put the gun. R. 238, ll. 1-21. However, as seen above, the gun was found nearby by the police officer and placed in his trunk. Petitioner testified, “I sat down and waited for the police to come . . . I sat down on the median.” R. 239, ll. 7-20.

On cross-examination, petitioner explained to the solicitor that it was very dark as he was driving that night and he was trying to keep the decedent from “killing us” by wrecking his SUV. R. 248, l. 1 – 251, l. 4. When the solicitor asked petitioner on cross-examination why there were *two shots* fired, petitioner answered: “It just happened within seconds.” R. 250, l. 22 – 252, l. 16.

The Defense's Request to Charge

Defense counsel requested and the trial court agreed to charge self-defense. R. 259, l. 13 – 260, l. 9. R. 263, ll. 19 – 21. Then, during her closing, the solicitor made the highly inflammatory argument that the jury could infer malice because two shots were fired. The solicitor said, “Ladies and gentlemen, I submit this is malice. Two shots, not one, two shots to the back of the head. One of them tight contact, barrel up against the head.” R. 298, ll. 22 – 24. The solicitor also argued, “So when you shoot somebody in the head and they stop struggling with you, if that’s what they’re doing, you don’t have—you won’t shoot them a second time unless you pull that trigger a second

time.” R. 293, ll. 15 – 22. The solicitor said, “Would a reasonable person shoot someone twice in the back of the head?” R. 301, ll. 2 – 3.

When the trial court asked for exceptions after his charge, defense counsel stated he wanted an instruction that:

[I]f the defendant is justified in defending himself or others in firing the first shot, then the defendant—also continue—to continue shooting until it is apparent that the danger of death or serious bodily injury has been completed—has completely ended.

R. 332, ll. 6 – 12. For this proposition of law, defense counsel cited State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007). R. 332, ll. 11 – 12. The trial judge responded that the proposed charge “sounds like a comment on the facts to me.” R. 332, ll. 13 – 14. After argument, Judge Cole declined to give petitioner’s requested charge. R. 332, l. 15 – 336, l. 1.

The jury then requested additional instruction on the definitions of malice and voluntary manslaughter. R. 336, ll. 16 – 19. The trial judge repeated his malice charge. R. 336, l. 21 – 338, l. 23. Following the jury’s confusion about malice and the additional charge, appellant again asked for the “continuing to shoot” charge, this time citing Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998) and State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). R. 341, l. 14 – 342, l. 11. The trial judge again refused to give the charge. R. 342, l. 12 – 343, l. 2. Approximately an hour later, the jurors returned with a verdict finding appellant guilty of murder. R. 343, l. 12 – 344, l. 5.

The Court of Appeals’ Decision

The Court of Appeals inconsistently held that: (1) the requested charge was not a correct statement of the law, and (2) that the requested charge had been sufficiently covered by the trial judge’s charge. Compare App. 4 (“We are concerned the charge [petitioner] requested is not a correct statement of law.”) with App. 6 (“Considered as a whole, the trial court’s charge explained this principle of law.”). With respect to its first inconsistent holding, the court stated that if

requested charge were correct, then defendants could continue to shoot “so long as the initial danger has not ‘*completely ended.*’” App. 4 (emphasis in original). With respect to its second inconsistent holding, the court held that petitioner’s requested charge “derives from the correct principle of law that, if no other element has been disproven, any particular act of deadly force done in self-defense is justified if the act was reasonably necessary to prevent death or serious bodily injury, under the circumstances as they existed at the time of the act.” App. 6. From this late recognition that petitioner’s requested charge was a correct statement of the law, the court concluded the requested charge was subsumed within the “may use such force is reasonably necessary” charge given by the trial court. App. 6-7.

Discussion

If the Court of Appeals’ reasoning is allowed to stand, it will mean that specific charges on principles of self-defense are unnecessary. Its decision contradicts this Court’s longstanding precedent that a trial judge has the responsibility to craft a self-defense charge tailored to the facts of a case. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011); State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989). As this Court recognized in Fuller, there is a “body of common law self-defense” and trial judges must “consider the facts and circumstances of the case at bar in order to fashion an appropriate charge.” Fuller at 443, 377 S.E.2d at 330.

A deep understanding of this Court’s decision in Fuller demonstrates the Court of Appeals’ error. In Fuller, the defendant was black. Id. at 441, 377 S.E.2d at 329. He solicited a white prostitute. Id. The prostitute took him to her trailer for sex, but the trailer was occupied and the defendant left. Id.

The defendant later returned to the prostitute’s trailer and a car driven by a white woman was blocking the road. Id. The defendant asked her to move her car. Id. At this point, two men

approached the defendant's car and asked him "what he was 'trying to do to that white lady.'" Id. One of the men used a racial slur and grabbed the defendant by the throat. Id. at 441, 377 S.E.2d at 329-30.

The defendant fired a warning shot which temporarily allowed him to drive away, but the street was a dead end. Id. at 442, 377 S.E.2d at 330. The two assailants tried to block the defendant's car from leaving and the defendant ultimately crashed and pinned his car against a steel rail. Id. The two men yelled, "'we're going to take care of you.'" Id. The defendant thought he saw something shiny in one of the men's hands and fired four shots at them, killing them both. Id. No gun was found on the assailants. Id.

Relying on State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984), the trial judge in Fuller only instructed the jury on the basic elements of self-defense. Id. This Court held it was error to only give the general charge from Davis when the defendant "repeatedly requested additional charges." Id. at 443, 377 S.E.2d at 330. The trial judge erred by not giving three specific charges on self-defense that further explained the principles in the general charge. First, the trial judge failed to charge the jury that a defendant has the right to act on appearances from State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). Id. at 443-44, 377 S.E.2d at 330-31. Second, the trial judge failed to charge the jury that "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense" from State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951). Id. Finally, the trial judge failed to charge that an individual has no duty to retreat "if by doing so he would increase his danger of being killed or suffering serious bodily injury" from State v. Hardin, 114 S.C. 280, 103 S.E. 557 (1920). Id. For each of these charges, this Court explained the specific facts necessitating the additional, illuminating instruction.

If the Court of Appeals' reasoning from petitioner's case were applied to Fuller, the case would not have been reversed. Under the Court of Appeals' analysis, general principles of self-defense are sufficient and further contextual charges are not required. The court believed that the general phrase "such force as is reasonably necessary" was sufficient in this case. App. 6. But if this phrase was sufficient, then the trial court's general charge in Fuller that a defendant who believed he was in imminent danger of losing his life could legitimately defend himself would have eliminated the need for the specific charges of acting on appearances or "words accompanied by acts." This Court held the specific charge was required. If the Court of Appeals' reasoning is correct here, then the Fuller trial court's general charge that the "defendant had no other probable means of avoiding the danger" would have eliminated the need for the specific charge that a defendant need not retreat if it increases the danger to himself. This Court held the specific charge was required. When the Court of Appeals' reasoning in this case is compared to this Court's holding in Fuller, it clearly stands in opposition to this Court's self-defense jurisprudence.

Here, the proper jury instruction petitioner wanted was similar in content – although a different principle – to the ones improperly refused in Fuller. The language requested by petitioner comes directly from this Court's decision in State v. Hendrix, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978).¹ In Hendrix, the Court specifically held that "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body

¹ The Court of Appeals initially stated that petitioner's requested instruction was not a correct statement of law, but Hendrix shows this to be incorrect. Other states impose even more stringent requirements on the prosecution when dealing with the question of multiple shots. In Illinois, "When it has been determined that a defendant was initially shooting in self-defense, the State must then prove that a sufficient amount of time had passed between the initial shot and any subsequent shots which would have allowed the defendant, as a reasonable person, to realize that no further shooting was necessary." People v. Guzman, 567 N.E.2d 500, 504 (Ill. App. Ct. 1990).

has ceased.” *Id.* This Court rejected the State’s argument that Hendrix used excessive force by firing four times. *Id.*

The “continuing to shoot” charge was required by the facts of this case, especially after the jury’s question about malice was provoked by the solicitor’s argument. The solicitor was urging upon the jury the incorrect sophomoric idea that you never have to shoot more than once to defend yourself. Self-defense is not an algebra problem and a defendant has the right to have the jury understand that. It was an elementary request on the law that once a defendant *properly fires in self-defense he can continue firing* until the danger is removed.

On cross-examination, petitioner explained to the solicitor that it was very dark that night and he was trying to keep the decedent from “killing us” by wrecking his vehicle. R. 248, l. 1 – 251, l. 4. When the solicitor asked petitioner on cross-examination why there were *two shots* fired, petitioner answered: “It just happened within seconds.” R. 250, l. 22 – 252, l. 16.

The lack of any motive in this case and the solicitor’s inflammatory closing argument highlights the necessity of the jury understanding this legal principle. The state had no argument on the element of malice other than the fact that two shots were fired. The solicitor repeatedly referenced the fact that two shots were fired. The solicitor said, “So when you shoot somebody in the head and they stop struggling with you, if that’s what they’re doing, you don’t have—you won’t shoot them a second time unless you pull that trigger a second time.” R. 293, ll. 15 – 22. The solicitor argued, “Would a reasonable person shoot someone twice in the back of the head?” R. 301, ll. 2 – 3. The solicitor said, “**Ladies and gentlemen, I submit this is malice. Two shots, not one, two shots to the back of the head.** One of them tight contact, barrel up against the head.” R. 298, ll. 22 – 24 (emphasis added). The solicitor continued, emphasizing the amount of force needed to pull the trigger and telling the jury that force was “used twice” and that petitioner had to “pull the

slide back and he has to fire it twice.” R. 299, ll. 2 – 13. She argued that malice aforethought could “be present in an instant.” R. 299, ll. 5 – 8. Then, after trying to distinguish murder from manslaughter, she told the jury, “**So the question is is this malice.**” R. 299, ll. 14 – 25 (emphasis added).

In many ways, the solicitor’s extremely prejudicial argument that the jury could infer malice because two shots were fired mirrors the error of inferring malice from the use of a deadly weapon when mitigating circumstances exist. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). In Belcher, this Court recognized the dangers inherent in allowing a jury to infer malice. Id. at 609-10, 685 S.E.2d at 808-09. Belcher recognized that such inferences can lead a jury to an incorrect verdict when the inference of malice is allowed to override the state’s burden of disproving self-defense or proving malice beyond a reasonable doubt. Id. Just like a Belcher error, the state in this case invited the jury to infer malice from multiple shots. Similar to Belcher, the error from the invited inference explains the jury’s verdict where the state had no theory of motive or malice other than the firing of two shots.

Once the jury requested the definition of “malice,” the need for petitioner’s requested charge became indispensable. See State v. Blassingame, 271 S.C. 44, 46-47, 244 S.E.2d 528, 530 (1978). In Blassingame, the jury requested additional instruction on the definitions of murder and manslaughter. Id. The trial court erred in how it defined the intent element of manslaughter, which necessarily involved a distinction from malice. Id. This Court found, “It is reasonable to assume that the jury had, at this point, focused critical attention on the meaning of these two offenses and was in the process of deciding upon its verdict based upon one or the other, but wanted to be readvised of the definitions of each.” Id. “The additional words which the trial judge would relay to the jury would be given special consideration by the jury since they were in response to its own

inquiry.” Id. Just as the jury in Blassingame struggled with malice, petitioner’s jury struggled with the solicitor’s invitation to infer malice from the firing of two shots. Had the trial judge correctly explained self-defense, the outcome of the case would likely have been different.

The Court of Appeals also incorrectly dissected the requested charge in order to give it an illogical meaning. App. at 4-5. The court improperly singled out the phrase “completely ended” from the remainder of the charge. The requested charge makes clear that what must “completely end” is the “danger of death or serious bodily injury.” This statement of the law is correct. Hendrix at 661, 244 S.E.2d at 507. The court erred in taking this language out of context to produce the extreme result that a defendant would be justified in continuing to shoot if a “minimal danger” existed. “Minimal danger” was never the petitioner’s argument. The danger to be defended against was death or serious bodily injury.

In Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-10 (1998), the Supreme Court noted the judge had charged that if the defendant was justified in firing the first shot he was justified in continuing to shoot until any danger to his life and body had ceased. The jury here likewise had a right and a need to know that firing more than one shot was not excessive force and that it did not remove a legitimate case of self-defense. Id.

In a self-defense case in New York, the defendant admitted first shooting the decedent in the face and then firing several more times after the decedent had fallen. People v. Patterson, 250 N.Y.S.2d 715, 719-20 (App. Div. 1964). The decedent was a landlord who brought his rifle to the defendant/tenant’s apartment after a night of drinking ended with a dispute over rent. Id. at 717-18. Much like this case, the prosecution relied mainly on the number of shots fired. The court cited New York’s self-defense law which holds that “a person subjected to a felonious assault in his abode is not expected to engage in a detached analysis of the probabilities, and may destroy the

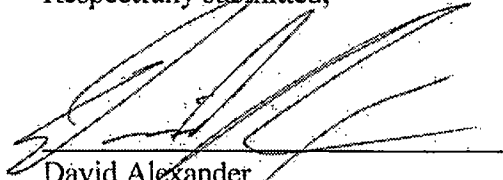
person making the felonious attack.” Id. at 722 (internal quotations omitted). The court concluded, “This is not the stuff upon which a man’s liberty should be taken from him.” Id.

Nor should petitioner’s liberty be taken from him on the shaky facts of this case when the jury was incorrectly instructed. This was a legitimate case of self-defense. Petitioner’s actions were reasonable and consistent with a person acting in self-defense. He waited on the police to arrive. He was in shock and disturbed after the bizarre events that the grossly intoxicated Tabares— with a .323 blood-alcohol reading – had inflicted on him. R. 273, ll. 1-25. Petitioner described how Tabares grabbed him from the backseat and almost caused him to hit a telephone pole after his SUV was forced into oncoming traffic and the forensic evidence corroborated petitioner’s testimony. The jury was confused about whether they could infer malice after the state’s inflammatory closing argument. Petitioner was entitled to a fair trial with a properly instructed jury on self-defense.

CONCLUSION

For the reasons stated above, the Court should reverse the decision of the Court of Appeals and grant petitioner a new trial.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'David Alexander', is written over a horizontal line.

David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER.

This 11th day of December, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MANUEL ANTONIO MARIN,

PETITIONER

APPELLATE CASE NO. 2013-002001

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 11th day of December, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of December, 2014.

Rhonda Demeese Foxworth (L.S.)

Notary Public for South Carolina

My Commission Expires: October 17, 2021

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2013 - 002001

THE STATE,

Respondent,

v.

MANUEL ANTONIO MARIN,

Petitioner

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITY	1
QUESTION PRESENTED	2
STATEMENT OF THE CASE.....	3
ARGUMENT	3
The evidence at trial.....	3
I. The trial judge's charges as to Malice, Murder, Manslaughter and Self-Defense were correct and complete statements of the law on the facts of this case.....	14
CONCLUSION.....	20
CERTIFICATE OF SERVICE	

Table of Authority

<i>Barber v. State</i> , 393 S.C. 232, 236, 712 SE 2d 436, 438 (2011)	13
<i>Priest v. Scott</i> , 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976)	18
<i>State v. Belcher</i> , 385 S.C. 597, 675 SE 2d 180 2 (2009)	14
<i>State v. Brandt</i> , 393 S.C. 526, 713 S.E.2d 591 (2011).....	18
<i>State v. Brandt</i> , 398 S.C. 526, 549, 713 SE 2d 591, 603 (2011).....	13
<i>State v. Curry</i> , 406 S.C. 364, 752 S.E.2d 263 (2013)	18
<i>State v. Hendrix</i> , 270 S.C. 653, 657-658; 244 S.E. 2 nd 503 (SC 1978).....	16
<i>State v. Manuel Marin</i> , 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013)	3
<i>State v. Mattison</i> , 388 S.C. 469, 478-79, 697 SE 2d 578, 583 (2010)	13
<i>State v. Rye</i> , 375 S.C. 119, 651 SE 2d 321 (2002).....	14

QUESTION PRESENTED

Whether the trial judge's charge on self-defense was, on the facts of the case, a correct and applicable statement of legal principles concerning Petitioner's right to use deadly force?

STATEMENT OF THE CASE

Petitioner, Manuel Marin, murdered Nelson Tabares on July 21, 2008 in Spartanburg County. Petitioner was arrested the same day. Petitioner was subsequently indicted by the Spartanburg County grand jury for murder and possession of a weapon during a violent crime. (Ind. # 2008-GS-42-5308). Beginning October 25, 2010, Petitioner was tried by a jury before the Honorable J. Derham Cole. (R. 1). At the trial's conclusion on October 27, 2010, Petitioner was found guilty of murder and the weapon charge. (R. 343-44). Judge Cole sentenced Petitioner to life for murder. (R. 346). Petitioner appealed. On July 3, 2013, the Court of Appeals affirmed Petitioner's convictions. *State v. Manuel Marin*, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). A petition for rehearing was denied August 22, 2013.

Certiorari was timely sought by Petitioner. Certiorari was granted in this Court on October 23, 2014. This briefing follows.

ARGUMENT

The trial judge's jury charge was, on the facts of the case, a correct and applicable statement of legal principles concerning Petitioner's right to use deadly force.

The Evidence At Trial

Petitioner claims reversible error arising from a single issue concerning self-defense. The claim is made against a backdrop of overwhelming proof Petitioner shot the victim twice in the back of the head at point blank range during the early morning hours of July 21, 2008.

The victim, Nelson Tabares, was a well-known celebrity in the Latino community of Greenville. He was a computer professor at Greenville Technical College, who also

advertised Latino events on his commercial web-page, Crazylatino.com. (R. 2-4). July 20 was Colombian Independence day, a day that ended in his brutal murder, which included an Independence Day celebration he attended where he took photos for his website. Afterwards, he attended an after-party at Bongo's restaurant and bar on East North Street in Greenville. (R. 3-5).

The victim's wife was Colombian, a working mother who assisted her husband in his web-site business as a translator because she was more proficient in Spanish than victim. (R. 8). The evening of the murder, she remained home and went to bed after turning down the volume on her telephone. (R. 10).

The owner of Bongo's testified that on the night of the murder the victim stayed until closing, was not feeling good and that he, the owner, tried to help the victim phone home, without success. (R. 12-15). One of the bouncers at the club testified that during the course of the evening the victim became intoxicated to the point the bar cut him off, that he was "pretty much just stumbling everywhere, couldn't really stand up," (R. 20), but he was not at all aggressive with anyone. (R. 20). The victim was then seated by staff in the kitchen, where he remained. At some point, Petitioner and his former brother-in-law, Alfredo Jimenez, (R. 21-22, 244), joined them and when the owner and other promoters began discussing how to get the victim home "for some reason [Petitioner] spoke up and said I will... [h]e said he knew where he lived." (R. 22, ll. 16-25).

Though Petitioner had at first said he knew where the victim lived, once the victim had been carried to Petitioner's car, the victim was too intoxicated to give information. Petitioner actually did not know the victim's address. Instead, the victim's address was obtained from his driver's license. (R. 22-26). Petitioner drove away with

the victim apparently passed out in the back seat and Mr. Jiménez riding in the passenger front seat. (R. 23-26). The victim was found later at an intersection in Spartanburg in the same car, shot to death. Mr. Jimenez was at the scene with Petitioner, whose pants were covered in the victim's blood.

Ms. Traci Bodner testified that later on that same evening/early morning, she was with friends outside an apartment in downtown Spartanburg at the corner of Daniel Morgan and Main Street when they saw two men arguing heatedly in the street, outside a vehicle; one of the men was in a black shirt [Jimenez], the other in a white shirt [Petitioner]. One of the men [Jimenez] pulled what appeared to be a handgun out of the other man's [Petitioner's] pocket and threw it down in the street. (R. 31-33).

Larry Gory testified he came by the scene described by Ms. Bodner. He saw the two men described by Bodner arguing in the street. He stated the one in the black shirt [Jimenez] told him [Gory] to call the cops, and that "he [petitioner] just shot him [victim]." (R. 41-42). Gory saw the gun the two men [Jimenez and Petitioner] had been fighting over and then called 911. (R. 42-43).

Officer Jeffery Powell of the Spartanburg Police Dept. responded to the call. At the scene, he found Petitioner wearing white and covered in blood. He was "sitting there calm," while the other individual in the black shirt was "very upset." (R. 49 - 50). The individual in the black shirt [Mr. Jimenez] "moved away from the other individual, and he's just very upset... he [Jimenez] kept saying, 'Dude shot him, dude shot him,' and he [Jimenez] would point down the road towards the guy with the white shirt on [Petitioner]." (R. 51, ll. 10-20.). The man in the black shirt [Jimenez] said "he took the gun from [Petitioner], and then he pointed towards the sidewalk just a little ways on

down. And there was a weapon laying on the sidewalk.” The gun was taken into custody and secured by the officer. (R. 51, ln. 22 - 52, ln. 21).

Officer George Brown of the Spartanburg Police Dept. was the shift supervisor on the scene sitting across the intersection from where I had pulled up.” (R. 58, ll. 12 - 22). Brown also attempted to calm down an individual in a black shirt [Jimenez]. (R. 58, ll. 19-25). This person remained very upset, “crying...bouncing all over the place,” and told Officer Brown “[Mr. Jiminez] just kept saying, ‘Dude, dude shot him,’ and kept pointing over towards the male in the white shirt... he said that he had taken the gun away from him [Petitioner] and that Officer Powell had taken that – that it was the gun that Officer Powell had taken.” (R. 59, ll. 4-11) Brown further testified the man [Jimenez] told him “they had left a club over in Greenville and that they were supposed to be taking the victim—supposed to be taking him home. And they had gone past his road and he [victim] got very upset and was trying to, to get them to stop the car, *and the driver wouldn’t stop. He said he just wouldn’t stop. And he said that was when he started fighting with the driver of the car.*” (R. 59, ll. 15-21) (emphasis added).

Officers found the victim’s body inside the vehicle in the intersection where the two men had been arguing. (R. 60).

At trial, Petitioner’s attorney used the out of court statements of Mr. Jimenez in an effort to place a prior written report of the incident before the jury, an effort to discredit Officer Brown with prior inconsistencies between the report and his testimony. It suggested to the jury a theory of defense based on a struggle in the car but had the collateral effect of highlighting the fact that, if any struggle took place, it occurred *solely* between the victim and Petitioner. The passenger in the front seat, who was supposedly

as much in danger, remained inexplicably detached from the "fight". According to Mr. Jimenez's words at the scene, the struggle would have taken place after Petitioner's car continued moving further and further away from the victim's home, into Spartanburg County, and over the victim's protests. (R. 61-67).

Officer Dale Arterburn of the Greer Police Dept. retraced the route taken from Bongo's with the other passenger, Jimenez. The location of the shooting was determined to have taken place on Highway 29 in Spartanburg County, across from U.S. Lumber Company, far removed from the victim's street address in Greer. This was approximately 6 to 10 miles from downtown Spartanburg where the vehicle finally stopped. (R. 76-80).

Gunshot residue examination and other evidence regarding Mr. Jimenez, including fingerprints, blood spatter, placement of relevant physical evidence within the car, and location of road debris on Highway 29 corroborated Jimenez' story and eliminated him as being the shooter. (R. 88-92; 131-35; 137-42; 143-53; 175-82). It tended to establish Petitioner was the shooter, using a Luger 9mm automatic which belonged to him. This was the gun taken from Petitioner by Jimenez during their argument in downtown Spartanburg, and thrown by Mr. Jimenez to the curb where it was found and retrieved by investigating officers. (R. 93-128; 135; 153-58; 175-98).

The pathologist testified the victim was 5'3" tall, 180 pounds, and died from two gunshot wounds to the back of the head. The shots "came close together because they were closely approximated" and one of which was immediately fatal. (R. 163-64).

The first wound was "irregular in shape, and it had splitting of the skin and underlying beveling of the, of the bone outwards, so indicated there was an exit gunshot wound...that [entry] wound appeared in the right—into the left occiput region, the back

of the head. It was 6 inches from the top of the head and a half inch to the left of midline. And it was split horizontally, and it—the horizontal dimensions were 5.5 centimeters, and it was half a centimeter wide. You could ap—re-approximate that wound, and it was 1 centimeter in diameter. And the entrance was medially. Now, *the reason it was like that is because it was essentially a contact gunshot wound...* That wound passed into the base of the brain — of the skull. It passed through a large drainage area called the sagittal sinus. It went through the cerebellum, which is an inferior portion of the brain, went through the cerebrum and came out anteriorly... So the path of that bullet was back to front. It was upward at about probably 15 or 20 degrees from the horizontal. And it was almost sagittal, meaning that if you drew a perpendicular line through the face and through the body, that's the sagittal plane. *So it was going from back to front and slightly upward and almost straight through.*" (R. 164, ln. 22 - 165, ln. 21)(emphasis added).

The pathologist went on to testify "wounds three and four were associated gunshot wounds. And as the gunshot wound exited it went through the ear, the pinna of the ear, the surface of the ear... But, nevertheless, the gunshot wound entered in the right posterior neck. It was a little bit lower, 6.75 inches from the top of the head, and it was a half inch to the right of the midline... This wound also had a little bit of splitting of the skin indicating that it was probably contact, being loose contact. And there was a little bit of charring of the skin surrounding that from the heat of the weapon. The charring was from 5:00 to 1:00 o'clock...*The, the first [wound] I described would have been almost immediately fatal.* The other one would have, like I said; only been potentially fatal. He could have lost consciousness from that one, but more than likely not." (R. 165, ln. 22 - 167, ln. 24) (emphasis added).

At the close of the State's case, Petitioner was appropriately advised of his constitutional rights not to have to prove anything in his own defense and his right not to testify, or his right to testify should he choose to. He was thoroughly questioned by the court as to whether he wished to take the stand in his own behalf and advised the court he did not. (R. 201-04). The court denied the request of Petitioner's counsel for a directed verdict, (R. 206-09), and entertained requests by Petitioner's counsel for charges to the jury on voluntary and involuntary manslaughter, self-defense under *S.C. Code Ann. 16-11-440(c)*, and statutory immunity from prosecution purportedly under the Castle Doctrine. The court deferred rulings on these jury charge requests overnight. (R. 209-21).

The following morning Petitioner informed the court he wanted to testify in his own behalf and did so. (R. 222 - 24). Petitioner testified that at the time of the incident, he had imbibed only four drinks during the course of the entire day, (R. 226, ll. 3-14; .242, ll. 3-9), but that Mr. Jimenez was intoxicated, (R. 231, ll. 2-7) and the victim was intoxicated. (R. 229, ln. 20 - 230, ln. 5). He claimed he was asked by the club owner to give the victim a ride home, (R. 228, ll. 6-9), but knew of the victim only as an acquaintance. (R. 291, ll. 19-25). He stated the security guard helped the victim into the back seat of Petitioner's vehicle at approximately 3:00 a.m. (R. 229-30). He told the security guard initially he knew where the victim lived but then had to get his address off his driver's license; then he and Mr. Jimenez, who was riding in the front passenger seat, proceeded up East North Street in Greenville to take the victim home. (R. 230-31).

According to Petitioner, he and Jimenez were having a discussion "[a]lmost political in nature" about kidnappings in Colombia by FARC, a revolutionary group which opposes the government there. (R. 232). Petitioner claimed the victim then sprang

from the back seat and grabbed him "[o]n my forehead." (R. 233). Prompted by constant leading from his attorney, Petitioner elaborated on his terror, his efforts "to find a public place, you know, people where I could, you know, possibly jump out of the car, and get some help you know...I mean, I was looking for a public place with people somewhere stopped." (R. 234, ll. 11-25).

Petitioner testified he had "been up all day", had "[b]een drinking throughout the day," and was tired. (R. 235, ll. 2-7). He stated the victim kept jumping forward to grab the steering wheel, and that he pushed repeatedly but that did not seem to work. (R. 235 - 236). "At that point I pushed him off, and I grabbed the, the glove box and I opened the glove box and got the pouch out which had the gun in it... I pulled out the gun and I shot Mr. Tabares... He fell on my knee." (R. 236, ln. 2- 237).

Again, with extensive leading from his attorney Petitioner recounted his fear and shock after shooting the victim, driving from a point on East North St. in Greenville, and ending up in downtown Spartanburg. He elaborated on his confrontation with Jimenez in Spartanburg while he "still had the gun in [his] hand," his remaining at that scene, it being "fair to say it's traumatic" when something like this happens. (R. 238-41).

He was asked by his attorney whether he ever thought about stopping the car or slamming on the brakes. The answer was: "No. When, when, I kept pushing him back he, he pulled the car towards, you know, trying to run it off the road. And I saw we were headed towards some trees. So." (R. 240, ll. 12-18).

Under cross-examination, Petitioner reiterated his knowledge of the extent of the victim's intoxication before agreeing to take him home, (R. 242), and confirmed the road to the victim's home took him in the opposite direction of his own home. (R. 243, ll. 4-

20). Petitioner offered denials and then equivocations that the victim became upset because Petitioner passed by the road he lived on and because Petitioner would not stop or turn around when told to do so. (R. 245-46). He claimed again he was looking for a public place to stop and let the victim out, "[s]ome place to stop and get some help where I could jump out and get some help, possibly let him out. And I don't know, maybe later get a cab. But my main concern was to get some help, me jumping out of the car." (R. 246, ln. 22 - 247, ln. 4).

Petitioner admitted the victim had no weapon, not a gun, or a knife, or even a plastic fork. (R. 247, ll. 9-13). However, he argued that he didn't *know* that simply stopping the car would have ended the threat, retreating from his earlier testimony about the extent of the victim's inebriation. (R. 247, ll. 14-25).

Petitioner could not deny that he had the presence of mind to reach into the glove box, extract a bag, and take a loaded and cocked gun from that bag. Then, while the victim supposedly struggled with him, and while a front seat passenger supposedly sat idly by with a threat of death clear and imminent, Petitioner moved the victim into a position of total helplessness and shot him twice, point-blank, in the back of the head, killing him instantly. (R. 248-53).

The Defendant at the close of the State's case first informed the trial judge that he did not wish to testify, but changed his mind during the overnight recess and took the stand in his own behalf. In doing so, he placed his own credibility in issue before the jury as to the facts of the case, especially his own version of the killing.

The Petitioner's rendering of the essential facts at trial essentially conceded circumstances supporting the verdict of murder, and a question of fact between murder and voluntary manslaughter, and no factual basis for a verdict of self-defense.

He does, however, skew what happened to the extent he can in an attempt to support his claims on certiorari, and to attribute error to the trial judge, the Court of Appeals, and now, for the first time, in the prosecutor's closing argument.

Petitioner's testimony corroborated the State's proof of a victim too drunk to walk, almost unconscious when put into Petitioner's car with Petitioner's acquiescence (Petitioner's version) or after he volunteered (testimony of nightclub personnel), after Petitioner claimed to know the victim and where he lived (he acknowledged on the stand he was only "acquainted" with the victim). (R. p.22, line 11 to p. 23, l. 14; p. 228, l. 19 to p. 229, l. 5). Once the victim was in the Petitioner's car outside Bongo's, to find his home address it was necessary to take identification from victim's person in front of the bar personnel. Then his ex-brother-in-law then seated in the front seat passenger seat put the information into his laptop GPS address. (R. p. 229, l. 11 to p. 235, l. 7). The address was a Greer address that took the car out East North Street, then past the victim's home and then to a point out Old Spartanburg Highway/Highway 29 on the Greenville/Greer side of I-85 near Tacapau Road to U.S. Lumber Company in front of which a last effort by the victim to be release from the car ended in his murder. (R. p. 5, lines 1-5; p. 11, line 20 to p. 12, l. 8; p. 75 to p. 86; p. 235, l. 8 to p. 236, l. 17).

The Petitioner claimed he was attacked by the victim from the back seat while trying to drive him home, turning the car into a "missile" and justifying that he put a gun to the back of the victim's head as the victim was prone and face down in his lap. He

then blew the man's brain's out and all over Petitioner's shirt, pants, floorboard, driver's dash side, and clear up into the gun barrel. (R. p. 106, lines 6-12; p. 170, lines 12-24; p. 163, line 11 to p. 170, line 9; p. 187, line 1 to p. 198, line 3). This was, and is now, claimed as self-defense by Petitioner.

A brief summary of the fallacy in this follows from the proof in the case, what was seen and heard by the jury and the trial judge, which are as follows: (1) a drunken, semi-conscious man, too drunk to even stand or walk was placed into the backseat of the Petitioner's car to be driven home, at Petitioner's request/offer/acquiescence (R. p. 18, lines 13-21; p.19, ll. 6-23; l. 14; p. 220) (2) he awakened to find himself in the backseat of a vehicle with two strangers/"acquaintances" driving past his street and the car continued on despite his own objections (R. p. 59, ll. 15-21; p. 51; p. 57, line 10 to p. 60) (3) the victim lunged to the front seat but was quickly shoved back (R. p. 231 to p. 235 and much later concluded after passing over the span of what jurors would have known (from their common sense, experience and the proof in the case) covered miles of lit roadways from Greenville County and on into Spartanburg County (R. p. 102, lines 2-24; p. 235-236, l. 17; p. 239, l. 21 to p. 241, l. 16), turning the car into what Petitioner's counsel has termed a "missile"; (4) continued to a point in front of a large, known company on Old Spartanburg Road/Hwy. 29 on the Greenville side of I-85, where the totally unarmed victim's final efforts to be released led to his being shot in the back of the head, twice (R. p. 76, l. 6 p. 79) and (5) then continued another 10 miles into downtown Spartanburg before the car stopped, the passenger, now seen by witnesses as hysterical and obviously outraged with the driver, jumped out, took the gun from the Petitioner and threw it down in the street, and the police arrived shortly thereafter.

I.

The trial judge's charges as to Malice, Murder, Manslaughter and Self-Defense were correct and complete statements of the law on the facts of this case.

The State argued that the proof established an intentional killing of the victim with malice aforethought, murder and refutation of self-defense beyond a reasonable doubt. (R. p. 277 to p. 303). The State expressly told the jury that a failure to find malice also left them the option of voluntary manslaughter. (R. p. 299, lines 5-25).

The trial judge's charge to the jury on murder and malice was appropriate in its entirety. (R. p. 312, line 19 to p. 317). The charge as to Voluntary Manslaughter was appropriate in its entirety. (R. p. 317, line 4 to p. 318, l. 22). The charge as to Self-Defense was appropriate in its entirety. (R. p. 320, line 2 to p. 324, l. 11).

The trial judge committed no error of law, and charged a correct statement of the law that was applicable to the case. When requested, the trial judge must charge a correct and applicable principle of the law. *State v. Brandt*, 398 S.C. 526, 549, 713 SE 2d 591, 603 (2011). But the trial judge is not required to use any particular language in explaining that principle. *State v. Mattison*, 388 S.C. 469, 478-79, 697 SE 2d 578, 583 (2010). The charge as a whole must be considered in determining whether the trial judge charged the correct law applicable to the case. *Barber v. State*, 393 S.C. 232, 236, 712 SE 2d 436, 438 (2011).

The trial judge gave a full and clear application of the use of force and deadly force as a legal principle in the law of self-defense. (R. p. 320 to p. 324, l. 11). In doing so, the Court stated initially that, "[t]he right of self-defense is founded upon necessity, either actual or reasonably apparent necessity. (R. 320, ll. 17-18).

The trial judge from there proceeded through the elements in a charge that was thorough, fair, and a correct statement of legal principles, (R. p. 320, l. 10 to p. 327, l. 11) but which admittedly did not tell jurors that having once shot an unarmed man who was pinned face down, while he was being held in a car against his will, in the back of the head at contact range, the Defendant was essentially entitled to do so again from a slightly different angle until the threat posed “had completely ended.”

The only exception to the charge raised and now argued on certiorari were the failure to charge that justifiable first shot entitles one to a second shot, (the “continuing to shoot charge”) relying on *State v. Rye*, 375 S.C. 119, 651 SE 2d 321 (2002). (R. p. 332 to p. 336, l. 8). The jury retired to deliberate at 1:10 p.m. and returned at 3:00 p.m., after sending a request to the Court “to provide [them] a reinstruction on the definition of malice and also the definition of voluntary manslaughter. (R. p. 336 ll. 14-20). The Court reinstructed them as requested. (R. p. 336, l. 21 to p. 340, l. 15).

The jury reported a verdict convicting Petitioner of Murder and Possession of a Firearm during a Commission of a Violent Crime at 4:25 p.m. (R. p. 343 to 346) and the trial judge imposed sentence.

The Petitioner has now for the first time made attacks against the assistant solicitor in the case, claiming her argument “mirrored” the jury charge in *State v. Belcher*, 385 S.C. 597, 675 SE 2d 180 2 (2009) There are several problems with this.

First, *Belcher* addressed and, under certain circumstances, has stricken a jury charge that instructs a jury that malice can be inferred from the use of a deadly weapon; this was held to be a violation of State common law principles 385 S.C. 517, 602-611; however, the argument of the prosecutor in this case was just that, an argument, and was

made without objection or claim at trial of a *Belcher* violation, one "mirrored" or otherwise. Now it is claimed for the first time on appeal in an attempt to bootstrap claims of prejudice. The "this" the Petitioner refers to is in fact the facts of the case in fact in their entirety and at no time encouraged the jury to infer malice merely from the use of a gun.

"This" was evidence of pulling a gun from the glove compartment while holding the victim face down, then cocking it under a four-pound pull or simply taking it from a bag, already cocked and at the ready, (R. p. 295, l. 9 to p 296, l.9; p. 293, line 3 to 22); this happened with malice aforethought after a second attempt by the victim to escape had nearly succeeded.

"This" was Petitioner's claiming at the Bongo's Bar in Greenville that he knew the victim whom Petitioner testified was only an "acquaintance", one who was drunk and barely conscious. "This" was ignoring the victim's efforts to get out of the car as it passed his home a short distance away. (R. p. 287, l. 10 to 28; ; p. 287 to 288, l. 14).

"This" was taking no action to simply choose some other way for the victim to get home.

"This" was expecting a jury to believe that miles of major roadway between large, conjoining cities in South Carolina was virtually unlit and unpeopled even at 3:00 a.m. (R. pp.270-277).

"This" was two shots to the back of the head, so close the victim could have felt the barrel against his skin as it was fired. And "this" was a cold indifference to what Petitioner had done, continuing to ride on for another ten miles into downtown Spartanburg with a man's head and chest still in his lap, and blood and brains all over the

Petitioner's shirt, pants and floorboard, (R. p. 251 to 253, l. 14), while another passenger was hysterical beside him. (R. p. 40 to ().

Against this record, the Petitioner now claims that the Solicitor's argument based on the facts somehow violated a prohibition as to jury charges under *Belcher*.

Against this record, these proven facts, it is argued that the Petitioner was (1) without fault in bringing about the difficulty; (2) actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; or actually was in such danger; (3) if his acts were only based on appearances, that a reasonable prudent man of ordinary firmness and courage would have thought likewise and acted as Petitioner did; and (4) the Petitioner had no other means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. *State v. Hendrix*, 270 S.C. 653, 657-658; 244 S.E. 2nd 503 (SC 1978); *McAninch, The Criminal Law of South Carolina*, pp. 675-686 (*The South Carolina Bar*, 4th Ed. 2002).

Even assuming for argument that the charge had been requested and given, the only scenario under which it might in theory have been claimed to apply, that of standing upon the right of self-defense while claiming immunity from a duty to retreat, *id.*, would still have been to no avail to Petitioner under the tenets of *Rye*. In *Rye*, trespassers upon the defendant's business property stole his tools, damaged the property and made sport of killing his pets. A confrontation between the defendant and some of these trespassers resulted in one of the victims being shot and killed by the defendant. 375 S.C. 119, 121-123. The trial judge refused the defendant's proposed request on the defense of habitation. *Id.* at p. 124. In his charge to the jury, the trial judge differentiated habitation from self-defense "with the sole caveat that "[a] person defending his or her home or

premises...has no duty to retreat." Though this was most of the picture, it was not the complete picture." *Id.* The Court in *Rye* held that "the charges in the instant case incorrectly implied that habitation requires a defendant to establish that his person or property was in some danger of injury or harm." *Id.*

Petitioner in this case never sought a charge on defense of habitation; his argument at p. 10 of his initial brief was merely an effort to now reconfigure and raise an issue via the back door. The question put to the jury was whether the killing of the victim was self-defense, murder, or voluntary manslaughter. Petitioner's counsel did not, and again could not, claim the car was a habitation in which Petitioner was lawfully armed and acting reasonably to *expel* a trespasser. The vehicle was claimed by Petitioner *as a weapon*, a "missile" against which Petitioner was acting in self-defense when he used deadly force upon the victim.

After the charge to the jury, Petitioner's counsel argued *Rye* only as support for the proposition that if a defendant is justified in shooting once, he is justified to continue until the threat is completely ended. (R. 332-35). Later on, at the jury's request during their deliberations, the judge recharged on the law of murder and voluntary manslaughter. (R. 336). After that, Petitioner argued *Douglas* and *Hendrix* in support of the one shot warranting another shot argument, which had been raised before without supporting precedent. The argument for that charge has been refuted herein.

Here, the jury requested only to be recharged on the law of murder and voluntary manslaughter at that point in the proceedings. For the trial judge to have added the improper charge of "shoot him once and you can shoot him again" at that point in time

would have potentially confused the jury, or improperly suggested some particular weight to be given to a charge that was properly refused in the first place.¹

The trial judge gave a properly crafted charge to the jury on the law of self-defense. During the incident in question, the facts at trial clearly established there was no danger present that would justify shooting the victim and continuing to shoot him.

Even assuming the charge as it was requested, that Petitioner could continue shooting the victim after the first shot, was a correct proposition of law, a trial judge is not required to give a charge, as requested, verbatim, and the charge actually given to the jurors in this case properly covered the issue of a reasonable use of deadly force in defense of self or of others. *State v. Brandt*, 393 S.C. 526, 713 S.E.2d 591 (2011). The request to charge was not properly raised and supporting authority was not offered to the court in timely fashion.

There was no error, there was no prejudice, and the denial of the request to charge was harmless, if constituting error at all. See *State v. Hicks*, *Douglas v. State and discussion above*. See also *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013); *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 (in reviewing charges for error, this Court will review the charge as a whole in light of the evidence and issues presented at trial); *Priest v. Scott*, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976) (an alleged error in a portion of a charge must be considered in the light of the whole charge and must be prejudicial to warrant a new trial).

¹The jury did not request to be recharged on self-defense or that self-defense be further explained or defined. It is clear the jury had already determined shooting someone in the back of the head under these circumstances, was not reasonable. The jury was trying to determine if Petitioner had committed murder or voluntary manslaughter, i.e. which of those crimes Petitioner had committed.

The Respondent has previously refuted these claims in detail. The Court of Appeals addressed them and rejected them. The Court of Appeals was correct in affirming the conviction and in denying rehearing.²

CONCLUSION

For all the foregoing reasons, the judgment of conviction must be affirm and/or certiorari should be denied as improvidently granted.

Respectfully submitted,

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Attorney General

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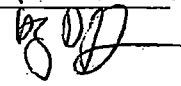
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² Respondent submits that the redacted Record on Appeal before this Court may cause some lack of clarity as to the actual locations and distance due to the manner of the removal of the actual address of the victim pursuant to the August 13, 2007 *“RE: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, Order (S.Ct. S.C. August 13, 2007)”* when the Record of Appeal was prepared before the Court of Appeals by Appellant Marin through his counsel on September 2012. The Court may wish to review the original and unredacted specific portions of the original unredacted trial transcript pursuant to SCARCR Rule 212 (a) (“The appellate court may require copies of all or any part of the transcript of proceedings . . . to be sent up for its inspection and consideration . . .”). In particular, the Court may wish to consider and compare R. pp. 11-12 with Trial Tr. p. 72, l.23 – p. 73, l. 1; R. p. 79, ll. 9; 24 with Trial Tr. p. 142, ll 9, 24; R. p. 80, ll 1, 3-4, 8 with Trial Tr. p. 142, ll. 3-4, 8; R. p. 279, l. 16 with Trial Tr. p. 342, l. 16; and R. 288, ll. 7, 10, 12 with Trial Tr. 351, ll. 7, 10, 12. Respondent additionally notes that the particular manner of redaction in leaving a blank space rather than a black block may erroneously suggest that no answer was given by a witness rather than an address given. This clarification is necessary due to the malice argument now raised by Petitioner’s counsel before this Court.

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BY: Russell D. Ghent
Russell D. Ghent 

January 12, 2015

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge**

THE STATE,

Respondent,

V.

MANUEL ANTONIO MARIN,

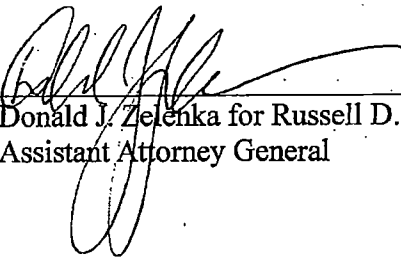
Petitioner

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, certify that I have served the Brief of Respondent on Petitioner by depositing two (2) copies of same in the InterAgency mail addressed to his attorney of record:

David Alexander
Appellate Defender
Robert M. Dudek,
Chief Appellate Defender for Capital Appeals
South Carolina Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

This 12th day of January 2015.


Donald J. Zelenka for Russell D. Ghent
Assistant Attorney General

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Manuel Antonio Marin, Petitioner.

Appellate Case No. 2013-002001

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 27613
Heard April 8, 2015 – Filed March 23, 2016

AFFIRMED AS MODIFIED

Chief Appellate Defender Robert M. Dudek and
Appellate Defender David Alexander, both of Columbia,
for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Senior Assistant Deputy
Attorney General Donald J. Zelenka, and Assistant
Attorney General Anthony Mabry, all of Columbia; and
Solicitor Barry J. Barnette and Assistant Solicitor Russell
D. Ghent, both of Spartanburg, for Respondent.

JUSTICE KITTREDGE: Petitioner Manuel Antonio Marin was convicted of murder and possession of a firearm during the commission of a violent crime. Marin appealed, and the court of appeals affirmed, rejecting his argument that the trial court committed reversible error by refusing to instruct the jury that a person acting in self-defense has the right to continue shooting until the threat has ended. *State v. Marin*, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). We issued a writ of certiorari to review the court of appeals' decision. We affirm as modified.

I.

On July 20, 2008, both Marin and Nelson Tabares (Victim) attended a Colombian Independence Day festival, followed by an after-party at a Greenville nightclub. According to Christopher McDonald, the nightclub's bouncer, Victim was extremely intoxicated and had difficulty standing and walking, but was not aggressive. Due to Victim's condition, nightclub staff members, including McDonald and owner Larry Rodriquez, determined that it would not be safe for Victim to drive. As a result, McDonald and Rodriquez attempted to find Victim a ride home.¹

Marin told McDonald that he knew where Victim lived and volunteered to drive Victim home. However, after McDonald helped Victim into the back seat of Marin's vehicle, Marin said that he needed Victim's address so that he could put it in his navigation system. McDonald looked at Victim's identification and gave the address to Marin. Marin, accompanied in the front seat by his former brother-in-law, Alfredo Jimenez, then began driving Victim home.

Marin testified that Victim was unruly and combative during the drive. According to Marin, Victim told him, "I'm sorry, but you got to go," then reached over the backseat and placed him in a headlock. Marin said he then decided not to take Victim home, but to drive to a public location and seek help. Marin further testified that Victim attempted to grab the steering wheel. However, Jimenez

¹ Rodriquez testified that Victim was not drunk, but merely ill. However, tests taken after his death revealed that Victim's blood-alcohol concentration was 0.323%, more than four times the legal limit to drive a motor vehicle. See S.C. Code Ann. § 56-5-2933(A) (Supp. 2015) (making it unlawful to drive a motor vehicle with a blood-alcohol concentration of 0.08% or higher).

stated that Victim became upset and began fighting with Marin over control of the steering wheel after Marin drove past the road on which Victim's home was located and would not stop.²

It is undisputed that Marin drove into Spartanburg County, retrieved a gun from the glove compartment, and shot Victim twice in the back of the head. Rather than stopping immediately, Marin continued driving until he arrived in downtown Spartanburg. Several witnesses observed Marin and Jimenez arguing in the street and a passerby called the police.

Marin was subsequently indicted for murder and possession of a firearm during the commission of a violent crime. Marin pleaded not guilty to both charges.

While Marin claimed he shot Victim in self-defense, he did not request any specific language for the self-defense charge at the charge conference, only requesting that the charge include an instruction that he had a right to act on appearances. Further, Marin did not object when, during closing arguments, the State asserted that Marin's firing of two shots was evidence of malice and supported a murder conviction, nor did he ask for any additional instructions before the trial court charged the jury, in relevant part, as follows:

In this case the defendant has . . . raised what is known in the law as the defense of self-defense. The law recognizes the right of every person to defend himself or herself or a friend, relative[,] or another from death or from sustaining serious bodily harm. To do this a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable.

The right of self-defense is founded upon necessity, either actual or reasonably apparent necessity. And it is a complete defense to a charge of an unlawful homicide should you find that it exists based upon your evaluation of the evidence produced during the trial of this case. The existence of self-defense entitles a person charged with the commission of an unlawful homicide to a verdict of not guilty.

² While Jimenez did not testify at trial, his statements were admitted into evidence as excited utterances. *See* Rule 803(2), SCRE (excepting from the prohibition against hearsay "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition").

And although the defendant has raised the defense of self-defense, the burden of proof is not on the defendant to prove the existence of self-defense. As I have already told you, the burden is always upon the state to prove the defendant's commission of the crime alleged against him beyond a reasonable doubt. And this would therefore necessarily require that the state prove beyond a reasonable doubt the absence of self-defense.

But in order for you to consider the defense of self-defense you obviously must know what the elements are. And there are four basic elements that are required before self-defense may be established.

First, it must be shown that the defendant was without fault in bringing on the immediate difficulty which gave rise to the necessity of using deadly force which resulted in the taking of human life.

One cannot provoke, initiate[,] or otherwise through his own fault bring about a difficulty and then claim the right of self-defense in the use of deadly force against an attack which was caused by that provocation.

Secondly, it must be shown that at the time the fatal act was committed the defendant actually believed that he was in imminent danger of losing his life or sustaining serious bodily injury, or some other person was, or that the defendant actually was in such imminent danger. And the term imminent danger means an immediate or present danger and not a past or future danger.

And, thirdly, if the defense is based upon a belief of imminent danger, then it must be shown that the belief was reasonable, that is a reasonably prudent person of ordinary firmness and courage would have entertained the same belief.

If the defendant or the other person being defended actually was in imminent danger, then it must be shown that the circumstances were such as would warrant a person of ordinary prudence and courage to inflict the fatal injury in order to save himself or some other person from death or serious bodily injury.

In other words, it must be shown that a reasonably prudent person of ordinary firmness and courage if acting under the same or similar circumstances would have reached the same conclusion and entertained the same belief.

Deadly force is only appropriate when necessary and may only be exercised where the defendant entertains a reasonable belief that he or some other is about to sustain loss of life or suffer serious bodily harm.

The law of self-defense encompasses preventative action taken to protect one's own life without another [sic] if such action is taken in anticipation of imminent danger of losing one's life or sustaining serious bodily injury.

A defendant has a right to act upon appearances. He may be mistaken. The law does not hold someone to a refined assessment of the danger as might be accomplished having an adequate time to reflect, provided however that the defendant has acted as a person of ordinary reason, firmness[,] and courage would have acted or should have acted in meeting the appearance of the danger.

In other words, one does not have to wait until his or her assailant gets the advantage, for one always has the right under the law of self-preservation to prevent another from getting an advantage.

Again, there is however a requirement of objectivity. Any such belief must be reasonable, that is a reasonable and prudent person if acting under the same or similar circumstances would have so believed or would have also been warranted in acting as the defendant did.

And, fourthly, it must be shown that the defendant had no other means of avoiding the danger of losing his life or sustaining the infliction of serious bodily injury other than to act as he did under the particular circumstances as existed, because, as I have stated, self-defense is founded upon necessity.

Now, if you have a reasonable doubt as to the defendant's guilt as it relates to a proof of an unlawful homicide after considering all of the evidence received during this case, including any evidence relating to the issue of self-defense, then it would be your duty to resolve that reasonable doubt in favor of the defendant and find him not guilty.

After the jury was charged, but prior to deliberations, the trial court provided an opportunity for the parties to note any exceptions to the charges. It was at this juncture that Marin first requested that the trial court instruct the jury that "if the defendant is justified in defending himself or others in firing the first shot, then the defendant—also [may] continue—to continue [sic] shooting until it is apparent that the danger of death or serious bodily injury has . . . completely ended."

Marin represented to the trial court that *State v. Rye*, 375 S.C. 119, 651 S.E.2d 321 (2007), mandated such a charge. However, the trial court reviewed *Rye* and noted that only the dissenting opinion mentioned that language, and the reference was in

the context of a different legal issue. Marin then acknowledged that *Rye* was not on point. When the trial court asked Marin if there were any other cases that approved of such a charge, Marin's counsel responded, "I'm not a walking encyclopedia." Thus, in the absence of any supporting authority, the trial court declined to give the requested charge.

A short time later, the jury requested further instruction on malice and voluntary manslaughter, but did not ask for clarification or reinstruction on self-defense. After the trial court reinstructed the jury on both malice and voluntary manslaughter, Marin renewed his request to have the "continuing to shoot" language charged to the jury. The trial court denied the request, finding that its thorough charge properly communicated the law of self-defense to the jury.

II.

Marin argues the trial court committed reversible error by failing to charge the jury that one who is acting in self-defense and has the right to fire a first shot has the right to continue shooting until it is apparent that the danger of death or serious bodily injury has ended. We disagree, for this common law rule was sufficiently encompassed in the jury charge provided by the trial court.

"[T]he trial court is required to charge only the current and correct law of South Carolina." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (alteration in original) (quoting *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)). "The law to be charged must be determined from the evidence presented at trial." *Id.* at 549, 713 S.E.2d at 603 (quoting *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007)). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2013)). "The substance of the law is what must be instructed to the jury, not any particular verbiage." *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) (citing *State v. Rabon*, 275 S.C. 459, 462, 272 S.E.2d 634, 636 (1980)). Moreover, "[t]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Brandt*, 393 S.C. at 550, 713 S.E.2d at 603 (quoting *Mattison*, 388 S.C. at 479, 697 S.E.2d at 583).

III.

The court of appeals expressed concern that "the charge Marin requested is not a correct statement of law." *Marin*, 404 S.C. at 620, 745 S.E.2d at 151. On this point the court of appeals erred, for we have previously held that "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." *State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978) (citation and internal quotation marks omitted). *But see* 40 C.J.S. *Homicide* § 189 (2014) ("[A] person who fatally wounds another, even in self-defense, is not entitled to hasten the victim's death by continuing to pump bullets into the victim's body."). While we acknowledge that the language Marin requested accurately states the law, our inquiry on appellate review is concerned only with the question of whether the jury charge, when viewed as a whole, accurately conveys the applicable law of self-defense. *See, e.g., Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." (quoting *Adkins*, 353 S.C. at 318, 577 S.E.2d at 464)). Indeed, "[t]he *substance* of the law is what must be charged to the jury, not any *particular verbiage*." *Id.* at 549, 713 S.E.2d at 603 (emphasis added) (quoting *Adkins*, 353 S.C. at 318–19, 577 S.E.2d at 464).

Here, the experienced and excellent trial judge gave a thorough and comprehensive self-defense charge, well beyond the general *State v. Davis*³ elements. While the "continuing to shoot" charge may have been appropriate, its absence does not mandate reversal. The essence of the charge was encompassed in the jury instructions, particularly the instruction that "a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable." The circumstances here are therefore unlike those in cases where the charge given completely omitted applicable principles of self-defense law. *See*,

³ 282 S.C. 45, 317 S.E.2d 452 (1984) (per curiam). The four-part self-defense instruction recommended by this Court in *Davis* was (1) the defendant was without fault in bringing about the danger; (2) the defendant believed he was, or the defendant actually was, in imminent danger of death or serious bodily harm; (3) the defendant's belief or action was reasonable; and (4) the defendant had no other probable means of avoiding the danger, except that a defendant on his own premises has no duty to retreat. *Id.* at 46, 317 S.E.2d at 453.

e.g., *State v. Fuller*, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) (holding "the trial judge erred in charging the jury only the *Davis* charge without considering the facts and circumstances of the case").

IV.

The dissent relies in part on *Fuller* to support its conclusion that the trial court inadequately instructed the jury on the law of self-defense as the law applied to the facts of this case. The dissent's approach would extend the *Fuller* holding to the point it both conflicts with our well-settled standard of review and risks offending our constitutional prohibition against judges "charg[ing] juries in respect to matters of fact." S.C. Const. art. V, § 21.

The facts in *Fuller* were as follows:

On the night of September 20, 1986, Fuller, a black man, solicited a white prostitute, Susan Phillips, on Two Notch Road, in the parking lot of the Columbia Motor Lodge. Fuller agreed to meet Ms. Phillips back at her trailer. Ms. Phillips lived in a trailer on Blume Court, next to the Ole Place Club and behind the Columbia Motor Lodge. Fuller drove to Blume Court while Ms. Phillips ran down Two Notch Road to Blume Court. Fuller parked his car and waited on Blume Court while Ms. Phillips went in the trailer. Upon arriving at her trailer, Ms. Phillips found that another prostitute already had a "bag" (a man) in the bedroom. Since the trailer was occupied by another prostitute, Fuller left to find a friend's party.

Unsuccessful in finding the party, Fuller returned to Blume Court. Upon returning, Fuller encountered a car driven by a white woman blocking the entrance to Blume Court. Fuller asked her to move. Mr. Dixon, the owner of the private Ole Place Club, and Mr. Phillips, the Ole Place Club's bouncer, approached Fuller's car and asked him what he was "trying to do to that white lady." Fuller denied that he was "doing anything." While grabbing Fuller's door, Mr. Dixon responded, "Nigger, don't lie to me." Mr. Dixon then grabbed Fuller by the throat[] and stated, "[T]hat is why we have got to take care of niggers like you."

Fuller, threatened by Mr. Dixon, reached down to the floorboard of his car and retrieved his gun. He then fired a warning shot between Dixon and Phillips. Not knowing Blume Court was a dead end street, Fuller drove to the end of Blume Court. As he began

to turn around in an attempt to leave, he saw Dixon and Phillips open the trunk of their car. Both Dixon and Phillips then got in their car and tried to block Fuller's car from exiting Blume Court.

Maneuvering past Dixon's car, Fuller turned right on Two Notch Road. After entering Two Notch Road, Fuller's car crashed into a steel rail at the road's curb. Fuller could not move his car off of the steel rail. The testimony was unclear as to whether the Dixon car forced Fuller off the road or whether he lost control of his car. After Fuller crashed his car, Dixon and Phillips drove their car into Fuller's car. Fuller testified that one of the two men yelled, "[W]e're going to take care of you."

Fuller testified that after his car had been rammed, the two men began to exit their car. He cautioned them to stay in their car. Fuller testified that when the door of the car opened, he saw something shiny in Dixon's hand and thought it was a gun. Fuller fired four shots at the men's car and killed both men. A gun was never found in Dixon's car.

Fuller, 297 S.C. at 441–42, 377 S.E.2d at 329–30.

This Court held "it was error for the trial judge to charge *Davis* as an exclusive self-defense charge." *Id.* at 443, 377 S.E.2d at 330. In charging only the general self-defense law from *Davis*, we held the trial court failed to charge the jury on applicable principles of law that were directly implicated by the facts of the case, such as the right to act on appearances,⁴ that words accompanied by hostile acts may establish self-defense,⁵ and that an individual has no duty to retreat if doing so would place him at an increased risk of death or serious bodily harm.⁶ *Id.* at 443–44, 377 S.E.2d at 331 (citations omitted).

⁴ "[Fuller] testified that he saw Dixon and Phillips open the trunk of their car and also thought he saw a shiny object in Dixon's hand." *Id.* at 444, 377 S.E.2d at 331.

⁵ "Testimony presented at trial revealed that Dixon stated 'he was going to take care' of Fuller; that Dixon grabbed Fuller by the throat; and[] that Dixon and Phillips called Fuller a 'nigger.' Testimony also revealed that Dixon and Phillips rammed Fuller's car" *Id.* at 444, 377 S.E.2d at 331.

⁶ "Testimony elicited at trial revealed that Dixon and Phillips rammed Fuller's car door when he tried to leave his car. Fuller also testified that he did not believe it was safe to leave his car and run from the scene." *Id.* at 444, 377 S.E.2d at 331.

Here, unlike in *Fuller*, the trial court gave a thorough self-defense instruction that far exceeded the requirements of *Davis*. *Fuller* does nothing to alter the recognized principles that an appellate court must consider the jury charge as a whole and a trial court need not use the precise verbiage requested by a party as long as the legal principle is included in the charge. Adopting the dissent's expansive interpretation of *Fuller* would therefore place the law on jury instructions at odds with settled law by encouraging appellate courts to ignore the standard of review and encouraging trial courts to make unconstitutional comments on the facts. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). Indeed, while maintaining it was reversible error to not charge the "continuing to shoot" language, the dissent concedes the charge is "alarmingly close to an impermissible charge on the facts."

V.

Because the thorough jury charge included consideration of the applicable principles of self-defense, the failure to incorporate the precise "continuing to shoot" verbiage does not rise to the level of reversible error. As the court of appeals correctly observed, "[c]onsidered as a whole, the trial court's charge explained this principle of law." *Marin*, 404 S.C. at 622, 745 S.E.2d at 152. We therefore affirm the court of appeals' decision as modified.

AFFIRMED AS MODIFIED.

BEATTY, HEARN, JJ., and Acting Justice Jean H. Toal, concur.
PLEICONES, C.J., dissenting in a separate opinion.

CHIEF JUSTICE PLEICONES: I dissent from the majority's decision because in my view, the trial judge's refusal to charge the legal principle contained in the requested charge was reversible error. Accordingly, I would reverse Marin's conviction and sentence and remand for a new trial.

I agree with the majority that the language requested by Marin was a correct statement of law. However, in my opinion, the charge given did not encompass the charge requested, and, therefore, based on the evidence at trial, it was reversible error for the trial judge to refuse to give the requested charge. *See State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial" (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003))); *State v. Day*, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (finding a trial judge's refusal to specifically tailor the self-defense charge to adequately reflect the facts and theories presented by the defendant is reversible error (citation omitted)); *State v. Fuller*, 297 S.C. 440, 443, 337 S.E.2d 328, 330 (1989) (holding a trial judge's refusal to include an additional requested jury charge on self-defense is reversible error where the facts and circumstances presented at trial warrant such a charge). First, it is my opinion that Marin was entitled to a charge explaining that where a defendant is justified in using deadly force, the defendant may continue to use such force until the danger dissipates.⁷ *See State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978) (holding a person justified in firing the first shot in self-defense may continue to shoot until the apparent danger to his life or body has ceased). Marin, who was employed as a newspaper marketing director and manager of a car rental company, testified he was being attacked from the backseat when he twice shot the victim out of fear for his safety, and evidence presented at trial corroborated Marin's version of events. Specifically, law enforcement testified skid marks and debris in the roadway were

⁷ I find the specific language "continuing to shoot" alarmingly close to an impermissible charge on the facts. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); *State v. Hartley*, 307 S.C. 239, 241, 414 S.E.2d 182, 183–84 (Ct. App. 1992). Regardless, Marin's requested charge was based on a correct principle of law, and the trial judge was required to charge that principle to the jury. *See Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 (holding when a party requests the trial judge charge a correct and applicable principle of law, the court must charge it (citation omitted)).

consistent with damage observed to the front of Marin's vehicle corroborating Marin and Jimenez's statements after the incident that there was a struggle over control of the steering wheel; the crime scene investigator found the victim's body slumped over the center console of Marin's vehicle between the driver's and front passenger's seat, with his left arm positioned palm-up in the driver's seat, and with one foot on the backseat floorboard and one foot on the backseat;⁸ and the pathologist who performed the autopsy on the victim testified there were two gunshot wounds to the head—one fatal, and one potentially fatal—and it was not possible to determine which gunshot wound came first, only that the gunshots "came close together," and both were fired at extremely close range. As to why Marin shot the victim twice, Marin testified at trial, "It happened real fast -- boom, boom."

In closing argument, the solicitor argued, "Ladies and gentlemen, I submit this is malice. Two shots, not one, two shots to the back of the head." The solicitor further argued, "Would a reasonable person shoot someone twice in the back of the head?" While the solicitor's statements do not singularly require the trial judge give the requested charge, in my view, the statements effectively highlight the importance of the charge requested in light of the facts of this case. Additionally, in my opinion, it is worth noting that after the trial judge gave the original jury charge, the jury requested additional guidance as to malice and voluntary manslaughter, and the trial judge again refused to include Marin's requested verbiage regarding the principle of "continuing to shoot."⁹ *See State v. Blassingame*, 271 S.C. 44, 46-47, 244 S.E.2d 528, 530 (1978) (finding that when a jury submits a question to the court following a jury charge, it is reasonable to assume the jury is focusing "critical attention" on the specific question asked, and that the information relayed by the trial judge to the jury is given "special consideration.").

Second, in my view, the language cited by the majority as encompassing Marin's requested charge—"a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable"—merely explains that a defendant may take a human life in self-defense, and utterly fails to further define

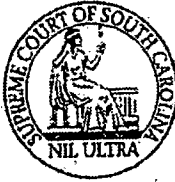
⁸ The crime scene investigator further found no indication the victim's injuries were sustained in the backseat or any other location other than where his body was positioned between the front seats of the vehicle.

⁹ The jury returned its verdict approximately one hour after the trial judge provided the additional instruction.

for the jury reasonable self-defense conduct under the facts of this case. In my opinion, the charge requested by Marin goes a step further, and elucidates reasonableness in this case, i.e., a person entitled to exercise self-defense may continue using deadly force until the perceived danger has dissipated.

Accordingly, in light of the solicitor's closing argument, I find the language cited by the majority is not remotely sufficient to explain or clarify for the jury that the two shots fired by Marin were not necessarily indicative of malice. See *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603; *Day*, 341 S.C. at 418, 535 S.E.2d at 435; *Fuller*, 297 S.C. at 443, 337 S.E.2d at 330 (1989). Thus, I do not find the jury charge included the requested, applicable principle of self-defense.

For the reasons given above, I would find the trial judge committed reversible error by failing to charge the principle embodied in the requested "continuing to shoot" language, reverse Marin's conviction, and remand to the lower court for a new trial.



The Supreme Court of South Carolina

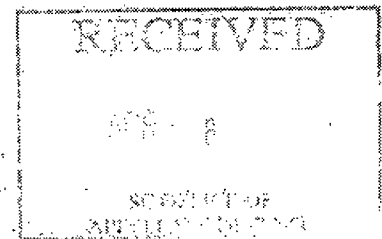
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April 8, 2016

The Honorable M. Hope Blackley
PO Box 3483
Spartanburg SC 29304-3483



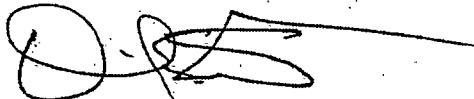
REMITTITUR

Re: The State v. Manuel Marin
Lower Court Case No. 2008GS4205308, 2008GS425308A
Appellate Case No. 2013-002001

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,



CLERK

cc: J. Anthony Mabry, Esquire
Russell D. Ghent, Esquire
Barry Joe Barnette, Esquire
Robert Michael Dudek, Esquire
David Alexander, Esquire

FORM 5

STATE OF SOUTH CAROLINA

County of SpartanburgManuel A. Marin #343371

Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2016-CP-42-2795

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Kirkland Correctional Institution
2. Name and location of Court which imposed sentence Spartanburg
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008 GS 4205 308
 - (b) 2008 GS 4205 308 (A)

2016 JUL 28 PM 11:30
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- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 10-27-2010, Natural Life
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeals
- ii. S.C. Supreme Court (writ of Certiorary)
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. conviction affirmed
- ii. conviction affirmed as modified
- iii. _____
- (c) the date of each such result:
- i. July 03, 2013
- ii. March 23, 2016
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2013-002001, State V. Marin, 404 S.C. 615, 745 S.E.2d
- ii. (ct. App. 2013)
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

2016 JUL 28 PM 1:30
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- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) see Attached Forms: pg. 1, A - ~~22-B~~ 3-A M.M.
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) see Attached Forms: pg. 1, B - ~~22-B~~ 22-B M.M.
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. _____

2016 JUL 28 PM 1:30
M. HOPE BLANCHLEY

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is initial PCR Application
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
No

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Tanya R. Jones 326 N. Church St. suite 3000
Spartanburg, S.C. 29303
 ii. Robert M. Dudek and David Alexander
SCCID 1330 Lady St., suite 401 Columbia, SC 29201
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. Trial
Appeal (Direct)
 ii. _____
 iii. _____

2016 JUL 28 PM 1:30
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19. State clearly the relief you seek in filing this application:

Remand for a verdict of acquittal or New trial

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of Spartanburg)

VERIFICATION

I, Manuel A. Marin # 343371, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Manuel A. Marin

SWORN to and subscribed before me this 20
day of July, 2016.

Melissa D. Spurgeon (L.S.)
Notary Public

My Commission Expires: Dec 1, 2025

2016 JUL 28 PM 1:30
M. HOPE BLACKLEY

Revised 3/2003

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Manuel A. Marín #343371, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this
20 day of July, 2016.


Notary Public

My Commission Expires: Dec. 1, 2025

2016 JUL 28 PM 1:30
M. HOPE BLACKLEY

10.

(a)

Trial counsel was ineffective in failing to object to witness Diane Tabares' statement, "He was a cancer survivor" Tr. pg. 64, 13-65, 9.

(b)

Trial counsel was ineffective in failing to object to witness Diane Tabares' statement, that she was pregnant and was due to deliver on the day of incident.

(c)

Trial counsel was ineffective in failing to recall the witness Larry Rodriguez to the stand and impeach the witness for lying on the stand, that he had closed the night-club at 2:00 a.m., since defendant's camera proved that photographs taken outside the night-club at the time the decedent was placed in defendant's truck showed time stamp on the camera was 07/21/08 @ 02:54:17 hrs.

(d)

Trial counsel was ineffective in failing to object to and allowing autopsy photographs to be entered into evidence.

(e)

Trial counsel was ineffective in failing to have an evidentiary hearing to have defendant's camera excluded from the evidence, since the camera was tampered with prior to a warrant being secured for the contents inside defendant's truck.

(f)

Trial counsel was ineffective in failing to have an evidentiary hearing to have the weapon excluded from the evidence since it was tampered with by officer Jeffery Powell. Tr. 114, 15-115, 7.

(g)

Trial counsel was ineffective in not being prepared for trial, by citing the wrong cases on point for a proposition.

~~10.~~
(H)

Trial counsel was ineffective in failing to object to prosecutor's highly inflammatory and prejudicial argument that the jury could infer malice because two shots were fired. The prosecutor said: "Ladies and gentlemen, I submit, this is malice. Two shots, not one, two shots to the back of the head Tr. 298, 11.22-24.

(I)

Trial counsel was ineffective in failing to raise the King defense after the jury came back from deliberations, and asked the trial judge to reinstruct the or repeat the instructions on murder and manslaughter

~~(J)~~

Trial counsel was ineffective in failing to claim immunity under the Protection of Persons and Property Act (Article 6) as a pre-trial motion instead of claiming it as a jury instruction.

(K)

Trial counsel was ineffective in failing to claim as a pre-trial motion that Spartanburg Superior Court lacked jurisdiction to try the case since the incident occurred before wal-mart in Greenville County. And the same principals apply to the directed verdict on venue as in the immunity from the Persons and Property Act. IF venue belongs to a different jurisdiction, then the defendant would also be shielded from a trial in that jurisdiction and the jury would never hear the trial in said jurisdiction.

(L)

Appellate counsel Robert M. Dudek was ineffective in failing to claim the directed verdict of self-defense since it was a dispositive issue in this case.

Robert M. Dudek

10.
(m)

Appellate counsel Robert M. Dudek was ineffective in failing to claim the directive verdict on venue, since these directive verdicts were dispositive of this case, and they were ruled on by the trial judge and therefore preserved for appellate review.

(n)

Appellate counsel Robert M. Dudek or appellate court was ineffective in failing to give Marin the same treatment as in State V. Curry, 406 S.C. 364, 752 S.E.2d 263, S.C. 2013. (Dec. 4, 2013)

(o)

The court of appeals wrongfully ruled on the continuing to shoot proposition since the directive went to the heart of Marin's case.

(p)

The South Carolina Supreme Court erred by sitting law against Marin which was enacted after Marin's indictment (July 21, 2008)

(q)

Trial judge abused his discretion by not sitting State V. Hendrix supra. After trial counsel cited such case for the continuing to shoot proposition. Tr. 404, 1-406, 1-2.

2016 JUL 28 PM 1:31
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(a) Sister's testimony, that decedent was a cancer survivor was highly prejudicial and it was calculated to arouse the sympathies of the jury, and it was irrelevant as to provocative facts or guilt on the case. Therefore, trial counsel was ineffective in failing to object to such testimony. See State v. Langly, 515 S.E.2d 98 (S.C. 1999), sister's testimony was not relevant to defendant's guilt. See also Strickland v. Washington, 104 S.C. 2052 (1984).

(b) Sister's testimony, that she was pregnant and due to deliver on the same day of the incident was highly prejudicial and it was calculated to arouse the sympathies of the jury, and it was irrelevant as to provocative facts or guilt on the case. Therefore, trial counsel was ineffective in failing to object to such testimony. See State v. Langly supra; see also Strickland v. Washington supra.

(c) Witness Larry Rodrigues lied on the stand under oath that he had closed the night club @ 2:00 a.m., when photographs taken outside the night club with defendant's camera at the time the decedent was placed into defendant's truck showed time stamp on the camera to be 07/21/08 @ 02:54:17 hrs. therefore trial counsel was ineffective in failing

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to impeach the witness Larry Rodriguez after defendant brought this matter to the attention of trial counsel. See State V. McMillian, 561 S.E.2d 602 (S.C. 2002), he was prevented from showing that if a given witness lied in the past or was now lying about a minor point, then he could very well be lying about a major point. Therefore trial counsel was ineffective in failing to recall the witness Larry Rodriguez back to the stand and impeach the witness for lying on the stand under oath.

(d)

Grusom autopsy photographs should have been excluded since prejudicial effect of photographs outweighed any evidentiary value. See State V. Middleton, 339 S.E.2d 692 (S.C. 1986), prejudicial effect of photographs of one murder victim clearly outweighed any evidentiary value, and thus such photographs were inadmissible. Prejudice created by color autopsy photographs of victim, one of which depicted scalp pulled away from victim's skull, and another...

Although photographs may be used to corroborate other evidence, see State V. Robinson, 201 S.C. 230, 22 S.E.2d 587 (1942), it is well established that photographs calculated to arouse the sympathies and

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prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial. see State v. Edwards, 194 S.C. 412, 10 S.E.2d 587 (1940); see also State v. Waitus, 224 S.C. 12, 775 S.E.2d 256 (1993); see also State v. Langley, 515 S.E.2d 98 (S.C. 1999)

(e)

Trial counsel was ineffective in failing to have an evidentiary hearing to have defendant's camera excluded from the evidence since it was tampered with prior to a warrant being secured for items inside defendant's truck. see State v. Tindal, 518 S.E.2d 287 (S.C. App. 1999), Thomas Taylor, a police instructor with experience in crime scene investigation, explained the standard procedure for securing the crime scene would not normally include removing items from the crime scene. According to Taylor, removal of any item would contaminate the crime scene.

(f)

Trial counsel was ineffective in failing to have an evidentiary hearing to exclude the ~~weapon~~ from the evidence since it was tampered with prior to crime scene photographer arrived. Officer Jeffery Powell picked up the weapon from the crime scene and put it in the trunk of his police car instead of following proper procedure. see State v. Tyndal supra, Officer Dana Wingate the crime scene investigator, observed

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the hammer lying on the floor. Before the crime scene photographer arrived, officer Win-gate removed the hammer from the floor, apparently for safety purposes, and placed it in his car. He mistakenly forgot to include the hammer in the crime scene diagram. Thomas Taylor, a police instructor with experience in crime scene investigation, explained the standard procedure for securing the crime scene would not normally include removing the weapon from the crime scene. According to Taylor, removal of any item would contaminate the crime scene.

(9)

Trial counsel was ineffective in not being prepared for trial by citing the wrong cases for a given proposition. When trial counsel asked for instructions that "If defendant is justified in firing the first shot, then the defendant is also justified in continuing to shoot until it is apparent that the danger of death or serious bodily injury has completely ended." Trial counsel cited State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007), which was a dissenting case. And the case on point was actually: State v. Hendrix, 244 S.E.2d 503 (S.C. 1978). When trial judge asked trial counsel if there were any other cases that approved of such a charge, trial counsel responded: "I'm not a walking encyclopedia." Trial counsel should have been prepared for trial by researching

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the right cases in the Law Encyclopedia prior to trial. See Strickland v. Washington, 104 S.C. 2052 (1984). The right to counsel plays a crucial role in the adversarial system embodied in the sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed 268 (1942); See also: Powell v. Alabama, *supra*, 287 U.S. at 68, 69, 53 S.Ct. 63, 64. Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a Federal or State crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972); Gideon v. Wainwright, *supra*; Johnson v. Zerbst, *supra*. That a person who happens to be a lawyer is present at trial alongside the accused, however is not enough to satisfy the Constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to

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be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

[2] For that reason the Court has recognized that the right to counsel is the right to effective assistance of counsel.

[7-9] Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, 466 U.S., at 346, 90 S.Ct., at 1717.

From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68-69, 53 S.Ct., at 63²⁸ 34. See Strickland v. Washington, supra. Indeed, counsel's incompetence can be so serious that it rises to the level of constructive denial of counsel which can constitute constitutional error without showing of prejudice. See Cronic,

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466 U.S., at 659-660, 104 S.Ct., at 2047; Javor V. United States, 724 F.2d 831, 834 (CA9 1984) ("Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all").

(h)

Prosecuter's closing argument that jury could infer malice because two shots were fired instead of one was highly inflammatory and prejudicial, and it is a misrepresentation of the law. See State V. Hendrix, supra. See also: State V. Davis, 239 S.C. 280, 122 S.E.2d 633; See also State V. Linder, 287 S.E.2d (S.C. 1981).

While solicitor should prosecute vigorously, her duty is not to convict a defendant but to see justice done, and solicitor's closing argument must be based upon this principal and therefore must be carefully tailored so as not to appeal to personal bias of juror, nor be calculated to arouse his passion or prejudice. See also: State V. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976); State V. White, 246 S.C. 502, 144 S.E.2d 841 (1965).

A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics. Appellate court Rule 407, Rules of Prof. Conduct, Rule 3.B comment.

(i)

Trial counsel was ineffective in failing to raise the King defense when the jury came back

II.

From deliberations and asked the trial judge to reinstruct them on the law of (malice) murder and voluntary manslaughter. Tr. pg 343-346. See State V. King, 158 S.C. 251, 155 S.E. 409 (1930), in King, the Court concluded that a charge must clearly and correctly instruct that if they have a reasonable doubt as to whether the defendant was guilty of murder or manslaughter, it was their duty to resolve that doubt in his favor and find him guilty of the lesser offense. See also: State V. Jackson, 389 S.E.2d 650 (S.C. 1990); Carter V. State, 392 S.E.2d 184 (S.C. 1990). As both crimes were submitted to the jury, counsel was ineffective in failing to request the King charge; State V. Robinson, 414 S.E.2d 142 (S.C. 1992); Chalk V. State, 437 S.E.2d 19 (S.C. 1993); State V. Gorum 428 S.E.2d 884 (S.C. 1993).

(j)

Trial counsel was ineffective in failing to claim immunity under the Protection of Persons and Property Act (Article 6) as a pre-trial motion instead of claiming it as a jury instruction. See State V. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). Marin also argues the trial court erred in refusing to charge the immunity from prosecution provision contained in South Carolina Code Subsection 16-11-450(A). We find the trial court corr-

11.

ectly refused to charge this subsection because it does not contain any substantive provisions of law. Rather, it is a procedural subsection under which the circuit court may grant immunity from prosecution before a trial begins if the court finds the defendant acted lawfully in self-defense. See *id* (providing [a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action; see also: *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) (standing subsection 16-11-450(A) was not intended as an affirmative defense but rather as a procedure for determining immunity prior to trial). In this case, the trial court fully charged self-defense - the substantive point of law upon which subsection 16-11-450(A) depends. Subsection 16-11-450(A) is a procedural provision that is not relevant to the work of a jury. In fact, if a defendant is entitled to the relief set forth in the subsection, defendant is shielded from trial and no jury will ever hear the case. 392 S.C. at 410, 709 S.E.2d at 665. Thus, the trial court correctly refused the requested charge.

(K)

Trial counsel was ineffective in failing to ask for the directed verdict on Venue as a pre-

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trial motion instead of a jury charge since the same principals apply to venue as in the immunity from the Protection of Persons and Property Act. (Article 6). It is a pre-trial motion, and if the court lacks jurisdiction than a trial can not comense and the defendant is shielded from a trial in such jurisdiction and a jury will never hear the case in said jurisdiction. Therefore trial counsel was ineffective in failing to ask for the directed verdict on venue as a pre-trial motion rather than a jury instruction.

(L)

Appellate counsel Robert M. Dudek was ineffective in failing to claim the directed verdict on self-defense since it was ruled upon by the trial judge and therefore it was preserved for appellate review and this issue was dispositive of this case. Tr. 269, 20-270, 18. We would make a directive verdict motion regarding the sufficiency of the evidence. My client is charged with murder. There has been no testimony, or offered into evidence, regarding my client acting with malice or with a cold heart, Your Honor... Tr. 271, 24-272. The Court: "All right, well based upon my consideration of the evidence I do find that there is substantial circumstantial evidence establishing both the element of malice... So the

11.

defense's motion for a directed verdict are denied". Tr. 318, 13-17. "We would again move for a directed verdict based upon the insufficiency of the evidence. Your Honor, again, there was no indication that my client acted in malice. In fact, he was acting in self-defense -- and for all the other reasons we articulated earlier yesterday..." Tr. 319, 3-15. "And we would argue under the castle doctrine, Your Honor, that he is qualified for immunity in these circumstances Tr. 322, 8. The Court: "I'm going to deny your motion for a directed verdict."

Defendant wrote a letter to appellate counsel Robert M. Dudek on Jan 17, 2012 also left a voice mail in Mr. Dudek's voicemail on Jan 18, 2012 @ about 11:00 a.m. with the same message as in the letter: "Dear Mr. Dudek, my case is parallel to the Hendrix case. State V. Hendrix, 244 S.E.2d 503(S.C. 1978). And we proved self-defense as a matter of law, and I was entitled to a directed verdict of acquittal; and my case should be overturned and remanded for a verdict of acquittal, not a new trial. Appellate defender Robert M. Dudek was ineffective in failing to claim the directed verdict on self-defense since this issue was dispositive of this case. See State V. Russell 546 S.E.2d 202(S.C. App. 2001), "We find the argument was raised to the trial court and is

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preserved. See also: Jones V. Burns, 463 U.S. 745 (1983), Appellate counsel has a professional duty to choose among potential issues according to their merit.

(m) Appellate counsel Robert M. Dudek was ineffective in failing to claim the issue of the directed verdict on venue since it was ruled upon by the trial court, therefore it was preserved for appellate review; and since it was an issue that was dispositive of this case because Spartanburg Superior Court had no jurisdiction over this case. Tr. 119, 10-11, Officer Jeffery Powell: "I asked him [Alfredo Jimenez, the eye witness said under excited utterance] where it happened at and he would just say Wal-mart. He did say Wal-mart." Tr. 138, 21-23 Det. Dale Arterburn.

A. The call came in that there had been a homicide that had occurred in the City of Greer, yet the vehicle and the victim were located downtown Spartanburg.

Tr. 140, 17-25

A. The area that we had arrived to based on information showed fresh skid marks on the roadway and particles of debris that appeared to be consistent with the vehicle's condition that had had some damage to the front end. But it appeared to be damage to a vehicle or

11.

vehicle particles in the roadway. They were freshly, freshly applied, I mean, not something that was all debris, but it was new. Obviously, and that's where his--I'm sorry--where we were taken to.

Tr. 141, 18-23.

A. We then drove the, the witness back to Spartanburg, made contact with Spartanburg Officials and advised them what had been stated to us. That information was turned over to them, along with the witness. After that we then left, left them with the witness and the information that we had passed on to them.

Tr. 143, 22-144, 22

A. Essentially, we were primary investigators involved at the scene. The information led to us or passed onto us was this occurred in the City limits of Greer, in front of the Wal-mart in Greer.

A. So we were, we were actually advised that was where it occurred. So at that time we, we were obviously using any witness we could use to establish jurisdiction yes.

Q. Okay. You indicated you are a detective.

A. Yes, ma'am.

Q. How long have you been on the force?

A. Been there 14 years.

Q. Fourteen years. So I would imagine you've done

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HOPE BACKLEY

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a lot of homicide investigations, correct?

A. Yes

Q. Okay. And isn't it fairly important in any type of investigation to write a few notes in your report?

A. I would agree on the investigation yes.

Q. Okay. It's not good just to rely on hearsay and telling folks anything. You should always write it down in a report, correct?

A. For anything that happens in Greer yes.

Q. Okay. In fact, you didn't write up any police report, isn't that correct?

A. On this case, no, ma'am.

Tr. 145, 18-147, 13.

Q. Okay. And, in fact you were initially -- thought it was at wal-mart correct?

A. That's the information that was passed to us yes that it occurred in front of wal-mart in Greer.

Q. And that's actually off Highway 29 correct?

A. That's correct.

Q. How far is Highway 29 to Tacapaw? It's a little bit of ways, isn't it?

A. Yes.

Q. Probably about 10 or 15 miles?

A. Maybe.

Q. Okay. And, in fact, when you got to Tacapaw and Highway 29 you actually did see skid marks, correct?

A. Yes.

2016 JUL 28 PM 1:33
M. HOPE BLACKLEY
STATION 11

[Handwritten signature]

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Q. And some debris, in the road correct?

A. Yes.

Q. Okay. did you take pictures?

A. It's not in the City of Greer. No I did not.

Q. Okay. You didn't want to assist the City or the County in their investigation of this case?

A. Are you asking me if I would?

Q. Yes.

A. I believe we had at that point established that we were assisting them by establishing jurisdiction, not in Greer.

Q. Okay. Who did you pass that information along, hey, there's skid marks and looks like there's some fresh debris in the road?

A. At that time we passed it on to Spartanburg County or Spartanburg City officers who were present on the scene over at the City Hall. I apologize.

Q. Okay. Do you recall who that would have been?

A. I have no idea who we spoke with. There was, there was multiple investigators, were called out, and they were doing a role-call. And there was, there were a lot of people around, but I don't know who we spoke to directly, no.

Q. Okay. And that debris--I think you indicated it could have been car pieces or plastic or something that came from a car?

A. It was plenty of fragmentation, particles of,

11.

of debris in that area where the skid marks were, yes.

Q. And it looked like it came from a car?

A. That could have come from anything. It looks like the vehicle or something had struck some thing and, and part of it was falling from it, yes Tr. 164, 9-165, 8. Sgt. David Hogsted:

A. I am currently assigned to the crime scene unit, Sergeant over the night shift.

Q. And what does that mean, you are assigned to the crime scene unit?

A. Basically, the crime scene unit with the Sheriff's office, any time a patrol officer, they need to call us out for a crime scene, whether it be just to take photographs or process a crime scene for latent prints, blood evidence, pretty much anything, we respond and process those crime scene

Q. And how long have you been working in law enforcement?

A. Twenty-one years.

Q. And were you working on July the 21st of 2008?

A. Actually, no, I was not.

Q. What happened that morning?

A. About 6:00 a.m. that morning I was called at home by Sergeant Burges, and informed me of the incident and told me that it was actually located in the city of Spartanburg. There was some jurisdiction issues that it appeared that the

11.

incident had initially taken place in Greer. At that time the Sheriff's Office had an agreement with the Greer Police Department that we would respond to and process crime scenes within the City of Greer. So it was requested that we respond and I responded from my residence.

Tr. 185, 186, 22.

Q. You indicated that you were notified that this incident may have happened within the City limits of Greer, is that correct?

A. That's correct.

Q. And you actually have some type of agreement with Greer to help them investigate?

A. We did at that time, yes ma'am.

Q. Okay. And was information relayed to you that the actual shooting incident probably took place around Tapacau Road?

A. Yes. I received a phone call that an area around the Tapacau Road area had been pointed out, that's where the shooting had actually taken place.

Q. Okay. And that's actually in the Wellford area is that correct?

A. That's correct.

Q. Okay. That's not in Greer?

A. No. Actually several miles from Greer.

Q. Okay. Were you told as an investigating officer that there were skid marks on the road on Highway 29 heading to Spartanburg?

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M. HOPE BLACKLEY

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A. I do not recall being told that.

Q. Would that have been something you would have wrote down and investigated?

A. Yes.

Q. Probably went out and took some pictures of it?

A. Yes, ma'am.

Q. Were you told that there was any debris in the road that probably looked like a car or something something fresh in the road?

A. I do not recall being told that.

Q. And again, if you had been told that, would that have been something you would have wrote a note on and taken a look at exactly what it was?

A. Knowing me and the way I am I would have been on the phone getting somebody out there.

Tr. 270, 19-271, 8.

The second issue we would bring up is we would a motion to dismiss based on venue...

Tr. 271, 24-272, 4.

The Court: "So the defense's motions for a directed verdict are denied."

Tr. 318, 18-21.

Again, we would renew our motion regarding venue

Tr. 322, 8 The Court: "I am going to deny your motion for a directed verdict."

Defendant wrote a letter on Jan 17, 2012 and also left a voicemail on Appellant defender Robert M. Dudek's voicemail on

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M. HOPE BLACKLEE

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Jan 8, 2012 @ 11:00 a.m.: Also the incident happened in front of Wal-Mart, which is in Greer, Greenville County, and I was entitled to a directed verdict of acquittal on venue, pursuant to State V. Wiggins, 184 S.E.2d 697 (S.C. 1971); and also State V. Allen, 224 S.E.2d 881 (S.C. 1976), so my case should have been overturned and remanded for a verdict of acquittal, not a new trial.

My trial counsel asked for those directed verdicts, and they were ruled on by the trial judge, Tr. 269, 20-272, 4 and again Tr. 318, 13-322, 8. And therefore those issues were preserved for appellate review. Appellate counsel Robert M. Dudek was ineffective in failing to raise those directed verdicts on appeal since those issues were dispositive of this case.

(n)

Appellate defender Robert M. Dudek or the Court of Appeals was ineffective in failing to give Marin the same treatment as in State V. Curry, 406 S.C. 364, 752 S.E.2d 263, S.C. 2013. Dec 04, 2013, since Marin also did not have the benefit of Duncan and Marin's trial was in Oct 27, 2010. State V. Curry: Appellant moved for immunity under the Act at the directed verdict stage, calling it a "slightly unusual procedure. We note that our decision in Duncan was published after this case was tried. In fairness to the parties and the trial court,

11.

the Act is silent on the procedure to follow when an accused seeks immunity. While Duncan interprets the Act to require a pre-trial determination by the trial court, because appellant and the trial court here did not have the benefit of Duncan, we elect to treat the matter as preserved through the directed motion.

Marin was discriminated by not being given the same treatment as Curry supra. Tr. pg. 320, 6-10. And I think there is, at least in talking to some other practitioners on our list, there was some discussion as to whether or not it's actually a motion--here it is--whether or not a judge can sua sponte dismiss it, or if it's something that actually just goes to the jury. (The Act).

(O)

The Court of Appeals wrongfully ruled on the continuing to shoot issue since the directive went to the heart of the case, and because of the prosecutor's highly inflammatory and prejudicial closing arguments.

(P)

The South Carolina Supreme Court erred by citing law against Marin which was enacted after Marin's indictment. Writ of Certiorari pg. 7. The court of Appeals expressed concern that the charge Marin requested is not a correct statement of law. Marin, 404 S.C. at 620, 745 S.E.2d at 151. On this point

Form 5, PCR, Attachment, pg. 21-B

11.

the court of appeals erred, for we have previously held that when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased... And then the Supreme Court contradicts itself: "But see: 40 C.J.S. Homicide §189 (2014) ([A] person who fatally wounds another, even in self-defense is not entitled to hasten the victim's death by continuing to pump bullets into the victims body." (emphasis added). The Supreme Court is contradicting itself by acknowledging the continuing to shoot proposition in Hendrix Supra and enacting a law that contradicts said proposition. And: 40 C.J.S. Homicide §189 (2014) was enacted after Marin's indictment on July 21, 2008. Trial judge abused his discretion by not citing State v. Hendrix Supra, Tr. 404, 1-406, 1.2. After the trial judge recharged the jury on murder (malice) and voluntary manslaughter at the request of the jury, defense counsel told trial judge the cases on point for the continuing to shoot proposition previously requested were Douglas v. State and also State v. Hendrix. The trial judge discussed the Douglas case, but refused to discuss the Hendrix case which was the main case for the requested proposition. See Strickland v. Washington Supra:

Form 5, PCR, Attachment, pg. 22-B

11.

Criminal Law § 641.12(1). Government violates right to effective assistance of counsel when it interferes in certain ways with ability of counsel to make independent decisions about how to conduct defense U.S.C.A. Const. Amend. 6.

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M. HOPE BLACKLEY

[Signature]

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Manuel Antonio Marin)

SCDC: 00343371)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2016-CP-42-2795

AMENDED
APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Kirkland Correctional Institution
2. Name and location of Court which imposed sentence Spartanburg
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008GS4205308
 - (b) 2008GS4205308(A)
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 10/27/2010, Natural Life

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SPARTANBURG COUNTY
2017 OCT -4 PM 11:17
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- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeals
- ii. S.C. Supreme Court (Writ of Certiorary)
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Conviction affirmed
- ii. Conviction affirmed as modified
- iii. _____
- (c) the date of each such result:
- i. July 3, 2013
- ii. March 23, 2016
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2013 - 002001, State v. Marin, 404 S.C. 615, 745 S.E.2d. (Ct. App. 2013)
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in

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SPARTANBURG COUNTY
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custody unlawfully:

(a) See attachments.

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See attachments.

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

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SPARTANBURG COUNTY
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- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeals
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- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Conviction affirmed
- ii. Conviction affirmed as modified
- iii. _____
- (c) the date of each such result:
- i. July 3, 2013
- ii. March 23, 2016
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2013 - 002001, State v. Marin, 404 S.C. 615, 745 S.E.2d. (Ct. App. 2013)
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in

CLERK OF COURT
SPARTANBURG COUNTY
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M. HOPE BLACKLEY

custody unlawfully:

(a) See attachments.

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See attachments.

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is initial PCR Application.

(b) _____

(c) _____

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17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Tanya R. Jones, 326 N. Church Street, Suite 3000, Spartanburg, SC, 29303
 - ii. Robert M. Dudek and David Alexander, SCCID 1330 Lady Street, Suite 401, Columbia, SC, 29201
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial
 - ii. Appeal (Direct)
 - iii. _____
19. State clearly the relief you seek in filing this application:
Remand for a verdict of acquittal or new trial
20. Are you now under sentence from any other court that you have not challenged?
No

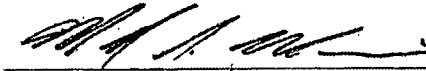
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 SPARTANBURG COUNTY
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STATE OF SOUTH CAROLINA)

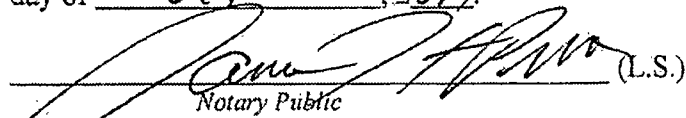
County of Anderson)

VERIFICATION

I, MANUEL ANTONIO MARIN, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this 3
day of Oct, 2017.

 (L.S.)
Notary Public

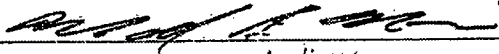
My Commission Expires: 6/15/25

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SPARTANBURG COUNTY
2017 OCT -4 AM 11:17
M. HOPE BLACKLEY

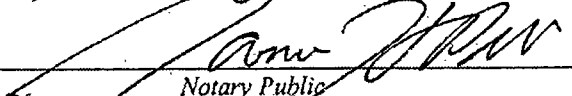
**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, MANUEL ANTONIO MARIN, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this
3 day of Oct, 2017.


Notary Public

My Commission Expires: 6/15/25

CLERK OF DISTRICT
SPRINGFIELD COUNTY
2017 OCT -4 AM 11:17
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Manuel A. Marin, #343371

Applicant

V.

STATE OF SOUTH CAROLINA

Respondent

IN THE COURT OF COMMON PLEAS

SEVENTH JUDICIAL CIRCUIT

2016-CP-42-2795

MOTION TO AMEND P.C.R. APPLICATION

2017 SEP -5 AM 10:28
FILED BLACKLEY

August 27 2017

Applicant, making an amendment to his Post-Conviction Relief (PCR) filed on July 28, 2016.

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted by the August 2008 term of the Grand Jury for Spartanburg County for murder and possession of a weapon during the commission of a violent crime (2008-GS-42-5308). Applicant was represented by Tanya R. Jones, Esquire, at trial. Susan B. Reese, Esquire, and Jennifer A. Jordan, Esquire, represented the State. On October 27, 2010, Applicant was found guilty as indicted of both counts. Presiding over the trial was J. Derham Cole.

Applicant filed a timely notice of appeal. Applicant was represented through the appellate process by Robert M. Dudek, Esquire and on the day before Oral Argument for Applicant's appeal, was replaced by David Alexander, Esquire. Robert M. Dudek again re-joined the appeal at the Writ of Certiorary stage of the ~~app~~ appeal.

The South Carolina Court of Appeals affirmed Applicant's conviction on July 3, 2013. State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). Applicant petitioned the Court of Appeals for a rehearing, but was denied in an order filed August 22, 2013 by a vote of two to one. Honorable J. E. Lockemy voted to grant a rehearing. Applicant then petitioned the Supreme Court of South Carolina for writ of Certiorary. The Supreme Court granted certiorary and on March 23, 2016, the Court affirmed the decision of the Court of Appeals as modified. However, Chief Justice Pelicones, dissented in a separate opinion: "I dissent from the majority's decision because in my view, the trial judge's refusal to charge the legal principle contained in the requested charge was reversible error. Accordingly, I would reverse Marin's conviction and sentence and remand for a new trial".

State v. Marin, 415 S.C. 475, 783 S.E.2d 808 (2016). The Remittitur was returned on April 8, 2016.

II.

In his amendment, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel

- a. "Failing to object to witness Diane Tabares' statement, 'He was a cancer survivor.'"
- b. "Failing to object to witness Diane Tabares' statement that she was pregnant and was due to deliver on the day of the incident."

2017 SEP -5 AM 10:28
 M. HOPE BLACKLEY

- c. Failing to recall the witness Larry Rodriguez to the stand and impeach the witness for lying on the stand.
- d. Failing to object to, and allowing the autopsy photographs to be entered into evidence.
- e. Failing to have an evidentiary hearing to have defendant's camera excluded from evidence, since the camera was tampered with prior to a warrant being secured for the contents inside defendant's truck.
- f. Failing to have an evidentiary hearing to have the weapon excluded from the evidence since it was tampered with by Officer Jeffery Powell.
- g. Trial counsel was ineffective for not being prepared for trial, by citing the wrong cases on point for a given proposition.
- h. Failing to object to prosecutor's highly inflammatory and prejudicial argument that the jury could infer malice because two shots were fired instead of one. The prosecutor said: "Ladies and gentlemen, I submit, this is malice. Two shots, not one, two shots to the back of the head."
- i. Failing to raise the King defense after the jury came back from deliberations, and asked the trial judge to re-instruct them or repeat the instructions on murder and manslaughter.

2017 SEP-5 AM 10:28
H. HIDE BLACK LACKLED

- J. Failing to claim immunity under the Protection of Persons and Property Act as a pretrial motion instead of claiming it as a jury instruction.
- K. Failing to claim lack of jurisdiction by Spartanburg Superior Court as a pretrial motion instead of as a directed verdict at the close of trial.
- L. Failing to request the court or produce expert witnesses for the defense.
- M. Failing to clearly explain to the jury on opening statements from the start that this was a self-defense case.
- N. Failing to object to prosecutor's statements that "defendant would not stop".
- O. Failing to disclose important (Brady) discovery material to defendant until well after trial.
- P. Failing to request complete charge on Article 6 instead of only §16-11-450 (a).
- Q. Failure to argue why the second shot was necessary in order for the court to instruct the charge requested.
- R. Failing to cite State V. Hendrix in a timely manner for the continuing to shoot proposition.
- S. Failing to argue the lack of fingerprints from the steering wheel as exculpatory evidence since other fingerprint evidence was presented.

2017 SEP -5 AM 10:28
M. HOPE BLACKLEY

- T. Failing to request jury instruction that the defendant had a right to judge the conduct of the deceased more harshly than otherwise because of his intoxication.
- U. Failing to request instruction to the jury that victim's violent behavior was an unreasonable reaction to defendant having passed his road.
- V. Failing to request jury instruction that the standard for evaluating whether a defendant accused of murder had reasonable belief that deadly force was necessary to prevent great bodily harm to himself, as element of self-defense is objective rather than subjective.
- W. Failing to request jury instruction that the jury could consider the first attack by the victim on the defendant after passing his road when weighing self-defense on the second attack by trying to run the vehicle off the road.

a. Ineffective Assistance of Appellate Counsel

- a. Appellate counsel Robert M. Dudek was ineffective in failing to claim the issue of the directed verdict on self-defense.
- b. Appellate counsel Robert M. Dudek was ineffective in failing to claim the issue on the directed verdict on venue.

2017 SEP -5 AM 10:28
M. HOPE BLACKLEY

- c. Appellate counsel Robert M. Duder was ineffective in failing to raise the issue of State v. Curry to the Appellate courts.
- d. Appellate counsel Robert M. Duder was ineffective in skipping a crucial step in the appellate process.
- e. Appellate counsel Robert M. Duder was ineffective in failing to raise the issue that evidence was insufficient that the defendant acted with malice.
- f. Appellate counsel Robert M. Duder was ineffective in failing to be present at the most critical part of the appeal; Oral Argument
- g. Appellate counsel Robert M. Duder was ineffective in failing to cite State v. Day along with Fuller for the trial judge's refusal to give the requested charge to the jury.
- h. Appellate counsel Robert M. Duder was ineffective in failing to raise State v. Belcher to the Court of Appeals for the prosecutor's charge to the jury that they could infer malice because two shots were fired instead of one.

M. HOPE BLACKLEY

2017 SEP -5 AM 10:28

3. Subject Matter Jurisdiction

- a. Subject Matter Jurisdiction lacked by Spartanburg Superior Court to try indictments 2008-GS-42-5308 and 2008-GS-42-5308(A)

4. Prosecutorial Misconduct and Malicious Prosecution

- a. Ass. Att. Gen. Donald J. Zelenka lied on his brief to the Appellate Courts about the evidence and facts of the case.
- b. Prosecutor Susan Reese lied to the jury about evidence and facts of the case.

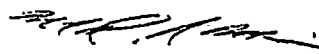
5. Abuse of Discretion by Trial Court

- a. Trial court violated Due Process by refusing to give defendant a Preliminary Hearing as timely requested.
- b. Trial court abused its discretion by refusing to direct a verdict on self-defense since defendant proved self-defense as a matter of law.
- c. Trial court abused its discretion by refusing to direct a verdict on venue since the evidence proved the incident occurred before Wal-Mart in Greer, which is located in Greenville County.
- d. Trial court abused its discretion by refusing to acknowledge State v. Hendrix for the continuing to shoot proposition.
- e. Trial court abused its discretion by failing to protect defendant's Constitutional Rights and Due Process of Law.

M. HOPKINS

2017 SEP -5 AM 10:28

STANDARD



6. Abuse of Discretion by Appellate and Supreme Court

a. Appellate court abused its discretion by refusing to grant the continuing to shoot proposition since it went to the heart of appellant's case, and because of prosecutor's highly prejudicial closing arguments.

b. Supreme court abused its discretion by citing law against Marin that contradicts itself with other law.

c. Supreme court abused its discretion by citing law against appellant that was enacted after appellant's case entered the appellate courts. ~~For~~⁴ years after

d. Supreme and Appellate court abused its discretion by not giving Marin the same equivalence as Belcher for the prosecutor's charge to the jury, that they could infer malice from ~~two~~ shots. The prosecutor said to the jury: "Ladies and gentlemen, I submit, this is malice! Not one, two shots!"

2017 SEP -5 AM 10:28
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF SPARTANBURG)

SEVENTH JUDICIAL CIRCUIT)

Manuel A. Marin, #343371,)

Case No.: 2016-CP-42-2795)

Applicant,)

(Post – Conviction Relief))

v.)

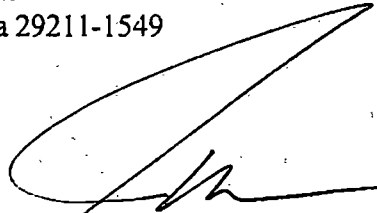
**AFFIDAVIT OF SERVICE
BY MAIL**

State of South Carolina,)

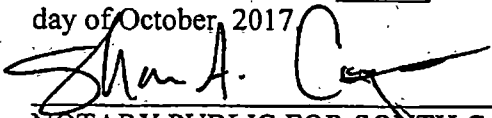
Respondent.)

I, James H. Price, III, attorney for the Applicant in the above captioned matter, hereby certify that I have on this the 10th day of October, 2017, served a filed copy of an Amended Application for Post-Conviction Relief, along with My Affidavit of Service by Mail, by placing same in the United States Mail, with proper postage affixed thereto, to the following individuals:

Valerie Giovanoli
SC Attorney General's Office
PCR Division
P.O. Box 11549
Columbia, South Carolina 29211-1549


James H. Price, III

Sworn to before me this 10th
day of October, 2017

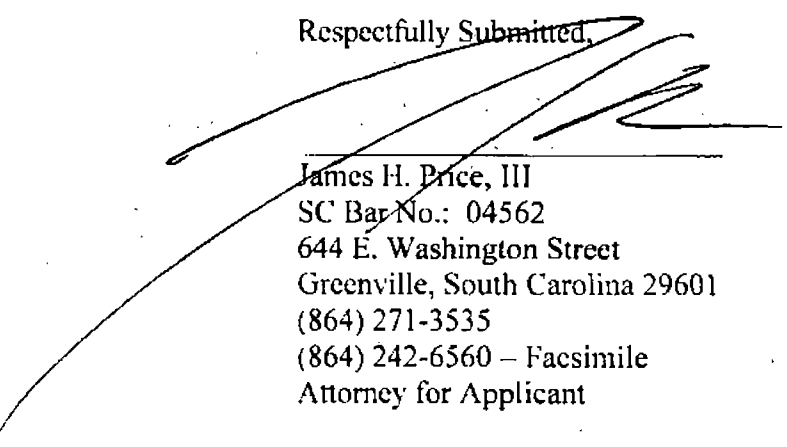

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 04-19-2027

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
Manuel A. Marin, #343371,	)	
	)	Case No.: 2016-CP-42-2795
Applicant,	)	(Post – Conviction Relief)
	)	
v.	)	
	)	SECOND AMENDED
	)	PCR APPLICATION
State of South Carolina,	)	
	)	
Respondent.	)	

Your Applicant would show unto this Honorable Court that:

1. Applicant has previously amended his PCR Application as shown from the record;
2. Applicant further amends his PCR Application by incorporating the attachments to this Second Amended PCR Application and reincorporating all previous filings.

Respectfully Submitted,


 James H. Price, III
 SC Bar No.: 04562
 644 E. Washington Street
 Greenville, South Carolina 29601
 (864) 271-3535
 (864) 242-6560 – Facsimile
 Attorney for Applicant

Greenville, South Carolina
 November 28, 2017

2017 DEC -4 AM 11:30
 M. HOPE DEACON

STATE OF SOUTH CAROLINA
 COUNTY OF SPARTANBURG
 MANUEL A. MARIN, #243371

Applicant

v.

STATE OF SOUTH CAROLINA
 Respondent

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT
 2016-CP-42-2795

MOTION TO AMEND PCR APPLICATION

NOV 13, 2017

Applicant making a motion to amend his PCR application
 filed on July 28, 2016.

1. Ineffective Assistance of Trial Counsel

Y. Trial counsel was ineffective
 in failing to object to or allowing
 falsified direct physical evidence
 to be introduced by Det. Dale Arterburn.

2017 NOV 20 AM 9:59
 N. FORT WORTH, TX

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
MANUEL A. MARIN, # 343371

Applicant

v

STATE OF SOUTH CAROLINA
Respondent

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT
2016-CP-42-2795

MOTION TO AMEND PCR APPLICATION

NOV 07, 2017

Applicant making an amendment to his PCR Application
Filed on July 28, 2016.

4. Prosecutorial Misconduct and Malicious Prosecution.
D. Suppression of evidence by prosecutor
Susan Reese.

Prosecutor Susan Reese maliciously
suppressed the steering wheel cover,
which was collected as evidence and
sent to SLED for DNA testing.

Prosecutor Susan Reese suppressed the
evidence because it was exculpatory
evidence and would have had the decedent's
DNA and proven that decedent was trying
to run the vehicle off the road and kill
everyone in the vehicle.

2017 NOV 17 AM 8:45
K. HOPE DECKLEY

Manuel A. Marin, #343371
 Perry Correctional Inst.
 430 Oaklawn Road
 Pelzer, S.C. 29669

Nov 07, 2017

The Honorable Hope Blackley
 Spartanburg County Clerk of Court
 P.O. Box 3483
 Spartanburg, S.C. 29304

Re: Manuel A. Marin v State of South Carolina
 Case No.: 2016-CP-42-2795

2017 NOV 17 AM 8:45
 M. HOPE BLACKLEY

Dear Ms. Blackley:

Respondent refuses to acknowledge the Supreme Court's ruling in Hiott v. State, 381 S.C. 622, 674 S.E.2d 491 (2009), "Rule 11 of the South Carolina Rules of Civil Procedure does not apply to PCR proceedings".

Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. *Id.* When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. See: Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007); see also: Mid-State Auto Auction of Lexington Inc. v. Altman, 324 S.C. 65, 69.

476 S.E.2d 690, 692 (1996); See also: State v. Duncan, 392 S.C. 404, 709 S.E.2d 622 (2011).

Applicant argues that respondent keeps hindering applicant from filing motions, amendments etc. to his PCR. And counsel for applicant James H. Price refuses or fails to file nonfrivolous issues, pleadings, or motions in a timely manner on behalf of applicant, which is the very reason and principle for Hiott v. State.

Due process clause guarantees aggrieved party opportunity to present case and have its merits judged. U.S.C.A. Const. Amend. 14. (especially in PCR proceed.)

Respondent may not interpret the Supreme Court's decision in Hiott to their liking, but to give it its literal meaning.

If the court will not consider the applicant's motions, then applicant requests that the Court orders applicant's counsel, James H. Price to immediately refile all of applicant's motions in question with the court in an expedient manner pursuant to Rule 3.2 of SCRC

Applicant also respectfully requests the court for an answer on the projected action by the court on the aforementioned matters.

Sincerely,


Manuel A. Marin, #345271

NOV 17 2017

AM 8:16

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
MANUEL A. MARIN, #343371

Applicant

V.

STATE OF SOUTH CAROLINA
Respondent

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT
2016-CP-42-2795

MOTION TO AMEND PCR APPLICATION

NOV 13, 2017

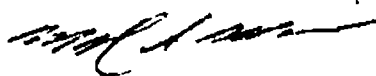
Applicant making a motion to amend his PCR application
filed on July 28, 2016.

1. Ineffective Assistance of Trial Counsel.

X. Trial counsel was ineffective
in failing to object to hearsay
testimony by Det. Dale Arterburn
about the scene or location of the
shooting since it was falsified
testimony by Det. Dale Arterburn.

M. HOFF BLAOKLEY

2017 NOV 20 AM 9:59



STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Manuel A. Marin, #343371,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

SEVENTH JUDICIAL CIRCUIT

2016-CP-42-2795

**RETURN AND PARTIAL
MOTION TO DISMISS**

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on July 28, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted by the August 2008 term of the Grand Jury for Spartanburg County for murder and possession of a firearm during the commission of a violent crime (2008-GS-42-5308). Applicant was represented by Tanya R. Jones, Esquire, at trial. Susan B. Reese, Esquire, and Jennifer A. J. Jordan, Esquire, represented the State. On October 27, 2010, Applicant was found guilty as indicted of both counts and then sentenced by the Honorable J. Derham Cole to imprisonment for the period of his natural life for murder. No sentence was imposed for count two because a life sentence was imposed for count one.

Applicant filed a timely notice of appeal. Applicant was represented throughout the appellate process by Robert M. Dudek, Esquire, and David Alexander, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction on July 3, 2013. State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). Applicant petitioned the Court of Appeals for a

rehearing, but was denied in an order filed August 22, 2013. Applicant then petitioned the Supreme Court of South Carolina for writ of certiorari. The Supreme Court granted certiorari and on March 23, 2016, the Court affirmed the decision of the Court of Appeals as modified. State v. Marin, 415 S.C. 475, 783 S.E.2d 808 (2016). The Remittitur was returned on April 8, 2016.

Attached herewith and incorporated herein by reference are the records of the Spartanburg County Clerk of Court regarding the subject convictions, the transcript from Applicant's trial, Applicant's appellate records, and Applicant's records for the Department of Corrections. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel

- a. "Failing to object to witness Diane Tabares's statement, 'He was a cancer survivor.'"
- b. "Failing to object to witness Diane Tabares's statement that she was pregnant and was due to deliver on the day of the incident."
- c. "Failing to recall the witness Larry Rodriguez to the stand and impeach the witness for lying on the stand."
- d. "Failing to object to and allowing the autopsy photographs to be entered into evidence."
- e. "Failing to have an evidentiary hearing to have defendant's camera excluded from the evidence, since the camera was tampered with prior to a warrant being secured for the contents inside defendant's truck."
- f. "Failing to have an evidentiary hearing to have the weapon excluded from the evidence since it was tampered with by Officer Jerry Powell."

- g. "Trial counsel was ineffective for not being prepared for trial, by citing the wrong cases on point for a proposition."
 - h. "Failing to object to prosecutor's highly inflammatory and prejudicial argument that the jury could infer malice because two shots were fired."
 - i. "Failing to raise the King defense after the jury came back from the deliberations, and asked the trial judge to reinstruct or repeat the instructions on murder and manslaughter."
 - j. "Failing to claim immunity under the Protection of Persons and Property Act as a pretrial motion instead of claiming it as a jury instruction."
 - k. "Failing to claim as a pretrial motion that Spartanburg Superior Court lacked jurisdiction to try the case since the incident occurred before Walmart in Greenville County."
2. Ineffective Assistance of Appellate Counsel
- a. "Appellate counsel Robert M. Dudek was ineffective in failing to claim the directed verdict of self-defense since it was dispositive issue in this case."
 - b. "Appellate counsel Robert M. Dudek or appellate court was ineffective in failing to give Marin the same treatment as in State v. Curry."
3. Various allegations of Judicial Error
- a. "The Court of Appeals wrongfully ruled on the continuing to shoot proposition since the directive went to the heart of Marin's case."
 - b. "The South Carolina Supreme Court erred by citing law against Marin which was enacted after Marin's indictment (July 21, 2008)."
 - c. Trial judge abused his discretion by not citing State v. Hendrix, after trial counsel cited such case for the continuing to shoot proposition.

III.

Applicant claims ineffective assistance of trial counsel in his application. Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286

S.C. 441, 334 S.E.2d 813 (1985). In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Butler, Id. Where ineffective assistance of counsel is alleged as a ground for relief, the 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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney 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, Id. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the 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, 386 S.E.2d at 625.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant also alleges that his appellate counsel was ineffective. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent contends that Applicant's appellate counsel rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. Respondent requests an evidentiary hearing on this allegation.

V.

Applicant's three allegations of judicial error enumerated in Section II(3) of this Return should be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20.

Objection to judicial interpretation is not a claim cognizable under the act. Moreover, post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520

(1993). Applicant could have raised these issues during the appellate process. The failure to do so has waived allegations as grounds for relief.

For these reasons and pursuant to Rule 12(b)(6), SCRCP, the Court shall dismiss the allegations for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

VI.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VII.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed or has otherwise retained counsel, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VIII.

Each and every allegation contained within the application not either expressly admitted, qualified, or explained is hereby denied.

IX.

WHEREFORE, having made its Return, Respondent requests that a hearing be held on the claims of ineffective assistance of counsel.

Respectfully submitted,

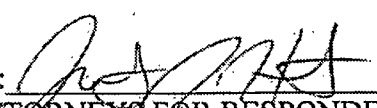
ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

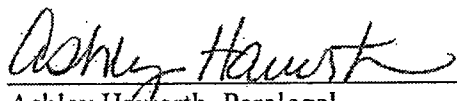
3/24, 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
	)	2016-CP-42-2795
MANUEL A. MARIN, #343371,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Partial Motion to Dismiss** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. James H. Price, III, Esquire
Price Law Firm P.A.
644 E. Washington Street
Greenville, SC 29601

DATED this 24th day of March, 2017.


 Ashley Haworth, Paralegal
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Manuel Antonio Marin, #343371,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2016-CP-42-2795

**MOTION
FOR DISCOVERY**

Respondent hereby moves this Honorable Court for an order allowing Respondent to "invoke the processes of discovery available under the South Carolina Rules of Civil Procedure." S.C. Code Ann. § 17-27-150(a).

Discovery in PCR

The Uniform Post Conviction Procedure Act comprehends and takes the place of the statutory writ of habeas corpus found in S.C. Code Ann. Sec. 17-17-10 (1985), *et seq.*, under which this action has been filed. *See* S.C. Code Ann. Sec. 17-27-20(b). The Uniform Post-Conviction Procedure Act does not allow for discovery in a non-capital post-conviction relief case without good cause and order of the circuit court authorizing discovery. S.C. Code Ann. § 17-27-150(A) states:

A party in a non-capital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for the effective utilization of discovery procedures, counsel may be appointed by the judge for an applicant who qualifies for appointment pursuant to Section 17-27-60 or similar applicable provisions of law.

(Emphasis added). Therefore, utilizing discovery in a noncapital PCR is not a right, but a tool a party must show good cause to invoke. S.C. Code Ann. § 17-27-150(A) (1976); see also Hiott v. State, 375 S.C. 354, 357, 652 S.E.2d 436, 437 (Ct. App. 2007)(“Section 17-27-150 indicates the legislature's express intent to afford PCR applicants limited use of the discovery process as stated in the South Carolina Rules of Civil Procedure.”), rev'd on other grounds, 381 S.C. 622, 674 S.E.2d 491 (2009).

The South Carolina Rules of Civil Procedure allow the “[p]arties [to] obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.” Rule 26, SCRCP.

Discovery in this case – good cause

Applicant filed an amendment, through counsel, on or about October 4, 2017. In his amendment, Applicant’s makes *forty three* separate allegations.¹ His exhaustive allegations essentially assign error to *each and every* aspect of his murder trial. The allegations include twenty three specific instances of ineffective assistance of trial counsel, eight specific instances of ineffective assistance of appellate counsel, a challenge to the subject matter jurisdiction, two allegations of prosecutorial misconduct, five allegations of abuse of discretion by the trial court and four allegations of abuse of discretion by the appellate courts.

¹ This tally does not include any allegations in the *four* other *pro se* amendments filed by Applicant while represented by counsel, as Respondent does not consider them part of the record. See Rule 11, SCRCP (requiring every pleading, motion, or other paper of a party represented by counsel to be signed by at least one attorney of record who is an active member of the South Carolina Bar).

Because Applicant alleges error on essentially every aspect of his trial, Respondent requests a list of witnesses Applicant intends to call at the evidentiary hearing, as well as any documents or tangible things Applicant intends to present to prove his numerous claims. Applicant's allegations are extremely expansive and exhaustive, but provide little substance upon which Respondent can defend without knowing what witnesses Applicant intends to call and what documents and tangible things upon which he intends to rely to substantiate his claims. Without this information, Respondent cannot properly prepare to defend Applicant's allegations. Respondent, upon this showing of good cause, is entitled to know what materials and witnesses Applicant intends to use to substantiate his claims for a new trial in order to prevent surprise or undue delay the day of the evidentiary hearing. Lastly, in the interest of justice and fairness, Respondent should be entitled to the requested information. As the *respondent* in this case, the State has provided their potential witness list to Applicant *well* in advance of the hearing.

[*Conclusion and signature to follow*]

Conclusion

Respondent therefore moves the Court for an order granting Respondent the right to invoke discovery in this matter. Respondent does not believe a hearing is necessary. If this Honorable Court deems a hearing is necessary, Respondent requests to convene a hearing during a term of PCR court in the Seventh Judicial Circuit.

WHEREFORE, the State requests that this Court order discovery.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

BY:


ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

January 11, 2018.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

) IN THE COURT OF COMMON PLEAS
)
)
)
)

2016-CP-42-2795

MANUEL ANTONIO MARIN, #343371

) Applicant,
)
)

vs

) AFFIDAVIT OF SERVICE BY MAIL
)
)
)
)

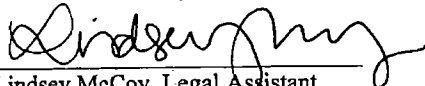
STATE OF SOUTH CAROLINA,

) Respondent.
)
)
)
)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Motion for Discovery** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James H. Price, III, Esquire
Price Law Firm P.A.
644 East Washington Street
Greenville, South Carolina 29601

DATED this 11th day of January, 2018.


Lindsey McCoy, Legal Assistant

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Manuel A. Marin, #343371)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUITCase No.: 2016-CP-42-2795
(Post-Conviction Relief)

ORDER OF DISCOVERY

2018 FEB -7 AM 11:43
H. HOPE BLACKLEYCOURT
CLERK
COUNTY

This matter comes before the Court pursuant to Motion of James H. Price, III, attorney for the Applicant, in which he seeks an Order of Discovery concerning a specific DNA/blood test requested of SLED in connection with Applicant's case on August 13, 2008. I find that the request for discovery is reasonable and should be granted under these specific circumstances.

Attached to this Order is a chain of custody form to SLED on SLED Lab No.: L08-11693. The specific item subject to this Order pertains to the test of the steering wheel cover as shown on the attached chain of custody form.

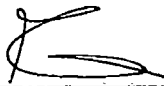
THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Within 30 days of the date of this Order SLED shall send copies of all DNA/blood test results performed on the steering wheel cover in connection with SLED Lab No.: L08-11693 (including to whom the results were sent). These test results, if any, shall be provided to Assistant Attorney General Valerie Giovanoli, South Carolina Attorney General's Office, P.O. Box 11549, Columbia, South Carolina, 29211-1549, and attorney James H. Price, III, Price Law Firm, P.A., 644 E. Washington Street, Greenville, South Carolina, 29601.

2. If no blood/DNA testing was done on the steering wheel cover SLED shall state so affirmatively in writing to both Ms. Giovanoli and Mr. Price.



IT IS SO ORDERED.

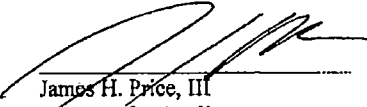


THE HONORABLE GRACE GILCHRIST KNIB
Presiding Judge - Seventh Judicial Circuit

Spartanburg, South Carolina

Feb. 5th, 2018

ISO MOVE:



James H. Price, III
Attorney for Applicant

2018 FEB -7 AM 11:44
CLERK OF COURT
CLERK OF COURT
M. HOPE BLACKLEY

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2391
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

February 7, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Manuel G. Marin
#343371
Applicant

7TH JUDICIAL CIRCUIT

CASE # 2016CP42-2795

CERTIFICATE OF SERVICE

vs.
Steve
Respondent

I certify that, on this date, I served a copy of the Order of Discovery
In this action dated 2-5-2018 on 2-7-18

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Valerie Giordano
Heidi M'Con
Susan Ross

2-7-18
(Date)

Carrie Seay
(Signature)

1 STATE OF SOUTH CAROLINA)

2 COUNTY OF SPARTANBURG)

COURT OF COMMON PLEAS NONJURY

3
4 MANUEL A. MARIN,)

5 APPLICANT,)

6 VS.)

7 STATE OF SOUTH CAROLINA,)

8 RESPONDENT.)

TRANSCRIPT

OF

RECORD

2017-CP-42-2795

9
10 February 1st, 2018
11 Spartanburg, South Carolina
12

13 B E F O R E :

14 THE HONORABLE GRACE GILCHRIST KNIE, Judge.
15

16 A P P E A R A N C E S :

17 JAMES H. PRICE, II
18 ESQ.
Attorney for the Applicant

19 VALERIE GIOVANOLI
20 ASSISTANT ATTORNEY GENERAL
Attorney for the State
21

22
23 PAMELA E. GREEN
24 Circuit Court Reporter
Seventh Judicial Circuit
25

I N D E X O F W I T N E S S E SWITNESSESPAGE

Motions 10

DALE ARTERBURN

Direct examination by Mr. Price 16

Cross-examination by Ms. Giovanoli 22

Redirect examination by Mr. Price 27

DONALD GIRNDT

Direct examination by Mr. Price 30

Cross-examination by Ms. Giovanoli 39

Redirect examination by Mr. Price 42

MANUEL MARIN

Direct examination by Mr. Price 43

Cross-examination by Ms. Giovanoli 117

Redirect examination by Mr. Price 146

TANYA JONES

Direct examination by Ms. Giovanoli 150

Cross-examination by Mr. Price 178

Redirect examination by Ms. Giovanoli 191

RUSSELL GHENT

Direct examination by Ms. Giovanoli 194

Cross-examination by Mr. Price 212

1 WITNESSES

PAGE

2

3 Certificate

222

4

5

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
	<u>Applicant's Exhibits</u>		
A-1	Diagram		64
A-2	Photograph		69
A-3	Photograph		69
A-4	Letter		76
A-5	<u>Brady</u> Material		79
A-6	Supreme Court order		83
A-7	SLED Information		109

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
	<u>State's Exhibits</u>		
S-1	Map	119	121, 130
S-2	Map	121	
S-3	Map	121	
S-4	Map	124	
S-5	Map	124	
S-6	Letter	138	139

P R O C E E D I N G S

MS. GIOVANOLI: Okay. May it please the Court?

THE COURT: Yes, ma'am.

MS. GIOVANOLI: We're gonna begin with the case of Manuel Marin versus The State of South Carolina. Docket Number 2016-CP-42-2795.

We're before the Court on an Application for Post-Conviction Relief filed on July 28th, 2016. Applicant was indicted in August of 2008 for murder and possession of a firearm during the commission of a violent crime.

Applicant was represented at trial by Tanya R. Jones, and Susan B. Reese and Jennifer Jordan represented the State.

On October 27th, 2010, Applicant proceeded to a jury trial. The facts from trial, from trial were essentially that the victim was heavily intoxicated at a Latin nightclub. Both the victim and the Applicant had been celebrating at the Colombian Independence Festival in Greenville, which led to -- them to the after party at Bongo's Nightclub in Greenville.

Towards the end of the night, the Bongo's staff was trying to find the victim a ride home because he was too intoxicated to drive. Applicant offered to take the victim home claiming he knew where the victim lived. However, when the bouncer carried the victim to Applicant's car, Applicant

1 had to retrieve the victim's driver's license to get his
2 address and then put the address in his navigation system.

3 The victim was placed in the back of Applicant's
4 Durango SUV while Applicant's then brother-in-law, Mr.
5 Jimenez, rode in the passenger seat of the car. At trial,
6 Jimenez could not be found, and it was believed he returned
7 to his home country of Mexico. However, some of his
8 statements were admitted at trial as excited utterances. He
9 was heard saying Applicant shot the victim because they
10 passed the victim's house, and, after the victim asked him
11 to stop the car, the Applicant refused to stop.

12 There was evidence presented that the shooting occurred
13 on Highway 29, 29 headed towards Spartanburg near the
14 intersection of, and I don't want to mispronounce this,
15 Tucapau Road, and that's also right there where U.S. Lumber
16 is located on Highway 29. After Applicant shot the victim
17 in the back of the head twice, he continued driving in
18 another approximately ten miles until Jimenez, his
19 passenger, got out of the car at an intersection in downtown
20 Spartanburg. The two were seen arguing outside of the car,
21 and the cops were called.

22 When the cops arrived, Jimenez was visibly upset while
23 Applicant sat calmly on the side of the road. The victim's
24 body was found dead in the vehicle with two gunshot wounds
25 to the back of the head. Applicant was covered in blood,

1 and the gun was retrieved by law enforcement. Applicant
2 testified at trial that he shot the victim in self-defense
3 because the victim was trying to run the vehicle off the
4 road by grabbing at the steering wheel.

5 Applicant was found guilty, as indicted, on both
6 counts, and then he was sentenced by the Honorable J. Derham
7 Cole to life imprisonment for the murder. Applicant did
8 file a timely Notice of Appeal, and Applicant was
9 represented by both Robert Dudek as well as David Alexander
10 of the Office of Appellate Defense.

11 The issues argued to the Court of Appeals were, number
12 one, whether the Trial Court erred in refusing to charge the
13 jury with a continue to shoot instruction. Basically that
14 if Applicant was acting in self-defense when he fired the
15 first shot, that he was entitled, entitled to continue
16 shooting until it was apparent that the danger of death or
17 serious bodily injury had ended.

18 Applicant also raised the issue of whether the Trial
19 Court erred in failing to charge part of the Protections of
20 Persons and Property Act where the Trial Court instructed
21 the jury on one portion of the PPP Act that says there's no
22 duty to retreat in one's vehicle, and they can stand their
23 ground, but not the portion that says, if he's justified in
24 using deadly force, then he's immune from prosecution.

25 So, Applicant then petitioned -- oh, yeah. The Court

1 of Appeals dismissed that appeal. They affirmed the
2 Applicant's conviction. Applicant petitioned the Court of
3 Appeals for a Petition for Rehearing, but that was denied by
4 Order filed August 22nd, 2013. Thereafter, Applicant,
5 through his appellate counsel, petitioned the Supreme Court
6 of South Carolina for writ of Certiorari only arguing the
7 first issue, the continuing to shoot jury instruction. The
8 Supreme Court granted cert and, ultimately, they held oral
9 arguments before the, before the Court, and they,
10 ultimately, affirmed the decision of the Court of Appeals
11 and his conviction.

12 Thereafter, Applicant filed his pro se application on
13 July 28th, 2016, and then later amended. He amended once in
14 October, and then he also amended another time in December.
15 And, just for the record, I did not receive the December
16 amendment from counsel until today. Our office did receive
17 pro se allegations. So, we are on notice of those, but as
18 Your Honor is aware that Applicant that are represented by
19 counsel are not suppose to file their own motions, but I'm
20 not opposing the amendment. There are three separate
21 Applications or an Application and two amendments that we'll
22 be proceeding on.

23 The Applicant -- allegations total approximately 49 by
24 my count. They include various allegations of ineffective
25 assistance of trial counsel, ineffective assistance of

1 appellate counsel, as well as improper claims of lack of
2 subject matter jurisdiction, prosecutorial misconduct, Trial
3 Court error, and Appellate Court error.

4 So, at this time, we'd move for summary dismissal of
5 improper claims because they're, number one, not cognizable
6 under the PCR Statute, and, number two, some of them are
7 direct appeal claims, and the PCR Act is very clear that PCR
8 is not a substitute for a direct appeal. So, as -- if those
9 are not pursued on a direct appeal, then they cannot be
10 pursued on -- at PCR.

11 So, at this point, I will hand it over to counsel. I
12 might mention that Mr. Marin is present and represented by
13 Mr. Chip Price, and The State is present and ready to
14 proceed. I believe there's a few procedural matters we also
15 need to take up, and I'll go ahead into one of them. We do
16 not have trial counsel in this State. So, she is not under
17 any duty to comply with any subpoena that we could issue.
18 She's living in Oklahoma now, but she has agreed to testify
19 by phone, and, at this time, I would move the Court to
20 accept that testimony.

21 I know it's not ideal, but, in the circumstances that
22 exists, I think, in all fairness, she should be allowed to
23 testify by phone to defend the allegations against her.

24 THE COURT: Okay. Well, there are several matters that
25 you brought up.

1 Mr. Price.

2 Well, let me, let me first make sure that I have all
3 the documents that I need.

4 Is the, the second amended PCR Application that is
5 recorded on December the 4th of 2017, Mr. Price, is that the
6 last amendment?

7 MR. PRICE: That is the last amendment, yes, ma'am.

8 THE COURT: And my understanding from Ms. Giovanoli is
9 that, ma'am, you are not objecting to this amendment?

10 MS. GIOVANOLI: I am not.

11 THE COURT: Okay. That's good.

12 All right. And so, now, Mr. Price, with regard to the
13 other issues raised by counsel.

14 MR. PRICE: As far as the -- let's deal with the
15 telephone testimony first.

16 THE COURT: Yes, sir.

17 MR. PRICE: Ms. Giovanoli and I have been discussing
18 this for some time now. This does not come as a surprise to
19 me. Personally, I have no objection.

20 My client's wish is it -- are you instructing me to
21 place an objection to the telephone --?

22 THE APPLICANT: I believe she should be here and not---

23 MR. PRICE: I, I agree, and, in a perfect world, she
24 would be here. But depending on the Judge's ruling, her
25 testimony is either gonna be by telephone or nothing.

1 THE APPLICANT: Well, she forfeit -- I mean you don't
2 want -- I accept that.

3 MR. PRICE: Excuse me?

4 THE APPLICANT: I accept her phone call testimony.

5 MR. PRICE: I didn't understand.

6 THE APPLICANT: Yes, that is fine.

7 MR. PRICE: Well, you accept it?

8 THE APPLICANT: I accept it.

9 MR. PRICE: All right. My client does not have an
10 objection to her telephone testimony.

11 THE COURT: And this is the testimony of -- is it Tonya
12 or Tanya Jones?

13 MR. PRICE: Tanya is my understanding.

14 THE COURT: Tanya Jones.

15 MS. GIOVANOLI: Tanya is my understanding too.

16 THE COURT: Okay. And where does Ms. Jones reside at
17 this time?

18 MS. GIOVANOLI: In Oklahoma, and, just for the record,
19 she's in the process of moving to Atlanta. So, if she's
20 made that move, I don't want to misrepresent anything to the
21 Court.

22 THE COURT: Okay. So, I will allow the telephone
23 testimony of Ms. Jones. We have done that before in these
24 types of proceedings and we can accommodate that.

25 MS. GIOVANOLI: Thank you, Your Honor. And if---

1 THE COURT: All right.

2 MS. GIOVANOLI: If I may also try to call her so she
3 can hear the proceedings prior to her testifying. She may
4 or may not be able to hear from my cell phone, but I just
5 wanted to give her that opportunity to at least hear the
6 allegations against her from the stand.

7 THE COURT: Any objection to that?

8 MR. PRICE: No, ma'am, I have no objection.

9 THE COURT: All right. And then I will allow that.

10 MS. GIOVANOLI: Thank you, Your Honor.

11 THE COURT: I'll allow it.

12 Okay.

13 MR. PRICE: The remainder of Mr. Giovanoli's
14 objections, as far as my client's allegations that have to
15 do with appellate counsel matters or jurisdiction matters, I
16 think they need to be dealt with on a claim by claim basis
17 especially on the jurisdictional basis cause that's gonna be
18 tied in to Sixth Amendment type issue, instructions on how
19 to proceed with the case. I don't think we can do so at
20 this time.

21 THE COURT: Okay. And I'm fine to take that up as it
22 comes.

23 Okay. All right. And so, counsel, just so you are all
24 aware of what I have, and, and you, if you need to
25 supplement this or you're planning on admitting anything

1 else, I have, in the file that has been presented to me by
2 the Attorney General, I have a copy of a transcript from
3 October the 25th through 27th of 2010.

4 I have the remittitur that was mailed to our Clerk on
5 April the 8th of 2016.

6 I have the copy of the indictment and verdict and
7 sentencing information. Well, yes, I have the sentencing
8 sheets, and the arrest warrant, and then I have the original
9 Application, which was filed on July the 28th of 2016.

10 I have an Amended Application, which was filed on
11 October the 4th of 2017, and I have a Second Amended
12 Application filed on December the 4th of 2017, and I have a
13 return and partial Motion to Dismiss dated March the
14 24th of 2017.

15 So, is there any -- are there documents that I am
16 missing before we commence?

17 MS. GIOVANOLI: I didn't hear you say the SCDC records.

18 THE COURT: Oh, I have that.

19 MS. GIOVANOLI: And, also, when you said the
20 remittitur, it's actually a full packet of the appellate
21 records, all the briefs that were filed, petitions, and
22 whatnot.

23 THE COURT: Yes, ma'am.

24 MR. PRICE: And does your record also include the South
25 Carolina Supreme Court final decision?

1 MS. GIOVANOLI: It should in the direct appeals
2 records.

3 THE COURT: Okay. One---

4 MS. GIOVANOLI: The remittitur is on top. The decision
5 would be on the very next page. It kind of goes in
6 chronological order. Most recent to oldest.

7 THE COURT: Yes, I do. I have an opinion dated April
8 the 8th of 2015.

9 MR. PRICE: Yes, ma'am.

10 THE COURT: Okay. Thank you.

11 Anything else, counsel, before we begin?

12 MR. PRICE: I can't think of anything, Your Honor.

13 THE COURT: Okay. All right. Are you ready?

14 MR. PRICE: Yes, ma'am, my first witness will be
15 Detective Dale Arterburn.

16 THE COURT: Okay.

17 Good morning, detective.

18 THE WITNESS: Good morning.

19 DALE ARTERBURN, being first
20 duly sworn, testified as follows:

21 THE COURT: Okay. If you will take -- yeah, that chair
22 and make yourself comfortable, sir.

23 THE WITNESS: Sure.

24 MS. GIOVANOLI: And, if you will, since your last name
25 is a little unusual, if you will spell that for our court

Dale Arterburn - Direct examination
by Mr. Price

1 reporter.

2 THE WITNESS: Yes, ma'am, last name's spelled

3 A-R-T-E-R-B-U-R-N.

4 THE COURT: Okay. Thank you.

5 Yes, sir.

6 DIRECT EXAMINATION

7 BY MR. PRICE:

8 Q Mr. Arterburn, how are you today, sir?

9 A I'm good. Thank you.

10 Q Good. It's good to see you again.

11 You are a detective with the Greer City Police
12 Department?

13 A That is correct.

14 Q And have been so for 22 years now?

15 A I've been employed for 22 years. I've been
16 investigating for about 16 of those out of the 22, yes, sir.

17 Q All right. And what are your general duties or let's
18 go back to 2010.

19 Were you a detective back then?

20 A Yes.

21 Q Okay. And did you have anything to do with the Marin
22 case in 2008?

23 A Yes, sir.

24 Q And let me ask you, in 2010, specifically in October,
25 had you had any accident reconstruction training?

1 A No, sir.

2 Q Had you ever been declared to be an expert in the field
3 of automobile accident reconstruction?

4 A No, sir.

5 Q And -- all right. Well, let's go back.

6 I believe you testified in the trial against Mr. Marin?

7 A That's correct.

8 Q And just to streamline things, basically you took a
9 witness, a Mr. Jimenez, from Spartanburg back to Greer, did
10 you not?

11 A Yes, sir.

12 MR. PRICE: And, Your Honor---

13 A I'm sorry. We took him from Spartanburg to Greenville.

14 Q Greenville.

15 A That's correct.

16 MR. PRICE: Okay. And, Your Honor, that reference in
17 the transcript will be Page 39, Lines 12 through 24.

18 THE COURT: Yes, sir.

19 MR. PRICE: Can you hear me?

20 MS. GIOVANOLI: I can.

21 MR. PRICE: Okay.

22 MS. GIOVANOLI: Thank you.

23 Q Didn't mean to cut you out -- just --.

24 All right. Now, Mr. Jimenez originally told you that
25 the shooting incident occurred near a Wal-Mart in Greer, did

1 he not?

2 A He did not, he did not tell us or myself that. That
3 information was provided to officers at Spartanburg City
4 Police Department.

5 Q All right. So, Mr. Jimenez told Spartanburg and
6 Spartanburg told you that?

7 A That is -- yes, sir, that's my understanding. We
8 received a phone call. I say we, as in myself and my
9 Lieutenant at the police department, that needed us to go to
10 Spartanburg, downtown Spartanburg, because something had
11 happened in Greer.

12 Q In Greer?

13 A Yes, sir.

14 Q All right. And that somewhere in Greer was at the
15 wal-Mart on Highway 29?

16 A That was the information that we were told, yes, sir.

17 Q which was in Greenville County?

18 A Spartanburg County.

19 Q The wal-Mart?

20 A Yes, sir.

21 Q Okay. weren't you -- didn't you also go into
22 Greenville County?

23 A We did drive to Greenville County.

24 Q okay.

25 A Yes, sir.

1 MR. PRICE: And, Your Honor, those transcripts and
2 pages are Page 143, Lines 24 to 25, 144, 1 through 5, 145,
3 18 through 23.

4 THE COURT: Thank you.

5 Q And you originally went to Greenville County, and then
6 you subsequently went to another location in Spartanburg
7 County, Tucapau Road or something like that?

8 A We did. With, with the information that we had
9 gathered, we, we did go with a witness starting from a point
10 of where this -- they all came into contact with each other,
11 which was in Greenville, and took his information and
12 followed his direction to the route that they traveled to
13 where the car came to stop.

14 Q Okay.

15 A That did take us through Greenville, Greer, and into
16 Spartanburg Wellford area, the Spartanburg County area,
17 towards Tucapau Road, that's correct.

18 Q And at someplace in Tucapau Road, and that's spelled
19 T-A-C-A-P-A-U?

20 Is that correct?

21 A It's---

22 Q I got you.

23 A To be honest with you, I've only been by that road a
24 couple hand full of times. I've never really paid much
25 attention to the spelling.

1 Q Your testimony was you found some -- what you
2 determined or what you testified to, without objection, as
3 fresh tire marks and some debris?

4 A That's correct. There was, there was tire marks along
5 that median area as well as some type of -- it appeared to
6 be vehicle -- different vehicle debris---

7 Q Okay.

8 A ---particles.

9 MR. PRICE: Your Honor, that's Transcript 140, Line 17
10 through 25.

11 All right. But you did not do any type of examination
12 on those tire marks, did you?

13 A No, sir.

14 Q You did not, as far as the debris, did you take any of
15 that debris with you?

16 A No, sir.

17 Q Did you photograph that debris?

18 A No, sir.

19 Q Did you do anything to compare that debris with the car
20 that was in Spartanburg County that had previously been
21 occupied by Mr. Jimenez and Mr. Marin?

22 A No, sir.

23 Q Okay. So, basically, at that point, you were relying
24 on what Mr. Jimenez was telling you?

25 A That's correct.

1 Q And you were allowed to testify about that without
2 objection during the trial?

3 A Yes, sir.

4 MR. PRICE: And, Your Honor, those transcript
5 references would be Page 146, Lines 9 through 10, 141, Lines
6 1 through 25.

7 THE COURT: Yes, sir.

8 Q But, at the end of the day, your initial information
9 was that the shooting happened in Greenville County?

10 A I'm, I'm sorry?

11 Q That the shooting had happened in Greenville County?
12 That's what you were, were told initially---

13 A No, sir. No, sir.

14 Q ---by Spartanburg?

15 A I was told that it happened in Greer, but on the
16 Spartanburg County side of Greer.

17 Q Okay.

18 A Our, our line actually splits further up, but, where
19 the wal-Mart -- well, at that time, we only had one Super
20 wal-Mart in 2008, and that's ones -- where it, where it was
21 located was on the Spartanburg County side of Greer city
22 limits.

23 Q The line -- how far, how far is Greenville County from
24 the wal-Mart?

25 A I would say roughly two miles.

Dale Arterburn - Direct examination
by Mr. Price

1 Q Two miles.

2 Okay.

3 A If I'm not mistaken. Somewhere within a mile and a
4 half to two miles.

5 Q But, again, at the end of the day, you did nothing,
6 scientific or otherwise, to compare debris or road scrapes,
7 or anything like that with the Marin vehicle?

8 A No, sir.

9 MR. PRICE: Okay. Your Honor, that's all I'd have of
10 Mr. Arterburn.

11 THE COURT: Okay. Ms. Giovanoli.

12 MS. GIOVANOLI: Thank you, Your Honor.

13 THE COURT: Giovanoli.

14 CROSS-EXAMINATION

15 BY MS. GIOVANOLI:

16 Q Good morning, detective.

17 A Morning.

18 Q So, I just want to get a little bit of the background.
19 Spartanburg informed you that they had some evidence
20 that the shooting had occurred at the Wal-Mart in Greer,
21 which is in Spartanburg.

22 Is that correct?

23 A That is correct. The information we received was that
24 there was an individual who provided the information to them
25 that this took place in front of the Wal-Mart in Greer.

1 Q And is it your understanding that that witness was
2 Jimenez?

3 A That's correct.

4 Q And Jimenez was the passenger of the defendant's car?

5 A Yes, ma'am.

6 Q Okay. And then, after that, you took him back to, I
7 guess, Bongo's where you started -- where they started in
8 Greenville.

9 Is that correct?

10 A That is correct. After meeting with him, and his
11 cooperation, he, he provided to go with us, along with us to
12 Bongo's where the, where they -- where they all met up, and
13 we kind of wanted to rewind the night and just start to
14 where, where did this happen because there's a lot of
15 different wal-Marts along the way between Bongo's and where
16 they ended up, I assume. So --.

17 Q But your testimony is that there's only one wal-Mart in
18 Greer at that time?

19 A In Greer, yes.

20 Q Okay.

21 A But the route, the route that they had allegedly taken,
22 there's many along that way, and that's what we wanted to
23 see, where their night started cause there's, there's
24 wal-Marts in Greenville County out past Bongo's. There's
25 wal-Marts down toward Spartanburg. So, there's not just one

1 along that, that route.

2 Q Sure.

3 And so this is probably an easily answered question.

4 A Sure.

5 Q But what was the purpose of you driving that route?

6 A To establish jurisdiction --

7 Q Okay.

8 A -- mostly to figure out where this occurred at so we'd
9 know whose jurisdiction it would be to investigate this case
10 further on.

11 Q And was Jimenez helpful in doing that?

12 A Yes, he was.

13 Q Okay. And did he remember the exact route that was
14 taken that night?

15 A He did, to the most part. He, he -- I think there was
16 a little deviation on how they got back to 29, but there's
17 several roads that actually lead back to 29.

18 Q Okay. And it was actually called West Wade Hampton in
19 that area?

20 A (Witness nods affirmatively.)

21 Q And, by several, you mean there's about three different
22 routes from where they were to get to Spartanburg?

23 A Oh, absolutely. Maybe, maybe more. I don't know.

24 Q Okay.

25 A But at least three.

1 Q And Jimenez remembered passing the Wal-Mart in Greer---

2 A That---

3 Q ---that night?

4 A Yes.

5 Q Prior to the shooting?

6 A Yes, ma'am.

7 Q Okay. And so you guys ultimately wound up around the
8 Tucapau area, and, other than the fresh tire marks, how else
9 did you determine that that was the area that, that the
10 shooting occurred?

11 A There was debris as well as -- as what appeared to be
12 fresh tire tracks on the roadway. The information that was
13 provided was consistent with what had been provided to us
14 that this is where this occurred---

15 Q Okay.

16 A ---through Jimenez.

17 Q From Jimenez?

18 A That's correct.

19 Q Okay. And counsel brought out the fact that you didn't
20 take pictures. You didn't examine the tire marks to see if
21 they matched the Defendant's vehicle. You didn't compare
22 any of the debris to the Defendant's car.

23 why did you not do that?

24 A Out of common courtesy, I don't investigate other
25 people's crimes, and I wouldn't want them to investigate

1 mine either. Once jurisdiction's established, the, the
2 county jurisdiction was for Spartanburg County, and we
3 provided the location, what the information was provided us,
4 and returned their witness back to them, and asked if
5 there's anything else we can do because it didn't happen in
6 Greer.

7 Q So, that location was not in Greer?

8 A Absolutely, no, ma'am.

9 Q It was not in your jurisdiction?

10 A No, ma'am.

11 Q Okay. And did you relay that information to
12 Spartanburg County?

13 A Yes, ma'am, or, I'm sorry, it was relayed to
14 Spartanburg City, and I'm assuming that the information was
15 then passed on to them. I don't know who we spoke with, but
16 we did let them know that it did not happen in Greer City
17 limits.

18 Q So, other than retracking the route, did you do any
19 other investigation in this case?

20 A No, ma'am.

21 Q Did you write a report in this case?

22 A No, ma'am.

23 Q Okay. So, you found the location, hands off, it's not
24 mine?

25 A That's correct.

1 Q Okay. No further questions. Thank you.

2 THE COURT: Any redirect?

3 MR. PRICE: Yes, ma'am.

4 REDIRECT EXAMINATION

5 BY MR. PRICE:

6 Q Mr. Arterburn, there's nothing that you did that tied
7 that area in Tucapau Road to the vehicle that was later
8 found in Spartanburg?

9 A Nothing that I did?

10 Q Yes, sir.

11 A Other than arrived to that location, and witness what
12 was told to us, no.

13 Q And you, you had a witness with you?

14 A Yes, sir.

15 Q And that witness did not testify at trial?

16 A That I don't know. I was not---

17 Q Okay.

18 A ---present for that trial.

19 Q Let's assume, for the purpose of my conversation or
20 my---

21 A Yes, sir.

22 Q ---I represent to you that Mr. Jimenez did not testify
23 at trial.

24 So, you were allowed to testify as to what Mr. Jimenez
25 told you?

1 A Yes, sir.

2 Q During the trial?

3 A That's my understanding.

4 Q Yes, sir.

5 A Right.

6 Q But, again, nothing that you did tied the scene in
7 Spartanburg County to the vehicle?

8 A No, sir.

9 Q Okay. Did you examine the vehicle in Spartanburg
10 County when you first were called to where it was found in
11 downtown Spartanburg?

12 A Can I ask you to---

13 Q All right.

14 A ---describe -- what, what do you mean by examine?

15 Q Well, my, my client---

16 A Observe---

17 Q ---asked me to show you a picture --

18 A Sure.

19 Q -- which he represents is a picture of the vehicle in
20 downtown Spartanburg after the police were called.

21 Did you examine that car?

22 A I don't ever remember recalling looking at it from this
23 angle, no, sir.

24 Q Okay. Do you recognize any -- anything about this car
25 or the hole in it or the radiator or any defects in this

1 car?

2 A I couldn't tell you what color it is to be honest with
3 you right now, but it, it appears to be the front end of a
4 vehicle where the radiator sits just from the, the
5 minimal---

6 Q But do you know---

7 A ---education I have in mechanics.

8 Q Good show.

9 But do you know which car this is?

10 A I would -- to -- if you're telling me it's his car, I
11 would say it's, it's his.

12 Q But if I did not tell you that, would you have any---

13 A I would---

14 Q ---idea?

15 A I wouldn't know.

16 (Pause.)

17 MR. PRICE: I have no further questions of this
18 gentleman, and I'd ask that he be excused.

19 THE COURT: Any objection?

20 MS. GIOVANOLI: I have no objection.

21 THE COURT: Okay. Detective, thank you so much for
22 being here.

23 THE WITNESS: Thank you.

24 THE COURT: Watch your step.

25 THE WITNESS: Thank you.

1 THE COURT: You may be excused, sir---

2 THE WITNESS: Wonderful.

3 THE COURT: ---if that's your wish.

4 THE WITNESS: Wonderful.

5 MR. PRICE: Your Honor, my client asked me to call
6 Mr. Don Girndt to the stand.

7 (Pause.)

8 THE COURT: Good morning, sir.

9 THE WITNESS: Morning.

10 DONALD GIRNDT, being first duly
11 sworn, testified as follows:

12 THE COURT: Thank you, sir. Watch your step. Pull
13 yourself up to that microphone. Make yourself comfortable,
14 and spell your last name for the record.

15 THE WITNESS: Donald Girndt. G-I-R-N-D-T.

16 DIRECT EXAMINATION

17 BY MR. PRICE:

18 Q Mr. Girndt, good morning.

19 How are you?

20 A Good. Thank you.

21 Q Tell me where you live.

22 A In Columbia.

23 Q And what do you do?

24 A For purposes of this hearing, I'm a forensic
25 consultant. I specialize in the areas of crime scene

1 analysis, blood stain pattern interpretation, and
2 fingerprint identification.

3 Q And can you tell me what your educational background is
4 and what your professional background is?

5 A I have Associate and Bachelor's Degrees from the
6 University of South Carolina. I was Sergeant in the Marine
7 Corp for four years, and, once getting out of the Marine
8 Corp, I went into law enforcement in South Carolina. I was
9 at the Lexington County Sheriff's Department, Richland
10 County Sheriff's Department, and eventually end up at SLED
11 in the crime scene unit where I stayed for eight and a half
12 years. And, at the end of the 25 years, I retired in
13 December of 1994.

14 I currently work part-time with the University of South
15 Carolina Police Department as the latent fingerprint and the
16 AFIS operator. So --.

17 Q Okay. And do you stay current in the field of crime
18 scene by any education or seminars or anything like that?

19 A Mostly through review of cases. I don't attend very
20 many seminars now, but I, I still review cases for various
21 departments.

22 Q When you were with SLED, you said you were with crime
23 scene reconstruction or crime scene investigation for eight
24 and a half years?

25 A Yes.

1 Q And tell the Court what you would do on a typical crime
2 scene.

3 A Well, typically SLED is, as you know, is assisting
4 agency. So, they're very few large departments in the
5 State, at that time, who could handle crime scenes. So, of
6 course, we didn't come to Spartanburg very much or
7 Greenville or Charleston. Those kind of places have their
8 own units, but we would assist all the smaller departments
9 who may have a murder every five years or ten years.
10 Something that just really didn't have the equipment to
11 handle it. So, we would handle it from beginning to end
12 from the investigation and carry it all the way to Court,
13 which included fingerprint identification, collection of
14 evidence, submitting it to the correct laboratories for
15 disbursement, and then seeing it in the Court till, till it
16 ends.

17 Q All right. And, during the time that you were with
18 SLED, were you qualified as an expert by a, by any Court to
19 testify as a crime scene analyst or reconstruction expert?

20 A Yes, I've testified numerous times in both North
21 Carolina, South Carolina, Federal Court, State of Georgia,
22 Maryland in crime scene, blood stain pattern, and
23 fingerprint identification.

24 Q Okay. Now, since you left SLED, you have been involved
25 as a consultant in the same fields?

1 A Yes, sir.

2 Q All right. Now, as a consultant, you obviously or I
3 would imagine that you do not go to the crime scene when it
4 is fresh being investigated by law enforcement agencies?

5 A No, I usually don't get involved until some time later
6 or perhaps a short time before the case goes to trial or,
7 you know, no, I -- crime scenes are not fresh --

8 Q Okay.

9 A -- at the time.

10 Q And, as a consultant, I'm assuming you rely on
11 discovery, photographs, transcripts, and the like.

12 Is that---

13 A Yes.

14 Q And are you able to formulate an opinion as far as a
15 crime scene analysis or reconstruction by using discovery in
16 a criminal case?

17 A Yes, generally, if it's a well documented case, through
18 photography, and case summary notes, autopsy notes, autopsy
19 photographs, that kind of thing, depending on what kind of
20 case it is, but, but, generally, yes.

21 Q And since you went out on your own as a consultant in
22 handling cases kind of after the fact I would say, have you
23 been qualified as an expert to testify as far -- in the
24 scene -- of crime scene investigation?

25 A Oh, yes.

1 Q On how many occasions?

2 A You know, I, I printed that out this morning. I left
3 it in the car when I got out of the car this morning.

4 For the, for the defense primarily?

5 Q For a defense or the State.

6 A Around 90 times.

7 Q Okay.

8 A I mean all together. I mean I had a separate list for
9 the defense and for the State, but --.

10 Q All right. So, you testify both for the State and for
11 the defense?

12 A Yes.

13 Q If asked to do so?

14 A Yes.

15 MR. PRICE: Your Honor, at this time I would offer him
16 as an expert in the field of crime scene analysis and
17 reconstruction.

18 THE COURT: Counsel.

19 MS. GIOVANOLI: And I have no objection to this
20 gentleman's qualifications.

21 THE COURT: So qualified.

22 Q Mr. Girndt, were you hired recently to formulate an
23 opinion concerning the, the Marin case?

24 A Well, I was hired to review the material in the case.

25 Q And---

1 A Not specifically to formulate an opinion.

2 Q Well, I understand. Well---

3 A Right.

4 Q I'm assuming, if you're gonna be hired, you're gonna
5 have an opinion---

6 A Right.

7 Q ---at one point?

8 A Yeah.

9 Q You were given disks of discovery, were you not?

10 A Yes, sir.

11 Q You were given the autopsy report, were you not?

12 A Yes, sir.

13 Q You were given a hundred or so photographs?

14 A I think there were many more, many more than that.

15 Q Okay. A lot of photographs?

16 A A lot of photographs.

17 Q Anyway, you were given what was represented to be the
18 entire discovery disk in the Marin case?

19 A Yes, sir.

20 Q And tell the Court what you looked at during -- as far
21 as that discovery?

22 A Well, what I try to do is go through the case, and see
23 what the facts of the case are. And then I go back and look
24 at the crime scene photos. In this case, it was an autopsy
25 report. In this case, also, it had already been to trial.

1. So, a portion of the trial transcript, transcript was
2. provided to me, and I looked over that, and just to see how
3. things fit together, and see if there were any discrepancies
4. and that type of thing.

5. In this particular case, the facts are, as I understand
6. them, is that the deceased, in this case, was in the back
7. seat of a car, and, at some point, came forward in the car
8. and, for whatever reason, maybe whatever it is, grabbed the
9. steering wheel to try to wreck the car. At some point, he
10. was shot.

11. So, what I looked at, in that particular case,
12. primarily photographs from the inside of the car, and what
13. I'm looking for there is the, the blood flow pattern in
14. particular, and, in this particular case, the body is
15. forward in the cab of the car, and slumped forward and all
16. the blood flow is down and away from the back of the shirt.

17. So, that tells me he was pretty much in that position
18. or pretty much in that area at the time that the
19. bloodletting occurred. And also what I looked at, in
20. reference to that, is the back of his shirt. He's wearing a
21. white shirt. It's fairly clean, which means no blood flowed
22. down the back of the shirt. So, he was forward in the cab.

23. And also what I looked at is the blood stain pattern
24. that was on the overhead light, the dome light, in-between
25. the passenger seat and the driver's seat, and what I'm

1 looking for there is there is what we refer to as high speed
2 spatter on the driver's side of the dome light.

3 And what that's -- what that relates to is that, when a
4 person is shot and, in this instance, in the back of the
5 head, there's two types of spatter that we look for. One is
6 called forward spatter. That's when the bullet, if it
7 penetrates the head and goes out the other side, the bullet
8 carries the spatter -- carries the blood forward. And, as
9 it goes forward, it, it -- I didn't see any really good
10 picture of the windshield. I'm sure there was some on the
11 windshield, and then there was some of the, on the upper
12 dome.

13 And then what we have, the other types of spatter, it's
14 called back spatter, and that's where the blood -- say, in
15 this particular case, from the wound in the back of the
16 head, it has a hydraulic affect, and what it does is it --
17 the bullet displaces the tissue and the blood, and it goes
18 backwards toward the gun. And I think there was some
19 testimony about that by Agent Black testifying that the gun
20 had some blood on it, and some in the barrel, which is
21 typical of a close or a contact type situation.

22 Q I understand.

23 Did you also read Manuel Marin's trial testimony in the
24 transcript?

25 A I think I did, yes, sir.

1 Q Okay. Now, based on your examination of the crime
2 scene through the photographs and the records that you
3 reviewed and Mr. Marin's testimony, do you find anything
4 inconsistent with Marin's testimony than what you saw in the
5 crime scene photographs?

6 A No, I didn't. I think everything's -- I think the
7 crime scene was generally accepted as the way it was. What
8 I looked for in the photographs is in the blood flow -- in
9 the blood stain patterns is that -- whether or not the body
10 had been moved afterward. Say example, this happened
11 somewhere else and they moved the body, but, in this
12 particular instance, everything I see indicates that the
13 body just stayed right where it was. Just kind of --

14 Q I understand.

15 A -- went straight down. The only other thing I would of
16 done, as the crime scene technician on that case maybe,
17 would of been to run a dowel, a wooden dowel, through that
18 hole in the windshield back across that area where the body
19 was found, and what that would do is give an elevation to
20 the head approximately where he was. Of course, we -- it's
21 a small area to begin with, but it would just bring it a
22 little closer.

23 Q But that wasn't done though, was it?

24 A It wasn't done.

25 Q Or at least you were -- we have no pictures of that

Donald Girndt - Direct examination
by Mr. Price

1 being done?

2 A I didn't, I didn't see any of it then.

3 Q Okay.

4 A And the other thing I noticed was the, the hands were
5 not bagged. It's customary to bag the hands of, of the
6 victim prior to moving them, and the purpose of that is so
7 that you don't lose any evidence or you don't gain any
8 evidence.

9 Q All right. But the question is, based on your
10 examination of the car, the pictures, the reports and the
11 like, and Marin's testimony, Mr. Marin's testimony was
12 consistent with what you saw in the crime scene?

13 A Yes.

14 Q Answer anything that the State has.

15 THE COURT: Cross.

16 CROSS-EXAMINATION

17 BY MS. GIOVANOLI:

18 Q Good morning. Thank you for being here.

19 A Thank you.

20 Q So, in your testimony that you reviewed all of this
21 discovery that included the crime scene photos, the autopsy
22 reports.

23 Did you also view the autopsy photos?

24 A Yes.

25 Q Okay. And in your review of this, was it consistent

1 with the shot coming from the driver's seat?

2 A Well, one was---

3 Q The victim being shot from someone that was in the
4 back?

5 A Well, one was virtually straight, and then the other
6 one would of been diagonal from the driver's side, right.

7 Q Okay. But the blood splatter, the blood splatter you
8 testified that it was on the driver's side of the dome
9 light.

10 So, is that consistent with the gunshot coming from the
11 driver's seat or the passenger's seat?

12 A That's consistent with his head being to the left of
13 the dome light at the time the bullet passed through, and
14 then the spatter is kind of a -- it's kind of conical---

15 Q Right.

16 A ---like this.

17 Q Sure.

18 A So, that would of been blocked.

19 Q But that was, that was forward spatter, right?

20 A Forward spatter.

21 Q So, it would be where the bullet was traveling to?

22 A Right. Right.

23 Q And so, if it was on the driver's side of the dome
24 light, that means the bullet came from some side on, on the
25 driver's side?

1 A I would think so, yeah.

2 Q Okay. And you said that you would of placed a wooden
3 dowel rod through the windshield to determine the trajectory
4 I assume?

5 A It's just customary to do that, yeah.

6 Q But you don't know if that was done or just---

7 A I didn't see any photos of it. I didn't see it
8 mentioned.

9 Q Okay. And could you tell from the photos that the, the
10 bullet hole through the windshield had an upward trajectory?

11 A I could not tell. It was fairly round, but I don't
12 know what slope the win -- that -- that's the purpose of the
13 dowel is, is to see what the trajectory is.

14 Q Okay. And your testimony is that the defendant's
15 testimony at trial is consistent with your review of the
16 evidence.

17 Is that correct?

18 A Yes.

19 Q But you can't testify -- you don't know if this was
20 self-defense?

21 A Oh, no.

22 MS. GIOVANOLI: Okay. Beg the Court's indulgence.

23 THE COURT: Yes, ma'am, take your time.

24 (Pause.)

25 Q I have no further questions. Thank you.

1 THE COURT: Okay. Redirect.

2 REDIRECT EXAMINATION

3 BY MR. PRICE:

4 Q But the flip side of that is you can not testify that
5 it wasn't self-defense, can you?

6 A No, the only thing -- no, I can't.

7 Q Okay.

8 MS. GIOVANOLI: No further questions.

9 MR. PRICE: Your Honor, subject to being recalled as a
10 reply witness, I have no more questions for this gentleman.

11 THE COURT: Okay. Counsel.

12 MS. GIOVANOLI: I have no further questions either.

13 THE COURT: All right. So, sir, if you don't mind, if
14 you'll hang around. You may be recalled. You don't have to
15 necessarily stay in the courtroom unless Mr. Price instructs
16 you to do so, but I, I wouldn't wonder too far.

17 THE WITNESS: Okay. Thank you.

18 THE COURT: There is a canteen downstairs.

19 THE WITNESS: Thank you.

20 THE COURT: Thank you, sir.

21 MR. PRICE: Your Honor, our next witness would be the
22 Applicant.

23 THE COURT: Okay. Mr. Marin.

24 THE WITNESS: Yes, ma'am.

25 THE COURT: Correct?

1 Yes, sir, you may need some assistance in bringing
2 those documents up with you---

3 THE WITNESS: Yes.

4 THE COURT: ---if that is your wish.

5 Good morning, sir.

6 THE WITNESS: Morning.

7 THE COURT: If you'll raise your right-hand for me.

8 MANUEL MARIN, being first duly
9 sworn, testified as follows:

10 THE COURT: Yes, sir. Watch your step, and then sit in
11 that chair. Pull yourself forward.

12 Okay.

13 And let's, let's state your name for the record.

14 THE WITNESS: My name is Manuel Marin.

15 THE COURT: Okay. All right. All right. Thank you,
16 sir.

17 Mr. Price has your documents.

18 DIRECT EXAMINATION

19 BY MR. PRICE:

20 Q You get organized like you want to before we start.

21 okay?

22 THE COURT: Yes, sir, just take your time.

23 Q I'll put some water right here.

24 A Thank you.

25 MR. PRICE: I believe I'm ready, Your Honor.

- 1 THE COURT: Okay.
- 2 All right, sir. Just make yourself comfortable.
- 3 Mr. Price.
- 4 MR. PRICE: Yes, ma'am. Thank you.
- 5 Q You are Manuel Marin?
- 6 A Yes.
- 7 Q And you are presently confined in SCDC?
- 8 A Yes, sir.
- 9 Q You were convicted of murder in October of 2010?
- 10 A Yes.
- 11 Q And you obviously understand why you are here today?
- 12 A Yes, sir.
- 13 Q You and I have met a hand full of times over the last
- 14 couple years?
- 15 A Yes, sir.
- 16 Q We have gone over to your testimony?
- 17 A Yes.
- 18 Q And I have explained to you that this is your day in
- 19 Court. This is not about me. So, we're gonna do this the
- 20 way that you want to.
- 21 A Yes.
- 22 Q And that's what you told me you want to do, is it not?
- 23 A Yes, sir.
- 24 Q All right. Now, you initially filed your own PCR
- 25 Application?

1 A I did.

2 Q with lengthy written explanations and case cites and
3 legal arguments?

4 A Yes, sir.

5 Q Okay. And that was done in 2016?

6 A Yes, sir.

7 Q And that is where we are going to start off.

8 Okay. Let us go -- your, your points begin on the page
9 you have the Number 10 in the upper left-hand---

10 A Yes.

11 Q ---corner.

12 Is that correct?

13 A Yes.

14 Q Okay. Your first point that you want to discuss is
15 your trial counsel was failing -- was ineffective because
16 she did not object to Diane Tabares statement that she was a
17 cancer survivor.

18 A That is correct.

19 MR. PRICE: All right. Your Honor, that is on Page 64,
20 Line 13.

21 THE COURT: Yes, sir.

22 Q All right. And why do you feel that that was
23 prejudicial to you, Mr. Marin?

24 A Well, I have a case here, State v. Langley, cited as
25 515 S.E.2d 98, Supreme Court, 1999, which was reversed on

1 the grounds that the murder victim's testimony was
2 irrelevant to the issues of defendant's guilt in the murder
3 prosecution---

4 Q The case---

5 A ---and the---

6 Q The case that you cited is, is further back in your,
7 your materials, isn't it?

8 A Sir?

9 Q The case that you just discussed is further back in the
10 materials that you filed in your application, is it not?

11 A I, I don't understand.

12 Q Did you include the case that you just told me about?

13 A I did. Yes, I did.

14 Q Okay.

15 A On the, on the -- if you see Page 11 1-B?

16 Q Uh huh. (Affirmative).

17 A It is there, yes.

18 Q Okay. So, rather than, than just discussing the case,
19 which the judge will look at, and that -- actually it's
20 11-A, is it not?

21 A Yes, it is.

22 Q All right. would you tell the Court why that
23 prejudiced you, in your opinion?

24 A Because, because the, the sister's testimony that she
25 was a cancer survivor was highly prejudicial, and it was

1 calculated to arouse the sympathies of the jury, and it was
2 irrelevant as to provative (sic) facts or guilt of the case.
3 Therefore, counsel was ineffective in failing to object to
4 such testimony.

5 Q All right.

6 A And that is State v. Langley. Sister's testimony was
7 not relevant to defendant's guilt. Also Strickland versus,
8 versus Washington.

9 Q Okay. And would your -- and you're gonna need to quit
10 scraping up against the mic if you can.

11 All right. There you go.

12 Now, would your testimony as far as prejudice be the
13 same in your next allegation, 10-B, about failing to object
14 to Ms. Tabares statement that she was pregnant and due to
15 deliver on the day of the incident?

16 A That is correct.

17 MR. PRICE: And, Your Honor, that would be Transcript
18 65, Line 7 through 9.

19 THE COURT: Okay. 65, 7 through 9?

20 MR. PRICE: Yes, ma'am.

21 Q Okay. Any other thing you want to say as far as the
22 prejudice on that particular point, Mr. Marin?

23 A Just a second please.

24 (Pause.)

25 A Yes, also the sister's testimony that she was pregnant

1 due to deliver on the same day of the incidents was highly
2 prejudicial, and it was calculated to arouse the sympathies
3 of the jury, and it was irrelevant as to prove prolative
4 (sic) facts of the guilt of the case. Therefore, trial
5 counsel was ineffective in failing to object to such
6 testimony. And that is also State v. Langley was -- which
7 was reversed on those grounds.

8 Q which is also contained in your brief as 11-B?

9 A That is correct.

10 Q Okay. Let's move on to 10-C. You wanted your attorney
11 to recall one of the State's witnesses, Larry Rodriquez.

12 A I did.

13 MR. PRICE: All right. And, Your Honor, that's shown
14 on Transcript Page 267, Lines 12 through 18.

15 THE COURT: Yes, sir.

16 Q Okay. Tell me how you were prejudiced on that point,
17 Mr. Marin.

18 A Well---

19 Q why did you want him recalled?

20 A Trial counsel was ineffective in failing to recall the
21 witness, Larry Rodriquez, to the stand to impeach the
22 witness for lying on the stand. He said that he had closed
23 the club at 2:00AM since -- and the, the Defendant's camera
24 proved that photographs taken outside the nightclub at the
25 time the decedent was placed in the Defendant's truck showed

1 the time stamp to be 2:54AM instead of two o'clock when,
2 when he said.

3 Q Okay. And---

4 A And I was prejudiced because the jury would of thought
5 that a whole hour would have elapsed from the time that the
6 deceased was placed in the car and the time of the incident.
7 So, the jury would have thought what, you know, what had
8 transpired in this whole missing hour.

9 So -- and I have a case which says that, if the witness
10 lied in a small matter, he could of also lied in a big
11 matter. So, if he lied in, in saying that he closed the
12 club at 2:00AM, when, in fact, he closed it at 3:00AM or
13 thereafter, he was lying. He could, he could as well been
14 lying about everything else that he testified to.

15 Q And you cited that case?

16 A Yes.

17 Q And you -- but the most important thing is, Mr. Marin,
18 you asked your lawyer, in the courtroom, to recall Larry
19 Rodriguez at that point in the transcript that shows that
20 she refused to do so?

21 A She did refuse---

22 Q Okay.

23 A ---and I asked her to, to recall them and she refused
24 to do it, yes.

25 Q And that was part of the way you wanted to have your

1 case presented?

2 A That is correct.

3 Q Okay. On 10-D, you say that your trial counsel was
4 ineffective by allowing autopsy photos.

5 A That is---

6 Q Now, I can not find in the transcript where there was
7 an autopsy photo introduced.

8 A Where did you -- you showed me some pictures.

9 How many did you---

10 Q I showed you pictures that -- from the entire evidence
11 package.

12 A Uh-huh. (Affirmative.)

13 Q And there were no autopsy photos in there.

14 Do you have anything to show that an autopsy photo was
15 introduced?

16 THE WITNESS: The solicitor I was -- of all the photos
17 that were introduced.

18 THE COURT: Yes, sir, I'm---

19 THE WITNESS: That's that---

20 THE COURT: Yes, sir, I have that right here --

21 THE WITNESS: Yes.

22 MR. PRICE: All of that is part of the record, Mr.---

23 THE COURT: ---in the transcript.

24 MR. PRICE: I'm sorry, Your Honor.

25 THE COURT: But I think that the witness does need to

1 understand that, even though it lists a photograph, it does
2 not describe the photograph. It just lists the page
3 number---

4 MR. PRICE: That's right.

5 THE COURT: ---and the exhibit number. Just like what
6 he has.

7 THE WITNESS: Yes, ma'am.

8 THE COURT: Yes, sir.

9 THE WITNESS: But all these pictures were shown to the
10 jury, and they were all autopsy photographs. And there was
11 no, no evidentiary hearing done by my trial attorney as to
12 which photos should be allowed or which, which photos should
13 not be allowed. The fact was that there was no evidentiary
14 hearing at all.

15 Q So, and your---

16 A And that was---

17 Q And your claim is that your lawyer did not contest or
18 object to the introduction of any of the photographs that
19 were placed in evidence?

20 MS. GIOVANOLI: Objection to leading.

21 THE COURT: Okay.

22 MR. PRICE: We're gonna be here all day then.

23 THE COURT: Mr. Price, sir?

24 MR. PRICE: Yes, ma'am.

25 THE COURT: Will you rephrase?

Manuel Marin - Direct examination
by Mr. Price

1 MR. PRICE: Yes, ma'am.

2 Mr. Marin?

3 THE COURT: Thank you.

4 Q what is your testimony about the affect of the
5 introduction of the photographs that are -- that were placed
6 into evidence and are part of this record?

7 A well, gruesome photographs should, should of been
8 excluded since prejudicial effect of photographs outweighed
9 any evidentiary hearing. I have a case that was reversed,
10 overturned, State v. Middleton, 339 S.E.2d 692, Supreme
11 Court, 1996, where prejudicial effects of photographs of one
12 murder victim clearly outweighed any evidentiary value, and
13 thus such photographs were inadmissible. Prejudice created
14 by color autopsy photographs of victim, one which depicted
15 scalp pulled away from the victim's skull and another which
16 I won't go into that, which is very explicit, although
17 photographs may be used to corroborate other evidence. See
18 State v. Robinson, two -- 201 Supreme Court 230, 225 -- 22
19 S.E.2d 882nd (sic), 1942.

20 It is well established that photographs calculated to
21 arouse the sympathies and prejudice of the jury are to be
22 excluded if they are irrelevant or unnecessary to the issues
23 at trial. See also State v. Edwards.

24 Q Mr. Marin, let me interrupt you here. You have cited
25 these cases in your written materials under 11-A, excuse me,

1 11-D, did you not?

2 A Yes.

3 Q All right. And you -- everything that you're reading
4 is off that. So, the judge has those, those cites and can
5 read that. So, I'm asking you just to confine your
6 testimony, not to reading what those cases say, but your
7 feelings about the prejudice, and you feel -- is it your
8 testimony, that because these picture were gruesome, you
9 were prejudiced?

10 A Yes. Well, and the -- I feel that the trial counsel
11 was ineffective in failing to have an evidentiary hearing.

12 Q I understand. She should of objected.

13 A She should have and -- not only objected, but she
14 should have had an evidentiary hearing.

15 Q I understand.

16 Okay. Let's move on to 10-E as far as your camera.

17 You have stated there that there should of been an
18 evidentiary hearing because of the introduction of the
19 camera, correct?

20 A Yes.

21 MR. PRICE: And, Your Honor, on the transcript, that's
22 Page 71, Lines 2 through 12.

23 A Well, I have pictures that show the camera being moved
24 from the backrest of the car, and the camera -- then a
25 picture of the same camera on the floorboard of the car,

1 which shows that the camera was tampered with prior to a
2 warrant being issued for that camera.

3 Q When you say tampered with, do you mean the camera was
4 moved?

5 A Yes, that is correct. It was moved prior to a warrant
6 being served for the contents of the vehicle.

7 Q Okay. Do you have anything else to say as far as that
8 issue?

9 A Yes, the trial counsel, trial counsel was ineffective
10 in failing to have an evidentiary hearing to have the camera
11 excluded from the evidence since it was tampered with. And
12 also she was ineffective in having evidentiary hearing to
13 exclude pictures taken from that camera because it was
14 tampered with. And pictures in the camera were also --
15 well, she, she was ineffective in failing to have an
16 evidentiary hearing---

17 Q I understand.

18 A ---to have the camera removed from evidence.

19 Q And you felt the pictures prejudiced you?

20 A They prejudiced my case. That is correct.

21 Q Your next allegation is F about failing to have a
22 evidentiary hearing about the weapon.

23 A That is correct.

24 Q And explain that please.

25 A The weapon was also moved from the crime scene before

Manuel Marin - Direct examination
by Mr. Price

1 any -- before the -- any pictures were taken, and it was
2 tampered with and trial counsel was ineffective in failing
3 to have an evidentiary hearing to have the weapon excluded
4 from the evidence, from the evidence since it was tampered
5 with prior to crime scene photograph being taken, and there
6 was no, there was no evidentiary hearing on, on that.

7 Q Okay. And you, you cited cases in 11-F to back that
8 up?

9 A Yes, that's State v., State v. Tindale supra says that
10 prior to crime scene photograph arrive---

11 Q You don't---

12 A ---Office Jennifer Powell---

13 Q You don't need to read the cases. I -- just, just
14 referring to those cause the judge will be able to look at
15 that when she reviews this case.

16 A Yes.

17 MR. PRICE: And, Your Honor, for -- that would be Page
18 115 of the transcript, Lines 2 through 19, and Page 259,
19 Lines 10 through 13.

20 THE COURT: Ten through?

21 MR. PRICE: Thirteen.

22 THE COURT: And, Mr. Marin, sir, sir, just so you
23 understand---

24 THE WITNESS: Yes, ma'am.

25 THE COURT: ---I'm reading right along with you.

1 Okay?

2 THE WITNESS: Okay.

3 THE COURT: All right?

4 THE WITNESS: Yes, ma'am.

5 Q Let's go to 10-G when you say your lawyer was
6 ineffective for citing the wrong cases.

7 A Just a second. Let me find it.

8 THE COURT: I think it's 11-G, counsel.

9 MR. PRICE: 11-G is the cites.

10 THE COURT: Oh.

11 MR. PRICE: Ten is the allegations.

12 THE COURT: Yes, sir.

13 Q Mr. Marin, do you need another copy of that initial --?

14 A I do. I'm trying to find it.

15 Q Here you go.

16 A I have it right here. I found it.

17 Q You need that?

18 Okay. Your Honor, could I redirect you back to E?
19 I left off two pages.

20 THE COURT: Yes, sir.

21 MR. PRICE: In addition to Page 171, it would be Page
22 203, Lines 11 through 25, and 204, Lines 1 through 2.

23 Okay. Mr. Marin, let's go to G down at the bottom of
24 your page by citing the wrong cases.

25 A Yes.

1 MR. PRICE: All right. Your Honor, that would be
2 Transcript Page 395, Lines 6 through 12, excuse me, six
3 through 25, and Pages 396, 397, and 398.

4 THE COURT: Yes, sir.

5 Q All right. Mr. Marin, would you please explain that
6 allegation?

7 A Yes, trial counsel was ineffective in not being
8 prepared for trial for writing -- citing the wrong cases for
9 proving proposition. When trial counsel was asked for
10 instructions the Defendant was justified in firing the first
11 shot, then the Defendant was -- is also justified in
12 continuing to shoot. It is apparent that, that the current
13 danger to date, serious bodily injury has ended. Trial
14 counsel had cited State v. Rye, which was the wrong case for
15 the proposition. In fact, trial lawyer did not cite the
16 correct case until the end of, of the case was presented to
17 trial.

18 Q But it was -- all of that is shown on the transcript,
19 and is it your testimony that she eventually did, after the
20 break, come back with the right case?

21 A After the case had concluded. After the, after the
22 defense had presented its evidence, then she found the right
23 case.

24 Q Okay. If I go to the next page on 10-H then.
25 Will, will you agree that the trial transcript clearly

1 shows all of the discussion between your attorney and the
2 Court about the, about the wrong case being cited?

3 A Yes.

4 Q Okay.

5 A That's correct.

6 Q Let's go to 10-H. You have alleged that the
7 prosecutor's final argument about two shots in the back of
8 the head constituting malice was inflammatory, and your
9 lawyer should of objected.

10 Is that correct?

11 A That is correct.

12 MR. PRICE: Your Honor, that would be on the Transcript
13 Page 361, Lines 12 through 24.

14 And what is your testimony about how that prejudiced
15 you, Mr. Marin?

16 A Prosecutor's closing argument that the jury could infer
17 malice because two shots were fired instead of one shot was
18 highly inflammatory and prejudicial, and it was a
19 misrepresentation of the law. See State v. Hendrix, which
20 is the actual case. While Solicitor should prosecute
21 vigorously, her duty is not to convict the Defendant, but to
22 see justice done, and Solicitor's closing argument is based
23 upon the principle that, therefore, there must be careful
24 tate (phonetic) not to appeal to personally and bias of the
25 jury nor be calculated to arouse suspicion of prejudice,

1 and, in fact---

2 MS. GIOVANOLI: Your Honor, I'm gonna object at this
3 point. This allegation is conclusively refuted by the
4 record. He's alleging that Ms. Tanya Jones didn't cite the
5 right case law for this proposition, and this is the exact
6 issue that was carried all the way up to the Supreme Court,
7 heard in oral argument at the Court of Appeals and the
8 Supreme Court. There was no lack of preservation. The
9 argument was carried all the way throughout the Supreme
10 Court.

11 So, I think that the record conclusively refutes that
12 trial counsel was ineffective for not bringing this issue to
13 the Court's attention.

14 THE COURT: Yes, ma'am, and you'll have the right to
15 cross-examine him on that.

16 Mr. Price, would you like---

17 MR. PRICE: And, and in response to---

18 THE COURT: ---to be heard?

19 MR. PRICE: In response to that, Your Honor, the, the
20 final opinion, which we will be introducing as far as marked
21 spots, does refer to that particular argument and that
22 particular issue. So, we would just say the record stands
23 for itself on that.

24 THE COURT: Yes, sir.

25 Q Mr. Marin, on Allegation I, at some point in the trial

1 the record will show that the jury came back and had a
2 question about malice and self-defense.

3 A Yes.

4 Q And is it your allegation that your attorney was
5 ineffective for not requesting a State v. King charge?

6 A That is correct.

7 Q And would you explain that please? And, Your Honor,
8 that -- excuse me one second, Mr. Marin.

9 That's on Page 399, Lines 16 through 25, Page 400, 401,
10 402, 03, 04, and, on 04, it's Lines 1 through 15.

11 A Yes, trial counsel was ineffective in failing to raise
12 the King defense. When the jury came back from
13 deliberations, and asked the trial judge to reinstruct them
14 on the law of malice and murder and voluntary manslaughter,
15 see State v. King, the Court concluded, in State v. King,
16 the Court reversed because the Court concluded that a charge
17 must be clearly and correctly instruct the jury that if they
18 have a reasonable doubt as to whether the defendant was
19 guilty of murder or manslaughter, it was their duty to
20 resolve that doubt in his favor and find, find him guilty of
21 the lesser offense. That is State v. Jackson.

22 Also State v. Carter was also reversed on those
23 grounds. State v. Robinson and State v. Charles---

24 Q Mr., Mr. Marin, the Judge can read the, the case and
25 she will read the cases that you've cited, but all of those

1 stand for the proposition that, if there's a doubt between
2 murder and manslaughter, the Defendant should be given the
3 benefit of the doubt?

4 A That is correct, and the---

5 Q Do you -- did your---

6 A ---trial counsel---

7 Q ---lawyer ask for that charge?

8 A She did not.

9 Q Okay. And you feel that that prejudiced you?

10 A Yes.

11 Q Okay. Allegation 10-J.

12 A Yes.

13 Q Okay. Would you explain that please?

14 A Yes, trial counsel was ineffective in failing to claim
15 immunity under Protections of Persons, Persons and Property
16 Act as a pretrial instruction instead of as a --.

17 Q Now, prior to the trial, did you and your lawyer
18 discuss that law commonly called Stand Your Ground and if it
19 applied to you?

20 A It did.

21 Q Not questioning if it did or not. The answer -- my
22 question is did you discuss that with your lawyer?

23 A No, I did not.

24 Q Okay. Did you request your lawyer to have an
25 evidentiary hearing on that pretrial versus telling the

1 jury?

2 A well, I did not know about the law at that time.

3 Q Okay.

4 A But the Supreme Court and the Court of Appeals says
5 that that should of been a pretrial motion instead of a, of
6 asking it as a jury instruction.

7 Q Are you talking about the Supreme Court in your
8 particular case?

9 A Yes, that is correct.

10 Q So, the opinion, as far as what the Court said, will
11 speak for itself?

12 A Yes.

13 Q All right.

14 A The Court said that it should of been asked for as a
15 pretrial motion instead of a jury charge since the same
16 principles apply.

17 MR. PRICE: And, Your Honor, on the transcript, that
18 would will be Page 318, Line 22, Pages 319, 320, 321, 326 at
19 Line 24, 327, Lines 1 through 18.

20 Mr. Marin, do you feel that you would of come out
21 better had that issue been dealt with on a pretrial basis?

22 A Yes, because if, if, if I had immunity, if she would of
23 claimed that pretrial, then the jury would have never heard
24 my case. It is a procedural section. The Circuit Court may
25 grant immunity from prosecution prior, prior to beginning of

1 the trial. If the Court finds the Defendant acted lawfully
2 in self-defense, then the jury would of never heard my, my
3 case, and I was prejudiced by her failure to ask for the
4 immunity prior to trial instead of as I -- instead of as a,
5 a jury charge.

6 Q I understand.

7 Okay. And your allegation in your brief line out the
8 rest -- the remainder of your argument?

9 A It does.

10 Q Okay. Let's look at 10-K, which is basically your
11 jurisdiction and venue argument.

12 A Yes, I feel that trial, that trial counsel---

13 Q Hang on.

14 A ---was ineffective---

15 Q Hang on one second. Hang on one second.

16 (Pause.)

17 Q Let me show you a document and ask if you can identify
18 that.

19 A Yes.

20 Q Well, let's identify it then.

21 What is it?

22 A This -- I made this for Tanya Jones. I told her the
23 incident happened as soon as we hit Wade Hampton
24 Boulevard---

25 Q All right. Hang on.

1 A ---which is---

2 Q Hang on one second.

3 A ---Greenville County.

4 MR. PRICE: Your Honor, we would offer this document as
5 Applicant's No. 1.

6 THE COURT: What is that, sir?

7 MR. PRICE: It is a diagram that my client drew and
8 gave to his attorney prior to trial.

9 THE COURT: Okay. And, Ms. Giovanoli, have you seen
10 this?

11 MS. GIOVANOLI: Yes, Your Honor, and I have no
12 objection to it.

13 THE COURT: Okay. So, this will be admitted.

14 (WHEREUPON, the diagram was marked as Applicant's
15 Exhibit No. 1 and received into evidence at this time.)

16 Is this my copy?

17 MR. PRICE: It can be.

18 THE COURT: Okay. Applicant's No. 1.

19 Q Well, you and I have---

20 THE COURT: Mr. Price, you're marking it right now.
21 You're not entering it in?

22 MR. PRICE: Excuse me?

23 THE COURT: You're marking it right now for
24 identification or you're actually entering it?

25 MR. PRICE: I'm entering it.

1 THE COURT: Okay. So entered, Applicant's No. 1.

2 Q Okay. Mr. Marin, let me give you what is now
3 Applicant's No. 1.

4 You prepared that and sent it to your attorney?

5 A I did.

6 Q And, in fact, it's stamped received by her office on
7 August 16th of 2010?

8 A Yes.

9 Q And your trial was in October?

10 A Yes.

11 Q Did you, prior to trial, did you discuss with her about
12 where this shooting incident, the fatal shooting occurred?

13 A Yes.

14 Q And tell the Court where it occurred.

15 A Well, it happened as soon as we hit Wade Hampton
16 Boulevard --

17 Q From what road?

18 A -- which is in Greenville County. When we were coming
19 down East North Street, as soon as we hit that big road,
20 that big avenue, that's when the incident happened.

21 Q In Greenville County?

22 A In Greenville County.

23 Q Okay. And you told your attorney that?

24 A Yes.

25 Q And you told her that you wanted to contest the

1 jurisdiction and venue of Spartanburg County to try your
2 case?

3 A well, I, I didn't know anything about venue or
4 whatever. I didn't know anything about the law at that time
5 or anything about where -- I just told her where it had
6 happened, and it is in Greenville County.

7 Q Okay. And you told her you wanted to be tried in
8 Greenville, not Spartanburg?

9 A well, I -- we didn't -- actually, I, I didn't know
10 anything about venue at that time.

11 Q Okay.

12 A She -- that was her job.

13 Q You told her you wanted to make that an issue?

14 A well, no, she did that.

15 Q All right.

16 A She did that because I told her it happened in
17 Greenville County.

18 Q All right. So, she told you she was going to make it
19 an issue?

20 A Yes.

21 Q Okay. And did y'all discuss this prior to trial?

22 A Yes.

23 Q And you sent this document?

24 A Yes.

25 Q All right. And was the issue of jurisdiction and venue

1 in Spartanburg, in your opinion, adequately argued and
2 preserved?

3 A No.

4 MR. PRICE: Your Honor, that would be Transcript 318,
5 Lines 18 through 21.

6 A That goes to Detective Arterburn's statement that he
7 found particles belonging to my car, and that is literally
8 impossible.

9 Your Honor, if you'll see, this is my car, and---

10 THE COURT: Okay. I tell you what. If, if you want ---
11 if you want me to look at something, why don't you have
12 Mr. Price offer that into evidence?

13 THE WITNESS: Yes.

14 THE COURT: Okay?

15 A Mr. Price?

16 THE COURT: Thank you.

17 Q Hang on one second, Mr. Marin.

18 (Pause.)

19 Q You are showing me two pictures of what appear to be
20 the front of a vehicle?

21 A The front of my vehicle.

22 Q All right. And you -- this morning you wanted me to
23 question Mr. Arterburn about these pictures?

24 A I did.

25 Q And now are you asking me to introduce these into

1 evidence so you can explain them?

2 A Yes.

3 MR. PRICE: Okay.

4 MS. GIOVANOLI: Are you guys waiting for my response?

5 MR. PRICE: Yes.

6 MS. GIOVANOLI: Are you admitting -- moving them into
7 evidence?

8 MR. PRICE: Yes.

9 MS. GIOVANOLI: Okay.

10 THE COURT: I was not sure, but, Mr. Price --

11 MR. PRICE: I intend to move---

12 THE COURT: -- are you offering these---

13 MR. PRICE: I'm offering these as evidence as
14 Applicant's 2 and 3.

15 THE COURT: Okay. Counsel, any objection?

16 MS. GIOVANOLI: Only that I'm just now seeing these. I
17 would like to confirm.

18 Are these from the defense's file, and were they
19 provided in the discovery?

20 MS. GIOVANOLI: I am just now seeing these. These were
21 shown to me by Mr. Marin this morning.

22 THE COURT: Okay. Maybe, maybe you should lay a
23 foundation, sir, as to how you obtained these photographs.

24 MS. GIOVANOLI: Your Honor, I have no objection to
25 admit them as evidence.

1 THE COURT: Okay. Then Applicant's 2 and 3 without
2 objection. They'll be moved into evidence.

3 (WHEREUPON, two photographs were marked as Applicant's
4 Exhibit Nos. 2 and 3 and received into evidence at this
5 time.)

6 Q Okay. Mr. Marin, I'm giving you Items 2 and 3, and
7 what do you want to tell the Court about those two pictures?

8 A Well, Detective Arterburn testified that he found
9 debris that came from my car or that seemed to come from my
10 car, and that is literally impossible because, if you see,
11 my car was -- already had damage to the front. If you see
12 this bullet holes on the frame of the car, it is literally
13 impossible for debris to have broken off if the bolts are
14 missing. There's -- if -- there have been an accident or a
15 wreck, the bolts would still be on the frame, and the
16 automobile is also missing a bumper, and the bumper is
17 attached to the vehicle with half inch bolts.

18 So, it's literally impossible for Detective Arterburn
19 to have found the debris that he said he found on the road
20 --

21 Q Okay.

22 A -- that belonging to my car.

23 Q And is it your testimony that those are pictures of
24 your car?

25 A Yes.

1 Q And were those given to you during discovery or---

2 A Yes, they were.

3 Q Okay. Is there anything else you want to say about
4 those, those pictures?

5 A Well, no, that is the vehicle had already damaged (sic)
6 to it prior to the incident.

7 Q Okay.

8 A So, so, venue would not have been where Detective
9 Arterburn said it was.

10 THE COURT: Thank you, sir.

11 Q Mr. Marin, your next allegation, 11, and the remainder
12 of those go to appellate counsel and those things.

13 A Yes.

14 Q Can we skip over those and come back to them and deal
15 with your, your remaining allegations in your amended
16 complaints as far as trial counsel so we can keep trial
17 counsel separate from appellate?

18 A Yes.

19 Q Okay. Excuse me one minute.

20 (Pause.)

21 Q Mr. Marin, let me see the documents that I just gave
22 you. The amended --.

23 A Those -- these are my copies. We have the same.

24 Q Okay. Got you.

25 Okay. You filed some papers, which I incorporated in

1 a, an amended application filed October 4th of 2017?

2 A Yes.

3 Q Okay. And we're gonna go over to the stuff that you
4 wrote beginning on Page 2 of 8.

5 A Yes.

6 Q All right. Now, the first two pages, going over to
7 Page 4 of 8, we have already talked about, have we not?

8 A Yes.

9 Q All right. So, we need to go down to -- let's go to
10 Item K on Page 4.

11 A Yes.

12 Q All right. You've already talked about the
13 jurisdiction and venue argument, but you felt that that
14 should of been dealt with on a pretrial basis?

15 A Yes.

16 Q Okay. And you were prejudiced by not doing so?

17 A Yes, because if jurisdiction would of been claimed as a
18 pretrial base -- basis, the jury would of never heard the
19 case.

20 Q Okay. Now, on Item L on Page 4, your attorney was
21 ineffective for not bringing an expert witness to the
22 defense to back up your version?

23 A That is correct.

24 Q Was an expert called on your behalf during the trial?

25 A No, sir.

1 Q How were you prejudiced by that?

2 A Because, because of, of Prosecutor Ghent briefed to the
3 Supreme Court. In his brief, Mr. Ghent claims that the, the
4 deceased was shot while being held down and pinned down. If
5 that would of been the case, then they would of found bullet
6 holes or fragments on the floorboard of the car instead of
7 on the windshield.

8 One bullet went through his head and went out the
9 windshield. The second bullet went through his head and
10 shattered the GPS unit which was hanging from the rearview
11 mirror. Prosecutor Ghent, which filed the brief to the
12 Supreme Court and the Court of Appeals claim, which that is
13 an issue which -- that I am claiming a separate issue.

14 Q We're gonna, we're gonna go in, into---

15 A Right.

16 Q ---that when we get into appellate counsel.

17 A Right. But he claims that I was pinning him down, and
18 holding him down when I shot him. If that would of been the
19 case, then they would of found a bullet fragment or a bullet
20 hole down in the car, low in the car, on the ground or
21 wherever if I was pinning him down, and an expert witness
22 would have corroborated that, in fact, he was standing up
23 while he was shot instead of being held down or pinning him
24 down.

25 Q Okay. So, you feel that an expert witness was

1 necessary to help your case?

2 A Yes, and, and it would of corroborated all the evidence
3 of, of my testimony, which he was grabbing hold of the
4 steering wheel while he was shot, and, and, as the expert
5 testified, that, that he was, in fact, trying to wreck the
6 vehicle.

7 Q Okay.

8 A Okay.

9 Q Okay. That leads us into the issue of self-defense.

10 Now, you met---

11 A Yes.

12 Q ---with your attorney half a dozen times at least
13 before your trial?

14 A Yes.

15 Q Okay. And did you discuss the fact with her that you
16 felt or your claim was self-defense?

17 You were defending yourself when the decedent came at
18 you?

19 A That is correct.

20 Q And how many times did you discuss that with your
21 attorney?

22 A Every time she came to visit me. From the very
23 beginning. From the first day she came to see me.

24 Q And did you tell her that that was the primary thrust
25 of your defense?

1 A Yes, that is correct.

2 Q That that was your case?

3 A That is correct.

4 Q Okay. And do you feel that her failure to bring that
5 out on an opening statement was prejudicial to you by not
6 telling the jury what your case was about?

7 A That is another issue that I am claiming. That is a
8 separate issue which I am claiming, yes, sir.

9 Q And that would be your allegation M on Page 4 of your
10 first amended PCR?

11 A That is correct.

12 MR. PRICE: Okay. And, Your Honor, on the transcript,
13 that's Page 58, Lines 4 through 25, and Page 59.

14 was anything mentioned about self-defense in the
15 opening statement?

16 A It was not.

17 Q Your next allegation---

18 A Well, I, I feel that I was ineffective in my trial
19 counsel failing to clearly explain, on opening statement to
20 a jury, that there was a self-defense case because I --
21 that's -- the jury, from the very beginning, the jury should
22 of been -- should of been explained to that this was a
23 self-defense case. I never claimed anything but
24 self-defense. So, the jury should have been explained, on
25 opening statement, that this was a self-defense case, and I

1 was -- she was ineffective in failing to do that.

2 Q Okay. On Number or Letter N, failing to object to the
3 Prosecutor's statement that the Defendant would not stop.

4 A Yes, the Prosecutor said I would not stop when, in
5 fact, I did testify that I was planning to stop. I was
6 looking for a place to stop, and -- but the deceased
7 attacked me before I could. He had already attacked me once
8 in East North Street, and, when he attacked me, I was
9 looking for a place to stop, but he attacked me again before
10 I had a chance to stop. So, when the prosecutor said that,
11 that I would not stop, it was after I had been attacked
12 once. I had already been attacked by, by the deceased.

13 Q I understand.

14 Your Honor, on the transcript, that's Page 363, Lines
15 19 through 22, and Page 360, 14 through 25.

16 Okay. Mr. Marin, Letter O, failing to disclose
17 important Brady material until after your trial.

18 A Yes, I---

19 Q Let me ask you if you can identify this.

20 A Yes.

21 Q Did you receive this letter from your attorney after
22 your trial?

23 A I did.

24 MR. PRICE: We would offer this into evidence as
25 Applicant's No. 4, Your Honor.

1 MS. GIOVANOLI: No objection.

2 THE COURT: Okay. Without objection.

3 (WHEREUPON, the letter was marked as Applicant's
4 Exhibit No. 4 and received into evidence at this time.)

5 Q Is this the letter that you are referring to in the
6 Letter O?

7 A That is correct.

8 Q Yes. Excuse me.

9 And what Brady material was included in that letter?

10 A Here is, here is a letter from the Spartanburg County
11 Sheriff's Department investigating report where it shows the
12 time stamp on the camera being 2:54AM, which shows that the
13 witness was, in fact, lying about the time that he closed
14 the, the club, and lying about the time that we left the
15 club.

16 Q Are you talking about the witness Mr. Rodriguez?

17 A That's correct.

18 MS. GIOVANOLI: I have a matter to take up. The
19 document I was handed that I think we're talking about, a
20 letter, is not the same as what he's reading. You asked him
21 what the letter was.

22 MR. PRICE: I'm not, I'm not sure what this is.

23 Can we take a five minute break?

24 THE COURT: Yes, actually we've been going now for an
25 hour and a half. And so why don't we take a ten -- we'll,

1 we'll come back at 11:30.

2 MS. GIOVANOLI: Thank you.

3 THE COURT: Okay. Mr. Marin, sir, you may return to
4 counsel table if that's your wish, but you can not talk to
5 your lawyer.

6 okay?

7 THE WITNESS: Yes, ma'am.

8 THE COURT: Thank you, sir.

9 (Whereupon, a short recess was taken at this time.)

10 THE COURT: Okay. Counsel, are we ready?

11 MR. PRICE: Yes, ma'am.

12 THE COURT: Okay. Mr. Marin, sir, if you'll come back
13 up.

14 THE WITNESS: Yes, ma'am.

15 THE COURT: Yes, sir, you're still under oath.

16 THE WITNESS: Yes, ma'am. Thank you.

17 THE COURT: Uh-huh. (Affirmative).

18 CONTINUED DIRECT EXAMINATION

19 BY MR. PRICE:

20 Q Okay. Mr. Marin, we were talking about the Brady
21 issue. This is the stuff here.

22 A Yes.

23 Q And---

24 THE COURT: Counsel, do you have Exhibit 4 or does our
25 court reporter?

1 MR. PRICE: I---

2 THE COURT: Wasn't that the correspondents or does Mr.
3 Marin have it?

4 THE WITNESS: I have a copy.

5 THE COURT: Oh, I see it.

6 Okay.

7 MR. PRICE: Four and are one back there.

8 THE COURT: Thank you.

9 Q All right. You were discussing No. 4, Exhibit 4.

10 A Yes.

11 Q And you were talking about the documents that were
12 enclosed.

13 Did that have to do with the, the time difference on
14 the camera?

15 A Yes, and it had to do with the witness lying on the
16 stand, lying under oath on the stand.

17 Q You mean Mr. Rod---

18 A One of the witnesses.

19 Q Mr. Rodriguez?

20 A Which is -- yes, which I asked trial counsel to recall
21 and pits the witness, the witness for lying on the stand.
22 And this is proof that he lied on the stand, and I didn't
23 get this until after trial --

24 Q All right.

25 A -- which was the proof that we left the club at 2:54

Manuel Marin - Direct examination
by Mr. Price

1 instead of 1:54 like he said.

2 Q Okay. And do you want to introduce that Brady material
3 enclosed in the letter as an exhibit?

4 A That is correct. That goes with the---

5 Q A simple yes or no will do.

6 A Yes.

7 Q It goes with four?

8 A Yes, that is correct.

9 MR. PRICE: Counsel.

10 MS. GIOVANOLI: Thank you.

11 THE COURT: So, this is going to be No. 5?

12 MR. PRICE: Yes, ma'am.

13 (WHEREUPON, the Brady material was marked as
14 Applicant's Exhibit No. 5, and received into evidence at
15 this time.)

16 Q Okay. Mr. Marin, you feel that this would of helped
17 you as far as Mr. Rodriquez testimony was concerned?

18 A That is correct because he lied on the stand, and it
19 was prejudicial because the witness was led to believe
20 multiple times by the prosecutor that we left the club at
21 1:54, and, and the, the incident where we arrived at
22 Spartanburg, it was almost four o'clock in the morning. So,
23 that would of been a two hour difference instead of a one
24 hour difference, which was a nice stop and run from the club
25 to where the car automobile was stopped, and he saw---

1 Q And you, you had already testified about your problem
2 with Rodriquez testimony about the missing hour.

3 That made things worse for you?

4 A Yes, because the jury -- in the jury's mind, the jury
5 would of thought what happened in this other hour. what,
6 you know, what --.

7 Q Okay.

8 A What transpired during this missing hour. So, that was
9 very prejudicial, yes.

10 Q Can we go to Allegation P, as in Paul, on Page 4?

11 A Yes.

12 Q Would you explain that please, sir?

13 A Yes, trial counsel was ineffective in failing to raise
14 other sections of Article 6. She only claimed 458 instead
15 of claiming other, other sections of Article 6 which apply
16 to the case.

17 Q Okay.

18 A For instance, 420(b) applies, and that was not asked
19 for a jury instruction. 420(d) also applies to the case and
20 it was not asked for that instruction. 420(e) also applied
21 to the case, and it was not asked as an instruction.

22 Q Okay.

23 A So, the whole article was not asked for. Only a
24 certain section instead of all the sections that applied in
25 this article.

1 Q Okay. Going over to Q, can you explain that as far as
2 the second shot?

3 A Yes.

4 Q And how is that different from your lawyer's request to
5 the court that he charge that, if you're entitled to shoot
6 once, you can shoot again?

7 A I -- the Supreme Court, in, in -- when they decided my
8 case---

9 Q Well, is, is that the issue that you're talking about?

10 A Yes, the Supreme Court that says in -- when the Supreme
11 Court decided my case, the Supreme Court says, in, in my
12 decision, that it was the duty of the trial counsel to argue
13 why the second shot was necessary and that was not done.
14 So, it was ineffective assistance of counsel for the trial
15 counsel not to argue and explain why the second shot was
16 fired.

17 The forensics---

18 Q Hang on, hang on one minute. Let's, let's stick on
19 that, that particular issue.

20 So, you are adopting the, the reasoning of the Supreme
21 Court in its decision as far as the timeliness of your
22 attorney asking for that charge?

23 A Well, failure to argue why -- the Supreme Court says
24 that, in, in my decision, that -- basically the Supreme
25 Court is saying that it was ineffective, she was ineffective

1 in failing to argue why the second shot was necessary.

2 Q Let me ask you if you identify this.

3 Is this a copy of your Supreme Court order?

4 A That is correct.

5 Q And the areas that you're referring to are marked as
6 pages or Item 3, self-defense is on two, venue on one, and
7 the other legal issue about the Rye charge is on four.

8 Are you asking that these be incorporated by the Court?

9 A Actually, the, the whole case. I don't know where
10 exactly it's -- it says, but---

11 Q I understand.

12 A It does say that -- the Supreme Court says that it was
13 the duty of the trial counsel to argue why the second shot
14 was necessary.

15 Q Okay.

16 A So---

17 MR. PRICE: Your Honor, we would offer a copy of the
18 Supreme Court order with certain areas---

19 MS. GIOVANOLI: It's already part of the record.

20 MR. PRICE: We have marked certain areas---

21 MS. GIOVANOLI: Oh.

22 MR. PRICE: ---that---

23 MS. GIOVANOLI: Yeah.

24 MR. PRICE: Yeah.

25 MS. GIOVANOLI: A highlighted version.

1 (Pause.)

2 MS. GIOVANOLI: Is this my copy?

3 MR. PRICE: No, I highlighted all those things.

4 MS. GIOVANOLI: I have no objection, Your Honor, to
5 this.

6 THE COURT: Okay. So, counsel has no objection to
7 the -- even though the Supreme Court decision is part of the
8 remittitur package.

9 This is a highlighted version highlighting the
10 Applicant's points?

11 MR. PRICE: Points that he has raised---

12 THE COURT: Raised---

13 MR. PRICE: ---during his -- including the two shots.

14 THE COURT: ---amended application?

15 MR. PRICE: Yes, ma'am.

16 THE COURT: Okay. And this would be No. 6.

17 THE COURT REPORTER: Yes.

18 (WHEREUPON, the Supreme Court order was marked as
19 Applicant's Exhibit No. 6 and received into evidence at this
20 time.)

21 THE COURT: Thank you.

22 MR. PRICE: Yes, ma'am.

23 Q Okay. Mr. Marin, going down to R---

24 A Oh.

25 Q Excuse me. Go ahead.

1 A I'm sorry. I have one or more thing on that same
2 issue.

3 Q Sure.

4 A The reason why it's, it was, it was more necessary is
5 because, when the forensic pathologist testified, he did not
6 specify which shot came first. He says there was one fatal
7 shot one, and one that would of stunned the deceased, but
8 not kill him. It was not -- one of the shots was not fatal,
9 and he -- when he was asked which shot came first, he said
10 he did not know. If the fatal shot would of been first,
11 then the victim would of fell immediately, and, and the
12 second shot would have been while he was -- while he had
13 fallen.

14 So, that makes -- if he was shot by the fatal shot
15 first, then, then, then that -- that's why it was necessary
16 to, to -- for the jury to understand which shot came first,
17 and, and, by her not arguing the second, the second shot
18 would of been necessary if, if the first one would not have
19 been the fatal shot.

20 Q Okay.

21 A So, that's -- that she was ineffective in failing to
22 arguing (sic) which shot came first and -- or why the second
23 shot was necessary.

24 Q All right. Going down to R. On State v. Hendrix --

25 A Yes.

1 Q -- you have already argued or testified about that as
2 far as part of your argument about the, the Rye request.

3 A Yes, the, the State v. Hendrix was the actual case that
4 applied to the, to the second, the shot for position. If
5 you're entitled to shoot one, you're entitled to shoot
6 twice. This Hendrix case was not mentioned or brought up by
7 the prosecutor until after the States (sic) have rested.

8 Q Well, your attorney originally cited State v. Rye, but,
9 after the break or whatever, she came back and correctly
10 stated State v. Hendrix, didn't she?

11 A It was never argued by the Judge, by her and the Judge.
12 They, they, they argued State v. Rye and State v. Brady --
13 Brayboy, but State v. Hendrix was not -- she cited it, but
14 it was not argued --

15 Q Okay.

16 A -- as a -- why -- as a proposition why the second shot,
17 you know, for the second shot proposition---

18 Q Okay.

19 A ---was not.

20 Q Let's go down to S. You say the failure to argue the
21 lack of fingerprints from the steering wheel.

22 How did that prejudice you?

23 A Well, my testimony was that he was grabbing the
24 steering wheel and trying to -- first he attacked me. He
25 put me in a headlock, and then the second time he attacked

1 me, he was trying to run the car off the road by grabbing
2 ahold of the steering wheel and, and trying to wreck the
3 car. They took fingerprints of, of various places in, in
4 the vehicle except for the, for the place where I said, you
5 know, where the fingerprint of the deceased would of been,
6 which is the steering wheel.

7 Q Okay.

8 A And if -- I believe she was ineffective in failing to,
9 to argue why fingerprints were not taken of the steering
10 wheel since him grabbing the steering wheel running the, the
11 vehicle off the car (sic) was -- went to the heart of the
12 case, and that would of been exculpatory evidence.

13 Q I understand.

14 A So, exculpatory evidence was suppressed.

15 Q If there was any?

16 A If there -- yes, if there was, which would of been
17 because that's what he did.

18 Q I understand.

19 All right. Let's go over to the next page. Items T,
20 U, V, and W all refer to jury charges that you feel that
21 your attorney should have asked the judge to charge.

22 A That is correct.

23 Q All right. And is it your testimony that you were
24 prejudiced by your attorney's failure to request these
25 charges?

1 A That is correct.

2 Q Do you have any other testimony to add other than what
3 you have in your application, and the fact that you feel
4 that it was prejudicial not to charge those?

5 A Well, I have cases to cite, cases that were overturned
6 on, on, on those issues because the trial counsel was
7 ineffective in failing to ask for those, for those charges.
8 I have cases that were actually reversed because trial
9 counsel's failure to ask for a jury was ineffective
10 assistance of counsel.

11 Q But---

12 A I can cite those cases---

13 Q All right.

14 A ---if you want me to.

15 Q Aren't your cases contained in your, in your initial
16 application or do you have additional cases?

17 A I believe I do have -- I do have additional cases which
18 I did not -- this was not in my initial application. So, I
19 have State v. Day, 535 S.E.2d 431, Supreme Court, 2000,
20 which says failure to charge specific elements of
21 self-defense that applied to Defendant's therapy constituted
22 reversible error.

23 Q Okay.

24 A Here is State v. Day---

25 Q You don't, you don't need to go into the contents of

1 it. The fact that you cited it is enough.

2 A Yes, sir.

3 Okay. Also State v. Hendrix.

4 Q You've already cited State v. Hendrix.

5 A Yes, I have cited State v. Hendrix, yes, sir.

6 Q All right. Let's go ahead on Page 5 to 2-A when you
7 get into appellate counsel.

8 Do you have that?

9 This is on the amended return.

10 A Yes, sir.

11 MS. GIOVANOLI: Your Honor, in the interest of judicial
12 economy, I would press with my motion to dismiss that I made
13 at the beginning of Court. Five of them, A, B, C, D, E, and
14 then even 6, they both are alleging abuses of discretion by
15 the Trial Court and the Appellate Court. These are direct
16 appeal issues, and, per the statute, they're not proper for
17 PCR. I don't believe it's proper for us to proceed down
18 this line of questioning with regard to those allegations.

19 (Pause.)

20 MS. GIOVANOLI: I'm on 2-A. I'm sorry. But on Page 5.

21 THE COURT: Of the amended application?

22 MR. PRICE: Yes, ma'am.

23 THE COURT: Okay.

24 MS. GIOVANOLI: Okay. So, we're addressing ineffective
25 assistance of appellate counsel?

1 THE WITNESS: Yes, ma'am.

2 MS. GIOVANOLI: Okay. That is proper for PCR. So,
3 I'll do withdraw that, but I do want to reserve that motion
4 when we do go to the other improper claims for PCR.

5 THE COURT: Yes, sir.

6 MR. PRICE: As I understand, we'll, we'll hit the---

7 THE COURT: Yes, sir.

8 MR. PRICE: ---appellate right now.

9 THE COURT: Yes, sir.

10 Q Do you have that document, Mr. Marin?

11 A Yes, I do.

12 Q Okay. 2-A on Page 5. You claim your appellate counsel
13 was ineffective for failing to claim issue of the direct --
14 the failure of the Court to direct a verdict on
15 self-defense.

16 Is that correct?

17 A That is correct.

18 Q Okay. Anything else you want to say about that?

19 A Yes. Appellate counsel, Robert M. Dudek, was effective
20 in failing to claim the directed motion on self-defense
21 since he was ruled upon the Trial Judge, and, therefore, it
22 was preserved for appellate review. This issue was
23 dispositive of this case, and, if you -- in the transcript,
24 this was in the transcript, Page 269, 20 through 270.

25 Q Okay. And would your argument be the same for B on the

1 directed verdict on the venue issue?

2 A Yes, I feel he was ineffective in failing to claim
3 those issues since those were issues that were dispositive
4 of the case.

5 Q while I'm thinking about it, when you testified, were
6 you ever asked by your lawyer where the shooting took place?

7 A Not -- I was asked -- well, I don't understand
8 dispositive.

9 Q As far as what county.

10 A Oh, yes, I told him -- like I told her it happened as
11 soon as we hit Wade Hampton.

12 Q But before the trial?

13 But your trial testimony will reflect whether you were
14 asked anything about venue and jurisdiction, would it not?

15 A well, I didn't understand anything about venue.

16 MR. PRICE: Okay. I'll withdraw the question, Your
17 Honor,

18 A Can you ask that again please?

19 Q I have withdrawn it. I'll get there another way.

20 A Okay.

21 THE COURT: Yes, sir.

22 Q On -- going over to D, you say that Mr. Dudek was
23 ineffective in skipping a crucial step in the appellate
24 process.

25 what do you mean by that?

1 A Mr. Dudek skipped the, the reply brief.

2 Q Okay. And why did you feel that a reply brief was
3 necessary?

4 A A reply brief was necessary because, in his brief---

5 Q Now, hang on one second. The Court does not know who
6 his is.

7 A Yes, I guess the Attorney General's Office.

8 Q You talking about the brief that Mr. Ghent filed---

9 A Yes.

10 Q ---claiming that you held the man down?

11 A That I held the man down and pinned him down --

12 Q Okay.

13 A -- while -- that I shot him while I was holding him
14 down and pinning him down.

15 Q And you take offense to that?

16 A Well---

17 Q We're gonna discuss that in a minute. That's a simple
18 question.

19 Do you take offense to that?

20 Yes or no.

21 A I was highly prejudiced by it, yes.

22 Q Okay. All right. And you feel that Mr. Dudek should
23 have filed a reply brief to that prejudicial statement?

24 A Yes, I do because I feel the Supreme Court and the
25 Court of Appeals, the outcome would of been different if, if

1 the Supreme Court or the Court of Appeals would of been,
2 would of been explained that the victim was not pinned down,
3 that he was -- I was not holing him down, that Mr. Ghent
4 lied about his brief. So, he should of filed a reply brief
5 to the Supreme Court rebut -- to rebuttable (sic) that lie
6 by Mr. Ghent.

7 Q Okay. E, Mr. Dudek was ineffective about contesting
8 the issue about malice.

9 would you explain that?

10 A Yes, D, the trial prosecutor submitted to the jury that
11 firing two shots was malice, and State v. Hendrix clearly
12 states that that is not malice. So -- and the prosecutor is
13 not suppose to cite law to the jury. That is the Judge's
14 job to cite jury to---

15 Q But what is your complaint about Mr. Dudek?

16 A That, that he should of raised that issue to the
17 Supreme Court that it was not malice, that we proved
18 self-defense as a matter of law.

19 Q And he did not do so?

20 A He did not do so.

21 Q Okay. F. There was an oral argument in your case, was
22 there not?

23 A Yes.

24 Q Did Mr. Dudek attend?

25 A He did not.

- 1 Q Did he have someone substituted for him?
- 2 A He did.
- 3 Q And why do you feel that was prejudicial to you?
- 4 A Because he recused himself only a couple of days prior
- 5 to the oral argument.
- 6 Q And when you say he, who?
- 7 A Mr. Dudek.
- 8 Q Okay.
- 9 A He recused himself a couple of days prior to the oral
- 10 argument, and instead of him arguing the oral argument, he
- 11 replaced himself with Mr. Alexander. That would be the same
- 12 as, as my trial counsel being my, my counsel all throughout,
- 13 all throughout my -- that would be the same as him being my
- 14 counsel all throughout the case, and then a couple of days
- 15 before trial, replacing himself with someone else.
- 16 Q You feel you were prejudiced by that?
- 17 A Of course.
- 18 Q Okay. G. Mr. Dudek did not cite State v. Day along
- 19 with Fuller.
- 20 why do you feel that that was---
- 21 A I'll, I'll, I'll skip over that.
- 22 Q All right. So, you're withdrawing G?
- 23 A I'll withdraw G.
- 24 Q Okay. What about H?
- 25 A Yes, I feel that I -- in State v. Belcher, that is the

1 same -- State v. Belcher equals to the, to the Hendrix
2 because, in State v. Belcher, the Court argued that malice
3 was inferred by the use of a weapon. In my case, malice was
4 inferred by the use -- by two shots being fired instead of
5 one. I feel that I should of gotten the same treatment as
6 Belcher did that the -- for the Supreme Court. She should
7 of argued that, that two shots were not -- you can not infer
8 malice by two shots being fired.

9 Q I understand. That was---

10 A Just as you can not infer malice by the use of a
11 weapon.

12 Q Okay. Let's go to Item 3, subject matter jurisdiction,
13 which basically goes back to the jurisdiction and venue.

14 A Yes, the, the incident happened in Greenville County---

15 Q You have already testified---

16 A ---and Spartanburg County had no---

17 Q You have already testified about that.

18 A Yes.

19 Q Okay. Item 4, Page 7. You referred to Mr. Zelenka
20 complaining about his brief on evidence and the facts. I
21 believe that -- are you referring to the portion of the
22 brief that had to do with the claim that you held the
23 deceased down?

24 A Yes, that I held him and shot him while I was -- while
25 he was being held down.

1 Q Hang on one second. Hang on one second.

2 Is this a copy of the coversheet of the brief?

3 A Yes.

4 Q All right. And is this the highlighted portions of the
5 testimony that you objected to?

6 A Yes.

7 MR. PRICE: Your Honor, I would offer this rather than
8 giving the Court the entire brief.

9 THE COURT: Counsel.

10 MS. GIOVANOLI: I would just refer to the record. The
11 entire direct appeal record is in there.

12 You just refer to the parts so she can look at it, and
13 we don't need to make the record too voluminous by adding
14 another copy, and I don't mind you putting this up, but I
15 don't think we need to make it an exhibit.

16 MR. PRICE: All right. We'll just refer to them.
17 We'll give the Court a copy and you a copy.

18 THE COURT: Okay. And so I have -- for the record, I
19 have been provided an informational highlighted copy of
20 Respondent's brief authored by Mr. Ghent, et al.

21 Okay. This looks like Pages 16 and 17 of that.

22 Is that correct, counsel?

23 MR. PRICE: Yes, ma'am.

24 THE COURT: All right. Thank you.

25 Q I have given you a portion of the brief.

1 A Yes.

2 Q Correct?

3 A Yes, sir.

4 Q Now, is the portion that I gave you the portion that
5 you were objecting to as far as being prejudicial and
6 untrue?

7 A This is only one part. It's missing two other parts,
8 which I have. That is not the -- actually, this is only one
9 part where he claims that -- there are three separate parts
10 in which he claims that---

11 Q All right.

12 A ---which I have here.

13 Q Go ahead and tell the Court what your testimony would
14 be as far as the parts you're concerned --.

15 A It's in his brief in Page 12, Page 15, and Page 16 of
16 Mr. Ghent's brief.

17 Q Okay. And your objection is what?

18 A That -- in Page 12 of Mr. Ghent's brief, he said, in
19 justifying that he put a gun to his head, to the back of the
20 victim's head as the victim was prone and face down in his
21 lap, which if he had been shot like Mr. Ghent said, prone
22 and on my lap, the gunshots, since it was through and
23 through, they would of found a bullet hole or a bullet
24 fragment on the floorboard of the vehicle. And the only
25 shots were the one that went through the windshield, the --

1 one of the shots, and the second shot hit the, the GPS
2 system and shattered it.

3 So---

4 Q So, your testimony is the shots went up instead of
5 down?

6 A That he was trying to run the vehicle of the car and
7 one of the shots went through the windshield, and the other
8 shot went and shattered in the GPS unit, which was
9 hanging---

10 Q I understand.

11 A ---from the rearview mirror. If it had been true like
12 Mr. Ghent says, the victim, prone down, face down, and in
13 his lap, they would of found bullet holes or fragments on
14 the floor inside of the car in the floorboard.

15 Q All right.

16 A The second time on his brief, on his brief, in Page 15,
17 he says but which admittedly did not tell jurors that having
18 one shot on an armed man who was pinned face down. Again,
19 if he would of been pinned and face down, they would of
20 found bullet fragments, and, and -- or bullet hole down in
21 the car on the floorboard or whatnot.

22 Then Mr. Ghent, again in Page 16 of his brief, says,
23 again, this was evidence of pulling a gun from the glove box
24 department -- compartment by holding the victim face down.
25 So, three times he claims that the deceased was face down

1 while he was shot, which is a lie. So, he lied on his brief
2 and this prejudiced, prejudiced me against the Court of
3 Appeals and Supreme Court.

4 Q And that's why you feel that Mr. Dudek should have
5 filed a reply brief contesting or disputing that --

6 A That is correct.

7 Q -- that representation of the facts?

8 A That is correct.

9 Q Okay. Item 4-B about the prosecutor misrepresenting to
10 the jury evidence of the facts about the case.

11 Is that your argument about the two shots being
12 considered malice?

13 A Yes, the prosecutor said to the jury, ladies and
14 gentlemen, I submit this is malice. That is not -- that is
15 not a fact. That is a lie. That is not --.

16 Q Well, that's, that's an issue that you have---

17 A That is not the law.

18 Q ---you -- you have already covered that issue---

19 A Right.

20 Q ---about your objection to and the -- that your
21 attorney should of objected to that.

22 A That is correct.

23 Q And that there was no preservation of that issue and
24 that you were prejudiced by the two shots---

25 A I'm prejudiced---

1 Q ---equals malice.

2 A That's correct.

3 Q Is there anything additional to add other than what
4 you've already testified to?

5 A No.

6 Q Okay.

7 A Not to this issue.

8 MR. PRICE: All right. Your Honor, at this time,
9 before we get into the legal stuff, let's go back to the
10 initial application that was filed.

11 THE COURT: Yes, sir, I have it.

12 MR. PRICE: And we'll go to Item 10-L.

13 THE COURT: Yes, sir.

14 Q I'm going back to your initial Application, Mr. Marin.
15 10-L says that Mr. Dudek was ineffective for failure to
16 claim the verdict of self-defense.

17 You've already -- you've just discussed that, did you
18 not?

19 A Yes.

20 Q All right. 10-M, Mr. Dudek did not claim the directed
21 verdict of venue. You have discussed that.

22 A Yes.

23 Q 10-N was your State v. Currie. You do not -- you are
24 not going into that now, are you?

25 A State v. Currie?

1 Q Didn't you waive that?

2 A No, no. I waived -- that's not one I waived, no.

3 Q Okay.

4 A I do want to claim that issue.

5 Q All right. My fault.

6 what do you want to talk about State v. Currie and Mr.
7 Dudek?

8 Now, you have briefed that on Page 11-N---

9 A Yes.

10 Q ---of your brief with your initial application,
11 correct?

12 A Yes.

13 Q Okay. Is there anything else that you want to say
14 other than what's contained in that brief?

15 A Well, yes, I feel that this was a case that -- Mr.
16 Dudek filed this claim for Mr. Currie, and it was at around
17 the same time that, that he was representing me, and
18 Mr. Currie -- in State v. Currie, 406 Supreme Court 364, 752
19 S.E.2d 263 of the Supreme Court of 2013, he claimed that the
20 Supreme Court says I can not move for immunity under the act
21 at the directed verdict stage calling it a slightly usual
22 procedure, and the Supreme Court allowed Mr. Currie to,
23 to -- they heard the directed verdict on, on immunity
24 because, because it was slightly an, an unusual procedure.
25 So, I feel I should of been given the same, the same

1 treatment as Currie.

2 Q Okay.

3 A My, my issue should of been brought up before the
4 Supreme Court also because my immunity was the same as
5 Mr. Currie.

6 Q Understood.

7 All right. In 10-0, you have an issue with a ruling of
8 the Court of Appeals.

9 MS. GIOVANOLI: And I'm gonna, once again, renew my
10 objection to any abuses of discretion by the Trial Court or
11 the Appellate Court, which I think are the remainder of the
12 allegations in the application, are not proper for PCR for
13 the reasons I mentioned before. I can elaborate if Your
14 Honor would like.

15 THE COURT: Counsel.

16 MR. PRICE: I would like to hear the elaboration.

17 MS. GIOVANOLI: Sure.

18 Under the PCR Statute, the issues that are meant for
19 direct appeal are not proper for PCR. PCR is not a
20 substitute for a direct appeal.

21 Direct appeals are essentially to handle any abuses of
22 discretion by a Trial Court. If there were any abuses by --
23 of discretion by an Appellate Court, if it was the Court of
24 Appeals, it would go up to the Supreme Court. If it was the
25 Supreme Court, it would then go up to the United States

1 Supreme Court.

2 And so, therefore, this is not the proper venue to be
3 raising allegations of abuses of discretion by any Court.

4 MR. PRICE: AS to O, whatever the Court of Appeals done
5 was reviewed on cert to the South Carolina Supreme Court.

6 So, I agree. I don't think that that's a proper PCR
7 argument.

8 THE COURT: Okay. What about P and Q?

9 MR. PRICE: I agree.

10 THE COURT: Okay. Those are, those are appellate
11 issues, legal issues, and not factual issues, which should
12 be raised here.

13 okay.

14 Q Okay. Mr. Marin, that will bring us back to some more
15 of the same issues on your Amended PCR, and I'm referring to
16 Page 7, and the ones I'm referring to are B, C, D, and E,
17 and I think those---

18 MS. GIOVANOLI: And, again, I'm renewing my objection.
19 We're still going down that same path of abuses of the Trial
20 Court discretion.

21 THE COURT: Okay. And, for the record, we are looking
22 at the Amended Application for Post-Conviction Relief filed
23 on October the 4th of 2017, and we are looking at
24 handwritten numbered Page 7 of 8, and this is numbered
25 Paragraph 5 of abuse of discretion by the Trial Court?

1 MR. PRICE: Yes, ma'am.

2 THE COURT: Number 5, and then Paragraphs B, C, D, and
3 E?

4 MR. PRICE: Yes, ma'am.

5 THE COURT: Okay. So, counsel, what is your position
6 as to the Attorney General's objection?

7 MR. PRICE: My position is, to the extent that
8 allegations against Trial Counsel for failure to request
9 charges as being ineffective and the failure to protect my
10 client during the trial would be part of this, but to the
11 extent that objections are made as far as the Court of
12 Appeals and -- the rulings of the Trial Court are -- should
13 not be part of this PCR. The parts of my client's testimony
14 pertaining to his client's (sic) ineffectiveness for failing
15 to protect his rights in these matters should be part of it.
16 Hopefully that makes sense.

17 THE COURT: I think so.
18 Counsel.

19 MS. GIOVANOLI: I'm, I'm -- so, are we pursuing more
20 allegations of ineffective assistance of counsel that
21 weren't pled?

22 MR. PRICE: No, those that -- those have already been
23 discussed, the self-defense, failure to bring that up during
24 the opening statement was testified to. Testimony has been
25 made on the failure to raise the issue of venue and

1 jurisdiction.

2 The record will reflect that my client was not asked
3 about where this offense occurred when he testified. State
4 v. Hendrix, he's, he's already testified about that.
5 Failure of trial counsel to request that.

6 well, she, she stated the wrong objection first, but
7 that got straightened out, and it sounds like somewhat of a
8 catchall.

9 MS. GIOVANOLI: And so my motion was we've addressed
10 those with ineffective assistance of counsel. Not as abuses
11 of the Trial Court.

12 MR. PRICE: In going over to 6-A, B, C, D, I don't
13 think PCR Application can address issues by the Supreme
14 Court. I -- well, I should say I have no cases to the
15 contrary.

16 Do you, Mr. Marin?

17 A No, sir.

18 THE COURT: Okay. So, Mr. Price, just so we're clear,
19 with regard to the Amended Application, at Numbered
20 Paragraph 5, you agree that B, C, D, and E, and Numbered
21 Paragraph 6, in it's entirety with Subparagraphs, is, is not
22 properly before this Court.

23 what about 5-A?

24 Did y'all agree to that?

25 MS. GIOVANOLI: I have the same position with regard to

1 A..

2 Q Mr. Marin, 5-A was the issue about preliminary hearing.
3 Last week you told me you were going to---

4 A No, I'll---

5 Q ---withdraw that issue.

6 A I withdraw that issue.

7 Q Okay.

8 THE COURT: Okay. So, 5-A is not before the Court?

9 MR. PRICE: That's correct.

10 THE COURT: Okay.

11 MR. PRICE: That should lead us to the Second Amended
12 PCR Application.

13 THE COURT: Yes, sir.

14 Q Do you have that?

15 A Here's one filed October 25th, 2017, for prosecutorial
16 miscontent (sic) and malicious prosecution. That was, that
17 was my last one. That is not -- I have a couple more
18 between those.

19 Q Well, I haven't seen those. So, let's talk about this
20 one, this one here, and they're, they're, they're a couple
21 on here.

22 A Yes, those are the ones.

23 Q These---

24 A These here are missing from --.

25 (Pause.)

1 A I have one from October 25th, and November -- one from
2 November 17th --

3 Q I think---

4 A -- which are clocked and stamped by the Clerk of Court.

5 Q Let me give you this, which will be the same thing.

6 A Yes, that's --.

7 Q All right. Put that stuff down.

8 A That's one of them, yes, sir.

9 Q Just use that.

10 Okay. Okay. Number one -- excuse me. Ineffectiveness
11 of trial counsel. Allowing falsified direct physical
12 evidence to be introduced by Detective Dale Arterburn. You
13 have already testified about that. Plus we put
14 Mr. Arterburn on the stand.

15 Is there anything else you want to add?

16 A Which one is that?

17 I'm sorry.

18 Q I'm talking about---

19 A Yes, I do.

20 Is that, is that Y?

21 Q Yes, sir.

22 A Trial counsel was ineffective.

23 Okay. I'm sorry. Do you have the pictures that were
24 introduced into, into evidence earlier?

25 Q Yes.

1 A I can't seem to find mine.

2 Q Here they are.

3 MS. GIOVANOLI: I'm gonna object now cause this has
4 been asked and answered. We went down this line of
5 testimony with regard to Dale Arterburn lying, introducing
6 some photos, which he's alleged showed that the accident
7 didn't happen that day.

8 THE COURT: Counsel.

9 Q Mr. Marin, you have already testified that you dispute
10 what Dale Arterburn testified to at the trial, that that
11 testimony was based on hearsay by Mr. Jimenez, the guy that
12 was in the car with you, and that your attorney should have
13 objected to it, but did not, and you were prejudiced. You
14 also testified about your car, those pictures there, and how
15 that refutes what Mr. Arterburn testified to back in 2010.

16 Is there anything else that you can add to that?

17 A Well, yes. What my testimony is on that is that
18 Mr. Arterburn introduced falsified evidence, and these
19 pictures will show---

20 MS. GIOVANOLI: Objection. Asked and answered.

21 A ---that his---

22 Q You have already testified to that.

23 Do you have anything new or different?

24 A No.

25 Q Okay. And your -- you're saying your attorney should

1 of objected to Mr. Arterburn's testimony in its entirety?

2 A That is correct.

3 THE COURT: Okay. Thank you. I guess I sustain that,
4 but --.

5 MS. GIOVANOLI: Thank you, Your Honor.

6 THE COURT: Okay.

7 Q Okay. Going over to prosecutorial misconduct, and
8 malicious, which will -- you've got 4-D, Dale Arterburn
9 lying on the stand about the evidence, the shooting, the
10 venue.

11 You have already testified about that, have you not?

12 A Yes.

13 Q All right.

14 A Yes.

15 Q To the next page, prosecutorial misconduct, D-4-D,
16 suppression of evidence by Prosecutor Susan Reese suppressed
17 steering wheel---

18 A Yes.

19 Q ---cover.

20 A Yes.

21 Q Explain that please.

22 A well, Prosecutor Suzanne Reese maliciously suppressed
23 the steering wheel cover, which was collected as evidence,
24 and sent to SLED for DNA testing. Prosecutor Suzanne Reese
25 suppressed the evidence because it was exculpatory evidence.

1 It would of had the decedent's DNA and proven the decedent
2 was trying to run the vehicle off the road and kill everyone
3 in the vehicle.

4 Q All right. What evidence do you have that Ms. Reese
5 suppressed anything?

6 A Well, the steering wheel cover was never presented at
7 trial, and it was sent to SLED for DNA testing. So, it was
8 suppressed.

9 Q What evidence do you have that there was, number one,
10 any evidence from SLED or, two, that Ms. Reese suppressed
11 it?

12 A Yes. Here is a SLED Laboratory Forensic Services
13 Request, and here Item 8 lists item steering wheel cover
14 from vehicle evidence processing.

15 Q Hang on one minute. I'm gonna help right here.

16 (Pause.)

17 MR. PRICE: Let's staple those together please, ma'am.

18 (WHEREUPON, the SLED request form was marked as
19 Applicant's Exhibit No. 7 for identification purposes only
20 at this time.)

21 Q Okay. Mr. Marin, over here is the SLED form
22 acknowledging receipt of the steering wheel cover.

23 A That is correct, yes.

24 Q And, again, the steering wheel cover in which they're
25 requesting blood and DNA comparison?

1 A Yes.

2 Q All right. You have not seen this letter. I got it
3 this week, but if you will look at that?

4 A (Witness complies.)

5 MR. PRICE: Your Honor, we offer this as --.

6 THE COURT: Okay. And what is that, counsel?

7 MR. PRICE: This is a -- about three or four pages of
8 not P&E, but chain of evidence documents that came from the
9 trial concerning evidence sent to SLED, which contained the
10 steering wheel cover that Mr. Marin is talking about. In it
11 it requests -- the request was made by Spartanburg County
12 that DNA be done on the steering wheel cover, and compare to
13 both Mr. Marin and the decedent.

14 Now, I'm representing to the Court the same thing as I
15 told Ms. Giovanoli. I did not catch this particular point.
16 This was filed in December, done by my client, and I
17 hurriedly filed it to get ready. When -- after talking to
18 Mr. Marin last week, I noticed this as an issue. So, I got
19 in touch with SLED and Ms. Giovanoli, and we got -- there
20 was another letter sent to Spartanburg County saying that
21 the samples submitted did not comply with their test
22 requirements.

23 Now, as of today, I have requested an email from SLED
24 just letting me know did they do DNA or did they not. I
25 wanted to put this thing to bed because this is a serious

1 allegation against Ms. Reese. It's a serious claim by him.

2 As of today, I have not gotten a response from SLED.

3 So, that's where we are. We've got a letter saying the
4 samples did not comply.

5 THE COURT: Okay.

6 MR. PRICE: Is that fair enough?

7 MS. GIOVANOLI: Yeah, just can I add that that request
8 for an email was made yesterday. So, it's not to say that
9 they won't respond. This letter was provided to us Monday,
10 and it basically says that the State asked for an analysis
11 of the, of blood samples from the steering wheel, but SLED
12 sent it back and said it didn't follow protocol.

13 So, as far as I'm concerned, what I have seen, no tests
14 were ever run on the steering wheel cover.

15 THE COURT: Okay. But what's your position as to that
16 coming in as evidence?

17 MS. GIOVANOLI: Oh, I'm fine with that document coming
18 in.

19 THE COURT: Okay.

20 MS. GIOVANOLI: No objection.

21 THE COURT: So, that will come in as Applicant's No. 7,
22 and, I guess, if you get evidence back to the contrary, that
23 will be another hearing, won't it, Mr. Price?

24 MR. PRICE: Frankly, I, I sent an email to SLED
25 Tuesday. They ignore my emails. And, quite frankly, they

1 do not ignore hers, which I certainly understand. She being
2 the Government, and me being an attorney.

3 I have requested this follow-up from them a couple days
4 ago, and that I followed up with Ms. Giovanoli yesterday.
5 And she, in turn, said -- sent the email to SLED saying she
6 didn't have any objection.

7 what I would propose is if I could submit an order to
8 this Court requiring SLED to send me and Ms. Giovanoli any
9 test results on this. I think -- and leave the record open
10 until we get either they did or they didn't. If they didn't
11 do it, then that's a dead issue. If they did do it, then
12 it's something that should be looked into.

13 MS. GIOVANOLI: So, essentially, what he's doing is
14 asking for discovery for an Order to Compel SLED to produce
15 some kind of statement or document that no test was
16 performed on that, and this is a little out of place.
17 Usually we take up discovery motions pretrial or pre-PCR
18 hearing.

19 I will inform the Court that the discovery statute in
20 PCR requires that there be a showing of good cause. I don't
21 feel that the Applicant is made a showing of good cause.
22 He, he's made a bare bones allegation that a prosecutor
23 suppressed evidence, and he has offered no grounds for that
24 allegation other than speculation. I think SLED's being
25 overly accommodating, as well as me, in providing him the

1 proof that no tests were produced, but I'll leave it in the
2 discretion of this Court. Just a little bit out of order
3 to make a discovery motion, and the State would, would argue
4 that a showing of good cause has not been made for this
5 matter.

6 THE COURT: Okay. Mr. Price, your response, sir?

7 MR. PRICE: SLED has -- SLED told us that they sent a
8 letter to Spartanburg November 20th of 2009 saying that
9 the samples had been sent down did not comply with their
10 requirements. SLED has not told me that they did not run
11 any more tests. I'm just thinking that this needs to be,
12 not only for my client, but for the allegation against Ms.
13 Reese, it needs to be put to bed. They either did it or
14 they didn't. They should tell me.

15 THE COURT: Okay. Let's, let's continue with his
16 testimony, and I'll issue a ruling on that at the conclusion
17 of the hearing.

18 MR. PRICE: Okay.

19 THE COURT: Okay. And so now Applicant's Exhibit No. 7
20 has been admitted into evidence, and this is correspondence
21 from SLED to Investigator Glenn of the Spartanburg County
22 Sheriff's Department dated November the 20th of 2009. A
23 chain of custody document from SLED, Page 11 of 39, a SLED
24 lab forensic services request, which looks like there are --
25 there's an additional three page looks like they are chain

1 of custody documents.

2 Okay.

3 (WHEREUPON, the documents were marked as Applicant's
4 Exhibit No. 7 and received into evidence at this time.)

5 THE COURT: Yes, sir. Thank you.

6 CONTINUED DIRECT EXAMINATION

7 BY MR. PRICE:

8 Q Mr. Marin, it looks to me that that's, that's it as far
9 as your Application.

10 A No. As far as on this issue, I believe that it was
11 either suppression of evidence or a Brady violation either
12 way because---

13 Q You talking about the issue of the steering wheel
14 cover?

15 A That is correct.

16 Q And when you say either way, would you explain that?

17 A Well, either she suppressed the evidence or, or Brady
18 material was not disclosed.

19 Q If that---

20 A I have never heard of that letter, that, that cover
21 letter, that was on the evidence sheet. I've never seen
22 that before.

23 Q I agree with you. That was not in the discovery.

24 A That was not in the discovery.

25 Q Now---

1 A So, it's either a suppression violation or it's a Brady
2 violation.

3 Q If testing was done?

4 A Well, if the testing was done, and it was not
5 presented, that would be a suppression violation. If
6 testing was not done and it was rejected, that is a Brady
7 violation because I've never heard -- I've never seen that
8 letter. I've never -- my, my trial counsel never mentioned
9 anything about that, and she just said they just recently
10 sent that letter. So, it's either -- either is a
11 suppression violation or it's a Brady violation.

12 Q Understood.

13 A Either one.

14 Q All right. Having said that, I think we've gone
15 through all your issues that you have raised in your
16 initial -- the second Application and the second amended.

17 Is there anything else that we have not discussed that
18 you want to testify to do -- today about the prejudice to
19 you?

20 A I believe, I believe that covers the---

21 Q Okay.

22 A ---all my issues.

23 Q Would you answer any questions that the State has for
24 you?

25 A Yes, sir.

1 THE COURT: Okay.

2 MS. GIOVANOLI: May I---

3 THE COURT: I tell you what, before we begin this,
4 counsel, can y'all approach and---

5 MS. GIOVANOLI: Sure.

6 THE COURT: I saw Mr. Richey, and then he was gone.

7 MS. GIOVANOLI: He asked me what time we'd be done, and
8 I didn't have an answer for him.

9 THE COURT: Okay.

10 (WHEREUPON, a bench conference was held at this time.)

11 THE COURT: All right. Mr. Marin, sir, we're, we're
12 going to break for lunch at this time.

13 THE WITNESS: Okay.

14 THE COURT: But, sir, because your examination is not
15 complete, you will not be allowed to talk to Mr. Price
16 during the break.

17 THE WITNESS: Well---

18 THE COURT: Okay. And you can leave all your documents
19 up here because you're going to come right back after lunch
20 and sit at that witness stand.

21 THE WITNESS: Okay.

22 THE COURT: And the deputies will lock this room.
23 Nobody will bother your things.

24 THE WITNESS: Okay.

25 THE COURT: All right?

1 THE WITNESS: All right.

2 THE COURT: So, we'll be in recess until two o'clock.

3 (WHEREUPON, Court was in recess for the lunch hour.)

4 THE COURT: Ms. Giovanoli.

5 MS. GIOVANOLI: Yes, ma'am.

6 THE COURT: I just see that another one of your
7 witnesses has entered the courtroom. You might want to take
8 a moment and explain.

9 MS. GIOVANOLI: Thank you.

10 THE COURT: Yes, ma'am.

11 (Pause.)

12 MS. GIOVANOLI: Thank you, Your Honor.

13 THE COURT: Yes, ma'am.

14 Are you ready to begin cross-examination?

15 MS. GIOVANOLI: I am, as long as the Applicant is.

16 THE COURT: Okay.

17 All right. Mr. Marin, sir, I'm gonna ask you to come
18 back up to the witness stand.

19 THE APPLICANT: Yes, ma'am.

20 (WHEREUPON, the witness returns to the stand.)

21 THE COURT: And be reminded, sir, you are still under
22 oath. Thank you.

23 CROSS-EXAMINATION

24 BY MS. GIOVANOLI:

25 Q Okay. Good afternoon, Mr. Marin.

1 A Hi.

2 Q Where were you going that night that you left Bongo's?

3 A Excuse me?

4 Q Where were you going the night you left Bongo's?

5 A To drop off the deceased.

6 Q Okay. And, and the bouncer put the deceased in your
7 vehicle, did he not?

8 A Well, he didn't put him there. He, he walked with him.

9 Q Okay. There's a photo that was admitted at trial
10 showing the bouncer putting the victim into your car.

11 Is that not correct?

12 A Yes, I mean---

13 Q Okay. And, at that point, you actually typed his
14 address into your navigation system.

15 Is that correct?

16 A Yes.

17 Q And what was the address?

18 It's was -- it's in the transcript, but that was 56
19 Hayfield Lane?

20 A I think so. Sounds familiar.

21 Q Okay. And are you aware that's only about five miles
22 away from the club?

23 A I think so, yeah. I mean I --.

24 MR. PRICE: Excuse me.

25 MS. GIOVANOLI: I'm sorry.

1 So, what was your answer to that question?

2 It was about five miles from the club to the victim's
3 house---

4 A I don't know---

5 Q Right?

6 A I don't know exactly --

7 Q Okay.

8 A -- how far it was. I suppose.

9 Q I'm gonna show you a document --.

10 (WHEREUPON, a map was marked as State's Exhibit No. 1
11 for identification purposes only at this time.)

12 Q -- a document that's been marked for identification
13 purposes only. It's State's Exhibit 1. And this is a map,
14 and I'm gonna use this for demonstrative purposes, purposes,
15 but there was testimony in the record that Bongo's is
16 located at 3715 East North Street. That's right there. And
17 that the victim's house, like you just said, is 56 Hayfield
18 Lane, and that's right there.

19 A Okay.

20 Q Okay. Now, I've shown you -- I'm showing you what is a
21 map, a Google map.

22 Do you use Google maps?

23 A I---

24 Q Did you---

25 A I have before.

1 Q You have?

2 A Uh-huh. (Affirmative).

3 Q So, you're familiar while -- with using Google maps in
4 order to locate locations?

5 A Yeah.

6 Q Okay.

7 A Sort of.

8 Q Well, that's what this is, and I'm using it for
9 demonstrative purposes, but this route it shows from --
10 going from East North Street to Old Spartanburg Road to the
11 victim's house.

12 Is that the route that you took that night?

13 A I -- the route that I started, yes, on East, East North
14 Street.

15 Q Okay. And your testimony was that the victim grabbed
16 your forehead on East North Street or Old Spartanburg?

17 A On East North.

18 Q At what point?

19 A East North Street.

20 Q Okay. So, that was within five miles. Let's see.
21 That says about five miles from the club to the victim's
22 home.

23 So, within those first miles, the victim attacked you?

24 A Yes.

25 Q That was your testimony?

1 A Uh-huh. (Affirmative).

2 Q Okay. And if I -- if counsel stipulates, I'd move to
3 admit this into evidence. It is a Google map. I think that
4 or I could ask for the judge to take judicial notice of---

5 THE COURT: Counsel, your position?

6 MS. GIOVANOLI: ---Google maps.

7 MR. PRICE: My position, Your Honor, the maps she
8 intends to use were shown to me earlier this week. I have
9 no issue as far as authentication such as Google subject to
10 my client being able to identify what happened and where I
11 have no objection.

12 THE COURT: Okay. Thank you, sir. So admitted.

13 MS. GIOVANOLI: Thank you, Your Honor.

14 (WHEREUPON, State's Exhibit No. 1 was received into
15 evidence at this time.)

16 (WHEREUPON, two more maps were marked as State's
17 Exhibit Nos. 2 and 3 for identification purposes only at
18 this time.)

19 Q I'm gonna go now to State's Exhibit No. 2 marked for
20 identification purposes. I'm sorry. I'm gonna go to
21 State's Exhibit No. 3, which I'm showing the witness.

22 Okay. And there was testimony in the transcript that
23 this may have occurred before, around, or after a Wal-Mart
24 in Greer.

25 Is that correct?

1 A Before actually.

2 Q Okay. And so this is the victim's house, and these are
3 multiple routes to Highway 29, to the Wal-Mart.

4 Can you demonstrate what route you took that night or
5 do you remember?

6 A I don't -- I know it's a straight shot pretty much
7 from, from East North Street to when we came up on a big
8 avenue, which I suppose is Wade Hampton. So, it's pretty
9 much a straight shot.

10 Q So, you don't remember the route that you took from the
11 victim -- when you passed the victim's home to Highway 29?

12 A After he attacked me, I was, I was pretty much in
13 shock. I, you know, I don't --.

14 Q So, you don't know if any of these routes are the
15 routes that you took?

16 A I can't tell from the maps -- from the map, no.

17 Q Okay.

18 A I can't tell.

19 Q All right. So, going back -- your testimony was that
20 the victim allegedly attacked you by grabbing your forehead
21 the first time.

22 Is that correct?

23 A Yes.

24 Q Okay. And then, while you were -- that was still while
25 you were on East North Street.

1 Is that correct?

2 A Yes.

3 Q Okay. So, how did you end up all the way in downtown
4 Spartanburg, which is about 25 miles away, with the victim's
5 dead body in your car?

6 A I was in shock. I was in shock. I was trying to find
7 a place -- I mean once he attacked me, once the incident
8 happened, I was totally in shock. I --.

9 Q Okay.

10 A I guess I was catatonic or whatever you --

11 Q Okay. Well, he attacked you more than once.

12 Is that correct?

13 A Twice.

14 Q Okay. Your first -- but your testimony was the first
15 time was in-between the club and the victim's home.

16 Is that correct?

17 A On East North Street.

18 Q Okay. And then the second time, your testimony in the
19 trial was actually you didn't know where it happened.

20 Is that correct?

21 A Well, I didn't know the address, exact location. I
22 know it happened as soon as we hit Wade Hampton --

23 Q Okay.

24 A -- which is four, four lane of six lane. I know it
25 happened right as soon as we hit the big avenue.

1 Q Okay. So, just for clarification, Wade Hampton is the
2 same as Highway 29?

3 Is that correct?

4 A I suppose, yes.

5 Q Okay. There was evidence presented that you, that the
6 shooting occurred at Tucapau and Highway 29 at the U.S.
7 Lumber Company.

8 Do you remember that testimony?

9 A Yes.

10 (WHEREUPON, two maps were marked as State's Exhibit
11 Nos. 4 and 5 for identification purpose only at this time.)

12 Q And I'm showing you right here, on this State's Exhibit
13 No. 4 for demonstrative purposes at this point, that is U.S.
14 Lumber. This is the victim's home.

15 Can you tell me which route you took from the victim's
16 home to U.S. Lumber?

17 A Actually we didn't get to the victim's home. Once he
18 attacked me, I was trying to find a place to stop, a
19 place -- a public place. But before I could get there, he
20 attacked me again, and that's when the incident happened
21 when---

22 Q And that second attack occurred at Tucapau and Highway
23 29.

24 Is that correct?

25 A No, that is not correct.

1 Q Okay. But that was the evidence offered at trial?

2 A No.

3 Q Correct?

4 A No, it was not. It was a lie by Detective Arterburn.

5 That's the evidence that he presented, which was a lie,

6 because I just proved with the pictures that my car was

7 already damaged. There was no debreeze (sic) where he says

8 he found debreeze (sic) because that photograph proves

9 there's missing bolts on the frame of the vehicle. Missing

10 bolts. The bolts are about half inch, which holds the --

11 all the debreeze (sic) that -- all the debreeze (sic) that

12 supposedly Detective Arterburn found.

13 Q Okay. Well, your---

14 A It is impossible for any debreeze (sic) to have been

15 broken. The bolts would still bend on the frame. So, that

16 was a lie. Whatever he said he found at Tucapau, it was a

17 lie, a fabrication, and the photograph proves that.

18 Q Okay. And do you recall that your attorney actually

19 admitted photographs of the intersection at Tucapau and

20 Highway 29 to help illustrate the location of the, the crime

21 scene?

22 Do you recall that from trial?

23 A Which was actually ineffective assistance. That's---

24 Q Okay.

25 A And that, that was without an evidentiary hearing,

1 which is one of my claims. An evidentiary hearing should of
2 been held for all evidence to be presented. I did not know
3 any evidence was gonna be presented because no evidentiary
4 hearing was held.

5 Q Okay. But you testified in your trial, didn't you?

6 A I did.

7 Q So, why didn't you testify that that is not where it
8 happened?

9 A Excuse me?

10 Q why didn't you testify that the shooting did not occur
11 where everyone had been saying it occurred during trial?

12 A I told my attorney that. I told that to my attorney.

13 Q See---

14 A But she never -- my attorney never asked me about,
15 about, about whether it happened at Tucapau or whatnot. I
16 told her---

17 Q You told your attorney, but you didn't tell the jury?

18 MR. PRICE: Your Honor, I object. My client gets a
19 chance to finish answering the questions before the next
20 one.

21 MS. GIOVANOLI: I'm sorry. I thought he was finished.

22 THE COURT: Okay. Yes, ma'am, just allow him to answer
23 before you ask your next question.

24 A Go ahead. Please answer.

25 THE COURT: Thank you.

1 A I was never asked.

2 Q Okay. But you testified in your own trial?

3 A I did.

4 Q And you offered your own side of the story?

5 A Yes, and I---

6 Q And when you were asked -- go ahead.

7 A I offered what happened between going from Bongo's to
8 where the shooting took place.

9 Q Which is where?

10 A In Wade Hampton Boulevard. As soon as we hit that big
11 avenue, that's where it happened. In Greenville County.

12 Q Okay. So, you're saying that it happened on Highway
13 29, but not at Tucapau?

14 It happened in Greenville County?

15 A That is correct.

16 Q Okay. Where in Greenville County?

17 A At soon as we hit Wade Hampton. I don't know where
18 that is. I know it's, it's -- as soon as we hit Wade
19 Hampton, that's when it happened.

20 Q But you never offered this information to your
21 attorney, did you?

22 A I did. I told -- did you see the map that I drew her?

23 I told her it happened as soon as we hit Wade Hampton
24 Boulevard, which is why she asked for venue.

25 Q Okay. But you don't know where you hit Highway 29,

1 Wade Hampton Boulevard?

2 You testified to that?

3 A It was a straight shot. So, I mean there's only so
4 many routes a straight shot could be from.

5 Q Just, if you could, please, on this map, this actually
6 shows -- here's 3715 East North Street, which was Bongo's.
7 Here's the victim's home at 56 Hayfield Lane. And then
8 here's Highway 29.

9 So, what do you mean a straight shot?

10 You would of had to make a couple of turns to get from
11 that location to Highway 29. So --.

12 A No. There's -- if you can see, it's pretty much a
13 straight shot. You can see it right there with your, with
14 your map.

15 Q And you're, you're right. Highway 29 is a straight
16 shot, but at what point did you enter Highway 29?

17 Your testimony earlier was that you don't even remember
18 where you got on Highway 29.

19 A I know it was from East North Street. To the end of
20 East North Street with -- East North Street ends and then
21 it's pretty much a straight -- it was a straight shot to
22 Wade Hampton Boulevard.

23 Q Okay. Well, by looking at this map, do you recognize
24 that this was the home where you lived at the time that you
25 testified to at trial?

1 That was the address of Bongo's. That was the address
2 of the victim's home, and this was downtown Spartanburg
3 where your car was located.

4 Do you recognize all of those locations on this map?

5 A You see here the -- here on this map, you don't have it
6 where -- you don't have it highlighted. It's a straight
7 shot from here, which is --.

8 Q If you see the road, you can mark it.

9 A This is -- would be a straight shot right here.

10 Q Okay.

11 A I mean I know it was pretty much a straight shot only.
12 So --.

13 Q Okay. So, your testimony is that -- first of all, I'm
14 gonna move this into evidence. It's State's Exhibit No. 1.
15 He's identified the locations on the map, and he's actually
16 drawn his own path that he---

17 A Actually I---

18 Q ---believes me took.

19 A No, I don't know that that's which way I went. I'm
20 saying, I'm saying that I was -- it was pretty much like a
21 straight shot. It wasn't many turns. It wasn't like any
22 turns. So, I --.

23 MR. PRICE: I have no objection to her admitting that,
24 but my client is saying he's not sure about the drawing that
25 he did. So, I would ask that that part be stricken or

1 blacked out or whatever.

2 THE COURT: Okay.

3 MS. GIOVANOLI: And that's fine. I have another clean
4 copy I can mark if that's necessary or we can have the
5 record reflect that the line is not a hundred percent.

6 MR. PRICE: Not accurate.

7 MS. GIOVANOLI: Accurate.

8 THE COURT: Okay. Why don't you just write on that
9 please, ma'am, not accurate or not precise?

10 MS. GIOVANOLI: Me?

11 THE COURT: Yes.

12 MS. GIOVANOLI: I can just get a new one.

13 How about I get a new one?

14 THE COURT: All right.

15 MS. GIOVANOLI: Sorry about that.

16 THE COURT: State's 1.

17 (WHEREUPON, the new map was marked as State's Exhibit
18 No. 1 and received into evidence at this time.)

19 Q Okay. So, the solicitor actually asked you where this
20 happened, and your response to her was I don't know, and you
21 actually said I don't know twice.

22 Do you recall that testimony?

23 I can refer you to Page 311 of the transcript.

24 Do you have a copy of the transcript?

25 A No, I said I didn't know exactly where, but I know it

1 happened as soon as we hit Wade Hampton, and it was before
2 Wal-Mart.

3 Q Now, actually on Page 311, on Line 4, you said "I don't
4 know where I was at." She then asked you, on 29 -- well,
5 let me back up.

6 A Uh-huh. (Affirmative).

7 Q On Line 1, she says and is it your testimony that, when
8 you're driving down this road looking for help, Wal-Mart,
9 the 24 hour Wal-Mart was not opened?

10 Your answer. I don't know where I was at.

11 Q. On 29?

12 I don't know where I was at.

13 So, twice you testified, you told the jury that you did
14 not know where you were, where the shooting took place?

15 A Well, I didn't know exactly where. I know it happened
16 as soon as we hit Wade Hampton.

17 Q But now today you're sure that it happened in
18 Greenville County?

19 A I mean as soon as we hit Wade Hampton. That's, that's
20 where it happened.

21 Q So, your memory today, eight years after the trial, is
22 better than it was at the trial.

23 Is that correct?

24 A No, I mean I, I just know it happened as soon as we hit
25 Wade Hampton. I don't know exactly where, but I know it

1 was---

2 Q Okay.

3 A ---at Wade Hampton before Wal-Mart.

4 Q But you'll agree that you never testified to that for
5 the jury?

6 A I was never asked.

7 Q Okay. All right. So, you testified that you reached
8 over to the glove box and got your gun out, right, during
9 one of the attacks by the victim?

10 Is that correct?

11 A Yes.

12 Q And that as he continually tried to come over the
13 console to grab the wheel, that's when you got your gun out
14 and shot him?

15 A Well, I kept pushing him back and he kept coming back.

16 Q So, when did you reach for your gun?

17 while he was in the back or while he was coming over?

18 A No, pushing him back and then I reached for the gun.

19 Q Okay. So, he was in the back seat when you reached for
20 the gun?

21 A Yes.

22 Q Why didn't you just pull over at that time?

23 A Because it -- I mean it -- I would of still been in
24 danger. The guy was -- kept attacking me, attacking me. He
25 kept coming over and coming over. I was trying to find a

1 public place, but it was dark.

2 Q But the danger that you testified to was him trying to
3 run the vehicle off the road.

4 Is that correct?

5 A And he was attacking me.

6 Q Okay. And so---

7 A He had already attacked me.

8 Q He hadn't -- and you testified he had no weapons?

9 A I didn't know that. I didn't, I didn't frisk him or
10 anything. I didn't know that.

11 Q But you testified that he's grabbing the wheel?

12 He's not grabbing you at this point?

13 A But he had already attacked me.

14 Q And, and so you shot him in the car instead of just
15 pulling over and kicking him out of the car?

16 A He was trying to kill us.

17 Q Okay.

18 A He was trying to run us off the road.

19 Q And isn't---

20 A We were all in---

21 Q ---it true that his blood alcohol level was .35
22 approximately?

23 A Excuse me?

24 Q Isn't it true that the evidence revealed at trial was
25 that his blood alcohol level was .35 approximately?

- 1 Maybe it was .34 or something.
- 2 A No, .32 something.
- 3 Q Okay.
- 4 A 3-2-6 or something.
- 5 Q It was above .3.
- 6 Is that correct?
- 7 A I suppose.
- 8 Q Okay. And didn't the---
- 9 A I don't know much about that.
- 10 Q ---doctor testify that people have died at alcohol
- 11 levels as low as .27?
- 12 A I don't know. I, I---
- 13 Q You don't remember---
- 14 A ---you could---
- 15 Q ---that testimony in the trial?
- 16 A I think -- possibly. I don't remember now.
- 17 Q But it's safe to say that he was very drunk?
- 18 That's why you were driving him home, right?
- 19 A He was drunk, yes.
- 20 Q Okay. So, at -- as this guys struggling to come over
- 21 and grab the wheel, amidst the struggle, how did you get the
- 22 gun pressed tightly up against the back of his neck?
- 23 A Excuse me?
- 24 Q How did you get that gun pressed so tightly up against
- 25 the back of his neck before blowing his brains out?

1 A Cause he was in front of me. I'm driving. He's in
2 front of me trying to wreck the vehicle off, off the road.
3 That's one of my issues that if, if, if the trial counsel
4 would of been -- would of had been inefficient, we would --
5 she would of had an expert witness to show that yeah, he was
6 in front of me. I'm driving. He's in front of me trying to
7 wreck the vehicle off the car (sic). I mean that's -- he's
8 right there in front of me.

9 Q So, you're driving with one hand, and you have a gun in
10 the other hand, and there's a struggle going on, and my
11 question to you is how did you get that gun barrel pressed
12 tightly up against the back of his neck in a struggle,
13 amidst a struggle of him trying to grab the wheel?

14 A What do you mean?

15 He's right there. I mean how -- I don't understand
16 what you --.

17 Q Okay. If there's a struggle going on, and he's
18 reaching for the vehicle (sic), how did you get a gun
19 pressed tight up against the back of his neck?

20 That's my question.

21 A Cause he's right there -- standing right there in front
22 of me trying to wreck the vehicle.

23 Q Okay. And that bullet wound, the evidence submitted at
24 trial, was that it went in the back of his neck and out the
25 front of his forehead, and then out the front windshield.

1 Is that correct?

2 A Yes.

3 Q And so he would of had to be looking to the right
4 slightly for that trajectory to take place.

5 Is that correct?

6 A I suppose. I mean --.

7 Q And so your testimony though is that, while he's
8 grabbing the wheel, he's looking towards the passenger seat.

9 Is that your testimony?

10 A Towards the passenger seat?

11 Q Yeah, that's to the right.

12 A No, he's looking---

13 Q He's---

14 A I guess he's looking in the direction which the bullet
15 trajectory went.

16 Q Okay.

17 A which is one in the windshield and the other one in the
18 GPS.

19 Q what hand did you shoot the gun with?

20 A My right-hand.

21 Q You shot the gun with your right-hand?

22 A I -- yes, I think so.

23 Q And, the bullet -- the gun was pressed up against the
24 back of his neck, the bullet exits his front forehead and
25 goes out the front windshield, and you did that with your

1 right-hand?

2 A Yes, I think so.

3 Q Okay. You were pretty drunk that night, weren't you?

4 A No.

5 Q You weren't drunk?

6 A No.

7 Q Okay. I mean if you were sober, then why didn't you
8 consider other options?

9 A I did. I was trying to find a place where I could
10 stop. It was dark and the guy's attacking me, but he
11 attacks me again before, before we could -- I could find a
12 place to stop.

13 Q I just want to say that, that -- okay. I'm gonna
14 withdraw that question.

15 All right. Moving right along to -- what about
16 Jimenez?

17 what was he doing the whole time?

18 Your testimony is that the victim's trying to pull the
19 car off the road and kill you-all.

20 what was Jimenez doing?

21 A I -- can I ask you a question?

22 I mean this is about PCR.

23 what does all this have to do with my PCR?

24 This sounds like you're putting me on trial again. I
25 already testified to all this.

1 Q Okay. And so what it -- I'm not gonna answer that
2 question. I'm gonna ask that you answer my question. I'm
3 the one doing the questions.

4 You testified that you were fighting this guy off.
5 What was Jimenez doing?

6 A He was suppose to be manning this -- the GPS, which was
7 on the laptop. He was drunk. The guy was drunk. He was,
8 he was suppose to be telling me which way to go.

9 Q So, the whole time that you're struggling to get this
10 guy who's trying to pull y'all's car off the road, you're
11 pushing him back, pushing him back, he's just sitting there
12 while you get a gun and he's sitting idly by?

13 A I suppose I wasn't paying attention to what he was
14 doing. I'm trying, I'm trying to keep this guy from killing
15 us.

16 Q I didn't know where I -- what Jimenez was doing. I
17 know he was suppose to tell me which way to go, but I don't
18 know what he was doing.

19 (WHEREUPON, a letter marked as State's Exhibit No. 6
20 for identification purposes only at this time.)

21 Q Okay. I'm showing you what's been marked as State's
22 Exhibit 6.

23 A Uh-huh. (Affirmative).

24 Q I'll give you a minute to read that over. I'll also
25 hand a copy to counsel, but I think he's seen this.

1 (Pause.)

2 A Okay.

3 Q Do you recognize that letter?

4 A Yes.

5 Q And you received that letter from your appellate
6 defender, Bob Dudek.

7 Is that correct?

8 A Yes.

9 Q And that's dated February 19th, 2015?

10 A Yes.

11 MS. GIOVANOLI: Okay. I would move this, this into
12 evidence as State's Exhibit No. 6.

13 THE COURT: Counsel.

14 MR. PRICE: Without objection, Your Honor.

15 THE COURT: Thank you.

16 (WHEREUPON, State's Exhibit No. 6 was received into
17 evidence at this time.)

18 MS. GIOVANOLI: And I'll provide Your Honor with a copy
19 so you can read along.

20 And, in this letter, what is Mr. Dudek advising you?

21 A To -- my family was to come to the hearing. To call --
22 and have them call in advance.

23 Q Okay. And your sister actually showed up at the oral
24 argument, did she not?

25 A I don't know. I wasn't there.

- 1 Q Well, you talk to your sister, don't you?
- 2 A I do.
- 3 Q Did she tell you if she traveled from Texas to come
- 4 to---
- 5 A She did.
- 6 Q ---the oral argument?
- 7 A Yes, she did.
- 8 Q Okay. Now, and David Alexander, he's your other
- 9 appellate defender. He was there handling your oral
- 10 argument.
- 11 Is that what she told you?
- 12 A Yes.
- 13 Q Okay. And she actually spoke with David Alexander
- 14 after the oral argument.
- 15 Isn't that correct?
- 16 A Yes, I think so, yes.
- 17 Q Okay. And she's a paralegal in Texas. So---
- 18 A Yes, she did.
- 19 Q ---she was very well versed in what they were arguing.
- 20 Isn't that correct?
- 21 A Excuse me?
- 22 Q She was well versed -- she understood what was
- 23 happening in the oral argument?
- 24 A I suppose.
- 25 Q Okay. So, you were aware that David Alexander was an

1 assistant appellate defender that was also representing you?

2 A Not until a couple of days before the oral argument
3 when I got a letter from Dudek saying he wasn't gonna be
4 there, and David Alexander was going to be.

5 Q Right.

6 In that letter, he informed you that he had another
7 oral argument in a death penalty case. So, it's his---

8 A No, he did not.

9 Q Oh, he didn't inform you why?

10 A No.

11 Q Okay. But are you aware that he did argue in the
12 Supreme Court in the oral argument?

13 A No.

14 Q You're not aware of your oral argument in the Supreme
15 Court?

16 A Oh, my oral, oral argument?

17 Q Right.

18 A Yes.

19 Q And who argued on your behalf?

20 A In the Supreme Court, him and David Alexander.

21 Q So, both Bob Dudek and David Alexander argued on your
22 behalf?

23 A Yes and yes.

24 Q Okay. I'll take that from you.

25 okay. So, you're also alleging that counsel was

1 ineffective because she should have recalled Larry Rodriguez
2 because there were photos from your camera that showed when
3 the victim was being loaded in your car, and the time stamp
4 was 2:54.

5 Is that correct?

6 A Well, because the, because the camera was stamped
7 tampered with, and photos were admitted from my camera, but
8 the camera was tampered with prior to a warrant being issued
9 for items inside of the truck.

10 Q And, by tampering, you mean it was moved?

11 A Yeah, I don't know what they did with it. I know it
12 was moved. They took it from where it was and put it
13 somewhere else. So, it was moved, yes.

14 Q Okay. And that was during the crime scene
15 investigation?

16 A Yes.

17 Q Okay. But you also allege that -- let me skip that.
18 And your testimony was also that all of the photos
19 admitted at trial were gruesome autopsy photos?

20 A No, I did not say all. I said a lot of them were, yes.

21 Q Okay. A lot of them. I have---

22 A Most of them.

23 Q I have your -- noted your testimony. The record will
24 reflect what your testimony was.

25 And I just want to further point out on Page 313 of the

1 transcript through 314.

2 THE COURT: You said 313?

3 MS. GIOVANOLI: Three -- 313. It starts at the bottom
4 at Line 15, where did you shoot him.

5 MR. PRICE: Do you have your---

6 MS. GIOVANOLI: I can just read it into the record.

7 MR. PRICE: Do you have your transcript, Mr. Marin?

8 THE WITNESS: I do. I do, yes, sir.

9 Q Just to save time, you can look at my copy.

10 Do you want to just look at my copy?

11 A Yeah.

12 Q Okay. All right. Okay. So, Line 15, where did you
13 shoot him?

14 A. In the back of the head.

15 Q. How many times?

16 A. Twice.

17 Q. After the first time, was he -- what was he doing?

18 A. I -- it was just boom, boom. I mean -- and then he
19 fell. He fell, he fell down.

20 Q. So, you shot him in the head, but he wasn't
21 fighting you after you shot him in the head, was he?

22 A. No, ma'am.

23 Q. You shot him again.

24 Continuing on Page 314.

25 A. No, it happened real fast. Boom, boom.

1 Q. After the first shot, was he still fighting you?

2 A. I mean it, it just happened within seconds.

3 Is that a correct statement of your testimony?

4 A Yes.

5 Q So, your testimony now today is that that second shot
6 was necessary because the first shot did not cease the
7 danger that you felt was immanent?

8 A Well, but the law says that is not matters to shoot a
9 more -- repeatedly, and the State v. -- in State v. Hendrix,
10 Mr. Hendrix shot with a shotgun four times, but that's what
11 the Supreme Court argued. The Supreme Court said that it
12 was, it was the duty of trial counsel to argue that. So --.

13 Q would you---

14 A That's, that's what the Supreme Court said.

15 Q Okay. But would you agree that the State of the law is
16 actually that you're entitled to a second shot if you were
17 in self-defense -- in self-defense firing the first shot,
18 and that the harm, the danger, did not cease. So, you're --
19 you can continue to shoot if the danger that you perceived
20 had not ceased or ended.

21 A Yes.

22 Q Is that a correct statements of the law rather than
23 what you just testified to?

24 A Well, the first, the first shot, if, if, if the lethal
25 shot would of been the first one, he would of fell. Then

1 the second shot would of been down -- while he was down.

2 That was not the case. He was still up when the first shot
3 was fired.

4 Q But the first shot the doctor testified was potentially
5 fatal.

6 Is that correct?

7 A Potentially.

8 Q Do you remember that testimony?

9 A Yes.

10 Q Okay. So, they're -- both shots were to the back of
11 the head. One was potentially fatal and the other was
12 fatal.

13 Is that correct?

14 A Yes, and the---

15 Q And your argument is that it, it matters---

16 MR. PRICE: Objection.

17 Q ---which one happens first?

18 MR. PRICE: Your Honor, again, ask that he be allowed
19 to finish his answer.

20 THE COURT: Okay. That's sustained.

21 Ma'am, just allow him an opportunity to respond.

22 Q Go ahead.

23 A And there, there is where the trial counsel is
24 ineffective in failing to have the, the expert testify that
25 if, if the first shot would of been the fatal shot, he would

1 of immediately fell, and then the second shot would of been
2 while he was down. So --.

3 Q Thank you.

4 I have no further questions.

5 THE COURT: Yes, sir, your redirect.

6 REDIRECT EXAMINATION

7 BY MR. PRICE:

8 Q Mr. Marin, when you were attacked the second time, did
9 Mr. Tabares give you any notice?

10 A No.

11 Q Did he tell you I'm getting ready to attack you?

12 A No.

13 Q Was it real sudden?

14 A Yes.

15 Q And the next thing you know, you have this guy coming
16 over your back, fighting you, grabbing at the steering
17 wheel?

18 A Yes.

19 Q And so you were fighting him and trying to keep control
20 of the car.

21 Is that correct?

22 A That's correct, yes.

23 Q And, again, is this going slowly or is this happening
24 quickly?

25 A No, this happened very quickly.

1 Q Okay. And you felt that you were defending yourself?

2 A Yes.

3 Q And the shots that you fired you felt were in
4 self-defense?

5 A Yes.

6 Q You did not attack the guy behind you?

7 A I did not.

8 Q He attacked you?

9 A That is correct.

10 Q And was trying to wreck your car?

11 A Trying to kill us, yes.

12 Q The two shots, were they like bang, (pause), bang or
13 were they instantaneous, boom boom?

14 A Well, like boom boom.

15 Q Okay. And that was at -- there was no length of time
16 between the two shots?

17 A No, not much length of time.

18 Q Okay. And you stopped shooting when he dropped?

19 A Yes.

20 Q Okay. You were in shock after this?

21 A And before. I was in shock the first time he attacked
22 me. We almost hit a telephone pole. If -- he put me in the
23 headlock, and, as as soon I touched the brakes, the car
24 veered to the left and we almost hit a telephone pole. We
25 almost got killed right there and then.

- 1 Q What night in the week did this happen?
- 2 A This was Sunday to Monday morning.
- 3 Q Sunday night, Monday morning?
- 4 A Yes.
- 5 Q Not many places open at---
- 6 A Everything---
- 7 Q ---that time?
- 8 A ---is closed on Sundays.
- 9 Q This diagram that is Applicant's Exhibit 1, you drew
- 10 that diagram?
- 11 A Yes.
- 12 Q And you provided that to your attorney a couple months
- 13 before your trial?
- 14 A Yes.
- 15 Q As far as where this wreck happened?
- 16 A Yes.
- 17 Q Or, excuse me, where the shooting happened, and you
- 18 believe it's in Greenville County?
- 19 A Yes.
- 20 MR. PRICE: Nothing further, Your Honor.
- 21 THE COURT: Okay.
- 22 All right. Mr. Marin?
- 23 THE WITNESS: Yes, ma'am.
- 24 THE COURT: Sir, you can step down, okay, and I tell
- 25 you what?

1 Why don't you let Mr. Price or our deputy gather your
2 items for you.

3 All right?

4 THE WITNESS: Thank you.

5 THE COURT: Watch your step. Thank you.

6 Okay. Mr. Price, sir, do you have any further
7 witnesses?

8 MR. PRICE: Your Honor, at this point, that's our case.

9 THE COURT: Okay. Thank you.
10 Anything before the State presents their position?

11 MR. PRICE: No, ma'am.

12 THE COURT: Okay. Counsel.

13 MS. GIOVANOLI: And, Your Honor, I would just start by
14 calling Tanya Jones to the stand.

15 As you're aware, she's testifying by phone. I have
16 that phone up there. I think she's still on the line, but
17 if you'll allow me to check it.

18 THE COURT: Yes, ma'am.

19 (Pause.)

20 THE COURT: Okay. Madam Court Reporter, let's, let's
21 make sure that we can all hear. Mainly you.

22 Okay. Ma'am, you are Tanya Jones.

23 Is that correct?

24 THE WITNESS: That's correct.

25 THE COURT: Okay. I'm just testing to see if our court

1 reporter, Ms. Green, can hear you.

2 Ms. Green.

3 THE COURT REPORTER: It wasn't very clear.

4 MS. GIOVANOLI: Can you just say -- spell your name.

5 THE WITNESS: Tanya Jones.

6 MS. GIOVANOLI: You okay?

7 THE COURT REPORTER: If I have any problems, I'll speak
8 up.

9 THE COURT: Okay. You know before we, I think we used
10 the mic right there behind the clerk's computer. So, why,
11 why don't you just move the phone down---

12 MS. GIOVANOLI: Okay.

13 THE COURT: ---and see if that will work for you
14 counsel.

15 Okay. Ms. Jones?

16 THE WITNESS: Yes.

17 THE COURT: Is that better, Ms. Green?

18 THE COURT REPORTER: Yes, ma'am.

19 THE COURT: All right. Ms. Jones, I need to swear you
20 in, ma'am. If you would, raise your right-hand.

21 TANYA JONES, being first duly
22 sworn, testified as follows:

23 THE COURT: Thank you, ma'am.

24 DIRECT EXAMINATION

25 BY MS. GIOVANOLI:

Tanya Jones - Direct examination
by Ms. Giovanoli

1 Q Good afternoon, Ms. Jones. Thanks for being available
2 for testimony today.

3 I'm just gonna roll right into this. Start out with a
4 little bit of background.

5 How long have you been practicing criminal law?

6 A Criminal law, I've been practicing since 2006.

7 THE COURT: Counsel, I hate to interrupt you.

8 why don't you go ahead and establish where Ms. Jones is
9 residing at this time and the reason that she could not be
10 here in person?

11 MS. GIOVANOLI: Okay. Yeah, I was gonna get to that.

12 THE COURT: Okay.

13 Q Okay. Well, back at the time of this trial, where did
14 you live?

15 A I lived in South, in South Carolina.

16 Q And you practiced in the Public Defender's Office for
17 Spartanburg?

18 A Yes.

19 Q And where are you now?

20 A I live in Edmond, Oklahoma.

21 Q And what do you do now?

22 A I'm a Public Defender for Oklahoma County.

23 Q Okay. And so you're still continuing to practice
24 criminal law.

25 Is that correct?

- 1 A That is correct.
- 2 Q Okay. You were appointed to represent Mr. Marin.
- 3 Is that correct?
- 4 A Yes.
- 5 Q Okay. And how many times -- did you meet with him more
- 6 than once?
- 7 A Yes, I did.
- 8 Q Okay. Do you recall how many times approximately you
- 9 met with him to discuss this case?
- 10 A I, in referring to my notes, it looks like I met with
- 11 him approximately ten, ten or eleven times. I might of
- 12 missed some times cause sometimes I didn't always document.
- 13 I tried to. But I, I went to see Mr. Marin. I did see him
- 14 on a regular basis. I do recall that.
- 15 Q Was he in jail during the pendency of this trial?
- 16 A He was.
- 17 Q Okay. And you remember what pod he was in?
- 18 A He was in, walking down, he had his own cell, and I
- 19 believe that was Pod 5.
- 20 Q Okay. So, during those meetings, did you review all of
- 21 the discovery in this case with him?
- 22 A I did.
- 23 Q Okay. And did you discuss with him his version of the
- 24 events?
- 25 A Yes.

1 Q And based on those version of events, did you come up
2 with a trial strategy?

3 A We did. We came up with -- Mr. Marin was always very
4 consistent in terms of this was self-defense. So, we really
5 didn't talk a lot about any type of pleas. He didn't ever
6 seem really interested in that, and so we just went
7 essentially with self-defense.

8 Q Did you think it was a strong self-defense case?

9 A I thought it was okay. There were certainly holes in
10 Mr. Marin's story in terms of how he got to where he was
11 going because the victim, I think, lived in Greer in, and he
12 ended up, I want to say, somewhere between 12, 13, 14 miles.
13 So, there was certainly some issues with that.

14 But also though there was some strong points in terms
15 of the body placement of the decedent. It did look like
16 there was some sort of struggle for that steering wheel.
17 The passenger did not attend the trial because he went back
18 to Mexico. There was some excited utterance there. He said
19 yes, this guy was trying to, to get the wheel. So, I, you
20 know, it wasn't -- it's not the worst one I've done.

21 Q Okay. Well, let's go to those holes.

22 Did he ever actually tell you where the shooting took
23 place?

24 A He didn't really, to be quite honest, recall where
25 anything really was except that he ended up somehow on

1 Highway 29.

2 Q Okay. So, he---

3 A He came from---

4 Q I'm sorry. Go ahead.

5 A I'm sorry. And I do know that we did learn, at some
6 point, from the detectives from Greer that he did take the
7 passenger out to an area that is still in Spartanburg
8 County. He saw skid marks. He saw debris. It did look
9 like there had been some sort of accident. That, coupled
10 with the fact that Mr. Marin had some damage to his own
11 vehicle, we thought it might have been there, and I don't
12 think that Mr. Marin really disputed that. I just don't
13 think he could ever tell me a hundred percent.

14 Q And he didn't tell the jury a hundred percent either,
15 did he?

16 A I don't recall that he ever did, no.

17 Q Okay. And so, with regard to that location, just to
18 get it clear, that was at Tucapau Road and Highway 29.

19 Is that correct?

20 A Yes, that sounds familiar to me.

21 Q Did you actually go out to the crime scene with your
22 investigator?

23 A Yes, my investigator, Wendy Alley, was her name. Based
24 on the information given to us by Mr. Marin, I think I might
25 of even brought some Google maps perhaps to see him. We

Tanya Jones - Direct examination
by Ms. Giovanoli

1 basically tried to retrace the steps that we thought that
2 Mr. Marin took. We took pictures of the area we thought
3 that Mr. Jimenez was talking about, the passenger.

4 We also went to Bongo's nightclub, and tried to figure
5 out a way to get onto Highway 29. You know, maybe he took a
6 wrong turn accidentally, which would of took -- taking him
7 to I-29, and then we also tried to go I think it was East --
8 Northeast Street if memory serves me right.

9 The victim did live on that street. I think that's
10 where he indicated, in his testimony, he started going, and,
11 you know, from there, we just tried to get on Highway 29
12 somehow, and I think we figured we found -- finally thought
13 that he might have turned wrong and ended up taking Suber,
14 which would of taken him to I-29 or Highway 29. That was
15 plausible.

16 We kind of, kind of went with that, but we kind of
17 stayed away though -- my trial tactic was to kind of try to
18 stay away from the very, very specifics of the way he
19 traveled simply because we didn't know, and to get from the
20 victim's house, the decedent's house to Highway 29, is not
21 really an easy feat, and I didn't want the DA to pick up on
22 that or the jury to pick up on that because the way the
23 testimony came out, it just seemed like the decedent lived
24 five minutes from Highway 29, which was not, in fact, the
25 case.

1 Q Okay. You met -- you brought up a few things there
2 that I just want to clarify.

3 So, you guys went out to the crime scene and you
4 actually took photos.

5 Is that correct?

6 A We did.

7 Q Were those photos admitted at trial as Defense
8 Exhibits?

9 A I believe we did introduce the, the ones where the, the
10 detective testified that he saw skid marks and just debris.

11 Q Okay. And what was your purpose of admitting those
12 photos to show the jury the location of the shooting?

13 A To corroborate that something had happened because,
14 obviously, if somebody was trying to grab at your wheel or I
15 think there was testimony to put a choke hold. I mean if
16 there's a physical onslaught, a physical fight going on, the
17 fact that the vehicle was damaged I find significant.

18 Q Okay.

19 A So, to corroborate that my client was essentially in a
20 death.

21 Q Okay. So, what about those photos corroborated your
22 client's testimony?

23 A I'm sorry?

24 Q What about those photos corroborated your -- you
25 said -- you mentioned damage to the vehicle.

1 Did you see skid marks out on the -- at the incident
2 location?

3 A No, we went out probably a good year or two years after
4 the incident. I did not represent Mr. Marin initially. He
5 has private counsel for a while.

6 Q Okay. Well, so, you were out at the scene and you took
7 pictures.

8 Were those pictures---

9 A Yes.

10 Q ---pictures to demonstrate that there were trees and
11 telephone poles around?

12 A Yes, I mean just the general location that he was
13 talking about, yes. I do recall, you know, there were
14 certainly trees. There were certainly telephone poles.
15 There were certainly trees and telephone poles throughout
16 that area, and where -- the possible grounds he could of
17 taken. I just couldn't pin that down, and that was the best
18 location that I could see, and, again, the officer did note,
19 you know, evidence, physical evidence, of something
20 happening. But, yeah, all of those things to -- are, are
21 reasons why we took those photos and try -- and introduced
22 them into the trial.

23 Q Okay. And then going back, you mentioned taking Google
24 maps to your client. Your client has admitted a map into
25 evidence, and I've provided this to you prior to your

1 testifying. It was a hand drawn map.

2 Did you get---

3 A Yes.

4 Q ---an opportunity to look at that?

5 A I did look at that, and I believe he provided -- this
6 was very familiar to me. I do believe that he -- this is
7 something he, you know, either mailed me or gave me when I,
8 when I went to see him.

9 Q And what was the, the gist of the discussion
10 surrounding that map?

11 A Essentially, this is the route he says that he took
12 going from Bongo's Nightclub going on that East North Street
13 Road. He said that there was a telephone pole there, and
14 that was the first time something happened. And you can,
15 you know, looking at this, he can show the passing of the
16 house and then continuing on I-29 or Highway 29 rather.
17 Then -- and we talked a lot about this.

18 That's wrong because East North Street does not connect
19 with Highway 29 like this at all. And so, again, we were
20 really struggling with the routes that he would of taken,
21 and I do believe that the decedent's house, and -- to me,
22 it's on my left, but, in reality, it should be on the right.
23 And, and that would of just been a scrivener's error, but we
24 definitely talked about this. And, again, this map is not,
25 geographically, true. It's not correct. It's -- Highway 29

Tanya Jones - Direct examination
by Ms. Giovanoli

1 does not map like that, and we had several discussions
2 regarding that, and he just simply couldn't remember.

3 It was really dark out with his testimony, which, you
4 know, if he got on the side streets, I can understand it
5 would be really dark, you know, depending on whether there
6 was light. We just never could figure out what he did.
7 Plus, he said he was scared, you know, and, obviously, if
8 you're in shock, if you're scared, you're looking for a
9 public place. You know, you're not just always paying
10 attention to the street signs.

11 Q Okay. And you testified that the victim's house was
12 about five minutes from the nightclub.

13 Is that correct?

14 A Oh, I want to say it was farther than that.

15 Q Okay. And maybe it was five miles?

16 A That, that sounds -- for some reason, ten minutes is in
17 my head, but also East North Street can be kind of busy.
18 So, I wouldn't anticipate two, the two lines, but I want to
19 say we thought it was a good ten minutes---

20 Q Okay. And then---

21 A ---I want to say.

22 Q You, you know approximately how many miles or how long
23 it would take to get from there to the incident location at
24 Tucapau and Highway 29?

25 A I don't because, again, we don't really know the, the

1 route, but I do recall some testimony or maybe we, we
2 researched it on our own. I think it was around 12 to
3 15 miles depending on which way he went. And I would
4 anticipate you probably could travel that, you know,
5 probably in 12 to 15 minutes simply because it was really
6 late at night, and I can't imagine there was a lot of
7 traffic out.

8 Q Okay. And let me see.

9 There's also another map and this is not been admitted
10 into evidence as of yet, but you provided it to me before
11 this hearing.

12 A Uh-huh. (Affirmative).

13 Q And I just -- is this with regard to the location of
14 the shooting incident or, or what is this map about?

15 A I took a look at this and I just had -- because when
16 you provided me that map of -- that Mr. Marin made, it
17 looked really, really familiar to me. I asked Clay Allen,
18 my boss at the time, to pull any of these kind of maps, and
19 he pulled this other one. And looking at it, it doesn't
20 ring really a big bell to me, and just by looking at it,
21 either my investigator would of done this or a police
22 officer just by the handwriting and the, you know, some of
23 them are all caps. But I think this, again, was something
24 either the police officer was trying to figure out or
25 conversely I bet it was Ms. Wendy Alley in that we were

1 trying to figure out what was going on.

2 Q Okay. So, you guys traced these routes, you and Wendy
3 Alley.

4 Is that correct?

5 A Yes, I mean we spent a lot of time trying to figure
6 this out.

7 Q And in tracing those routes, did you see the waffle
8 House, the 24-hour Wal-Mart?

9 Any of these places that would of been open 24/7, did
10 you see those?

11 A I don't remember a waffle House, but, again, you know,
12 Highway 29 is a fairly busy intersection, and I think on
13 Wade Hampton, and it has a lot of businesses. And, again,
14 you can't really tie down whether or not he was able to pass
15 the Wal-Mart or pass a convenience store because he doesn't
16 know the route he took. You know, if he took some round
17 about crazy way to get to I-29 or Highway 29, he very well
18 may not have passed a convenience store, but, if he took
19 Suber Road, which is the best thought process we had at the
20 time, my investigator and I, he certainly would of passed
21 businesses.

22 I don't recall where that Wal-Mart was, and there might
23 of even been a few Wal-Marts, you know, and I, and I just
24 don't really recall, but, certainly, if he got to Highway 29
25 sooner rather than later, he would of passed -- he would of

1 passed convenient stores.

2 Q Okay. And what I'm gonna do now is kind of just run
3 through quickly one -- each of the allegations, give you a
4 chance to respond, and I believe you have the documents, his
5 pro se application. I'm specifically---

6 A Yes.

7 Q ---looking at the one dated October 4th. I think
8 this was -- has the most comprehensive allegations against
9 you, but---

10 A Uh-huh. (Affirmative).

11 Q ---in the trial, Diane Tabares, who is the victim's
12 sister, testified, and, in response to a question about what
13 the victim did for a living, which was relevant to why he
14 was where he was that day, she responded that he sponsored
15 cancer runs because he was a cancer survivor.

16 Do you recall that testimony?

17 A I, I don't really have a specific memory of that, and I
18 don't know necessarily the facts. We did do some objecting
19 to some of the lay witnesses, and Judge Cole did certainly
20 curtail some of that. You know, maybe I missed it, but,
21 ultimately, I don't think that that necessarily hurt us.

22 Q Did you find an objection was necessary at that point
23 when she was testifying to that information?

24 A No.

25 Q Okay.

1 A No.

2 Q And then also she also testified, in response to the
3 State's questions why didn't you go with your husband to
4 this Columbian Independence Festival, she explained that she
5 was pregnant and due to be -- she was due to be delivered
6 that day or around that day of the incident.

7 Do you---

8 A Right.

9 Q Do you remember her testifying to that?

10 A I do, and I also remember -- I think that was right
11 around the time I started objecting, and then that was when
12 Judge Cole basically said keep it relevant. And so I think
13 Ms. Reese, that was probably one of the last personal
14 questions she asked.

15 Q Okay. Did you think that those were background
16 questions?

17 A They -- yes, they are, but a lot of times though if,
18 if -- the trial judge, I will object to things even
19 necessarily always gonna help me, no, but I think we, we --
20 I was on my toes on that, but, ultimately, I don't think
21 that that's necessarily harmful, and certainly the jury did
22 not swing one way or the other because he -- his wife was
23 pregnant or, you know, he was a cancer survivor.

24 Q Yeah, his sister who was pregnant, but, yeah, okay.

25 A Sorry.

1 Q Go -- no, go onto the next one on Page 267. I know you
2 do have a copy of the transcript, but this is where you
3 mentioned to the Trial Court that your, your client wanted
4 to recall Larry Rodriguez, Rodriguez to the stand, and you
5 didn't feel a need for that.

6 Can you just elaborate a little bit on your decision
7 making in that, in that point in trial?

8 A Yes, and I think he wanted me to recall Mr. Rodriguez
9 because there was testimony that he said he closed down the
10 bar at 2:00, and he just hopped in his car and left.
11 However, with Mr. Marin's camera, it looked to be more like
12 everybody left at 3:54.

13 Again, nobody was really disputing the timeframe. In
14 other words, the State, Ms. Reese, wasn't standing up and
15 down saying, you know, he can't account for four hours. You
16 know, what was he doing out in the country with this person.
17 Nobody was really saying that, you know, the decedent's
18 got -- didn't get into the car, and they started driving
19 home, and something happened. I think everybody agreed with
20 that. It's just, one, whether or not it happened, and, two,
21 whether or not it was reasonable under the law.

22 So, I'm not gonna call him to try to get him to admit
23 he was there at 3:00. It's the kind of issue anyway, but I
24 did cross-examine him about whether or not he got straight
25 in the car and went home, and whether or not he saw people

1 lingering. So -- and anybody's that been to a bar
2 understands that, but I think that it was really necessary
3 to change routes so to speak.

4 Q Okay. And there were never any autopsy photos admitted
5 in this trial, were there?

6 A Not to my knowledge. I would of certainly objected to
7 that.

8 Q Okay. And the, the, the Applicant's made allegations
9 that you failed to have an evidentiary hearing to have his
10 camera excluded. He claims that it was tampered with.

11 There was some testimony in the trial from the
12 investigator that he photographed first where the camera was
13 found, and then removed the camera as they were trying to
14 photograph the body.

15 Did you find any grounds to have an evidentiary hearing
16 to exclude that camera based on tampering by law
17 enforcement?

18 A No.

19 Q Okay. And at -- the same with the gun. There was
20 testimony from one of the officers that he, he removed the
21 bullet from the chamber for security, that it was standard
22 protocol.

23 Did you find---

24 A Yes.

25 Q ---that, that -- to be a reasonable grounds to move to

1 exclude the gun based on evidence tampering?

2 A No.

3 Q Okay. And -- sorry. I'm going through the allegations
4 figuring out what I should ask you about.

5 I just want to clarify you, you first cited to Rye in
6 your proposition that Applicant was entitled to continue to
7 shoot.

8 Is that correct?

9 A Yes, I did.

10 Q And then you later, on Page 395, I believe that's when
11 you cited Hendrix and Douglas.

12 Is that correct?

13 A Yes.

14 Q Did you keep up with the appeal on this case?

15 A I'm sorry. Say that again.

16 Q Did you follow the appeal?

17 Did you keep up with it?

18 A I did. It's been a long time though since I've read
19 those opinions.

20 Q Okay. After the prosecutor made the arguments that,
21 that two shots was a demonstration of malice, you requested
22 the continuing to shoot charge.

23 Is that correct?

24 A That's correct.

25 Q Was that in response to her argument?

1 A Yes.

2 Q Did you find her argument objectionable?

3 A I -- well, I, I do -- I think it's -- you can object.
4 Certainly.

5 Do I think it's a proper argument maybe for a
6 prosecutor to make?

7 Sure. I've heard that argument here many times, but I
8 think that, in South Carolina, with those two cases, Hendrix
9 and Douglas, I do believe and still believe that the jury
10 instruction should of been given. Now, obviously, the
11 Supreme Court felt otherwise, but that was just my reading,
12 and I think that, when she made that argument, it was
13 appropriate for me to ask for the remedy of the jury
14 instruction.

15 Q Okay. And moving onto the -- I'm at J now.

16 A Okay.

17 Q There, there -- you actually requested that the
18 Protection of Persons And Property Act, part of that act be
19 read as a jury instruction, and the Judge, in fact, did
20 instruct the jury at -- with regard to standing your ground
21 in your vehicle, but he didn't -- you didn't request the
22 portion that said that he was immune from prosecution if he
23 was entitled to the stand his ground, and, and, and -- he
24 was immune from prosecution.

25 Do you recall that?

1 A I, I do. I made a directed verdict motion based on
2 the, the Castle Doctrine as well as a jury instruction cause
3 there really wasn't a lot of evidence backing it up back
4 when this was tried because it was a fairly new law, and I
5 do believe I asked for immunity in the jury instruction, and
6 Judge Cole said that was not appropriate, but he would give
7 me that my client didn't have the duty to retreat if memory
8 serves me right.

9 So, he basically felt that the Stand Your Ground or
10 Castle Doctrine was essentially the codification of common
11 law, but removed, removed the duty to retreat. And so
12 that's kind of the compromise he gave me in the law to say
13 that they don't have a duty to retreat I believe.

14 Q And, at the time of the trial, which was 2010, what was
15 the common practice for the defense bar with regard to the,
16 I'm gonna call it the P.P.A. Act?

17 A Well, I do know that there was discussion on the Lister
18 Gasgo (phonetic) that I was a member of as to whether or not
19 it should be a pretrial motion or whether it's appropriate
20 to ask it as a jury instruction and go for a directed
21 verdict. There's been a lively discussion on it, and what I
22 personally did, I decided not to go with the pretrial motion
23 simply to keep the -- it's to surprise the State,
24 essentially, keep my cards more at the table, and I think,
25 if you review the transcript, you can tell the State was not

1 prepared for our argument.

2 Q So, it was kind of a surprise argument that you were
3 trying to make for the -- to, to catch the State offguard?

4 A Yes, absolutely. I was trying to catch the State
5 offguard, and I didn't really want them to know where I was
6 going, and I thought, with a pretrial motion, although I
7 thought that's probably the better avenue, but since there
8 wasn't any really direction, I thought I can get creative
9 because, obviously, if we had pretrial motions, there's just
10 probably enough of a factual dispute to take it to the jury.
11 In fact, years since, cause this law is not uncommon, we
12 have it here in Oklahoma, and I have yet to see a judge
13 grant it. They always find enough of an issue, a fact, and
14 send it to the jury.

15 Q Okay. And then, moving onto another allegation, he's
16 alleged that you failed to call an expert witness, and,
17 today, earlier, they called an expert witness and basically
18 crime scene investigation reconstruction.

19 A Uh-huh. (Affirmative).

20 Q Did you -- did you even consider the idea of calling an
21 expert?

22 A No.

23 Q Okay. And why is that?

24 A Because I had no idea where the crime scene was, and
25 not only that, I mean we got the case -- oh, I think I was

1 appointed in April of '09. So, you know, and then, of
2 course, nobody took any pictures, which I was, you know,
3 really surprised by the Greer detective saw this debris, was
4 verifying, you know, the information that the, the witness
5 was giving, and nobody relayed that to Spartanburg Police
6 Department. I think they were the ones that -- doing the
7 investigation or it was the County. You know, so, all of
8 that was, was kind of lost.

9 Now you're just getting into speculation, and I worked
10 with the Public Defender's Office. We're not gonna spend
11 thousands of dollars on mere speculation as to where we
12 think the crime scene might of happened.

13 Q Do you think it would of been beneficial to have an
14 expert look at the photos of the vehicle and the way the
15 victim's body was found to testify that the victim was, in
16 fact, that the top part of his body was in the driver's
17 portion of the car?

18 A I think we made that argument, and I certainly think --
19 I believe I got that through the detective, and, again, I
20 don't -- it's been a while, and I did review the transcript,
21 but I don't recall the State even really questioning that
22 something happened. I think she was more saying that should
23 of just stopped the car. Somebody trying to attack you, you
24 need to stop the car or, you know, one shot's enough
25 essentially was her, was her argument.

1 And the picture, and I'm sure you've seen that photo,
2 it's clear that body is in the front portion, and I even
3 think I questioned, either it was the CI or one of the
4 detectives, that none of the blood or splatter or anything
5 was in the back seat. It was all up front. So, clearly
6 something had happened up front because passengers don't
7 ride in the front seat. I don't think I needed an expert
8 for that.

9 Q So, the State was never disputing that the victim may
10 have been reaching in the front seat?

11 A Right. There was no, there was no testimony
12 contradicting that because they got in Mr. Jimenez's excited
13 utterance they were trying to take the wheel, trying to take
14 the wheel. My client took the stand and said he was trying
15 to take the wheel, and then, you know, and it's now just a
16 matter of whether the State or, sorry, the jury believed it
17 was self-defense or manslaughter or murder.

18 Q Okay. So, I'm gonna -- you touched on one thing, that
19 Jimenez, some of his testimony came in through excited
20 utterances as a hearsay exception.

21 A Yes.

22 Q And, and -- but then there was some testimony later,
23 whenever Detective Arterburn testified, Detective Arterburn,
24 just to refresh your recollection, was the detective that
25 took Jimenez, the passenger---

1 A Uh-huh. (Affirmative).

2 Q ---and basically tried to retrace the route that was
3 taken and determine where the shooting actually occurred so
4 they can establish what law enforcement officer, agency
5 should investigate.

6 A Sure.

7 Q So, Detective Arterburn testified that, while in the
8 car, that he, Jimenez, told him that the Defendant passed
9 the victim's house and the victim wanted him to stop, and
10 then he specifically said he would not stop, and then he
11 started grabbing the steering wheel.

12 Do you remember that hearsay testimony that came in?

13 A Yes.

14 Q Okay. And you did not object to that testimony at that
15 point. That wasn't an exact -- that was different from the
16 excited utterances at the scene, and---

17 A Yes.

18 Q ---did you not object to that because he actually
19 corroborated the Applicant's story that the victim was
20 grabbing at the wheel?

21 A Yes, I mean I reviewed that in the transcript in
22 getting ready for this. I know that I probably should of
23 objected because that is no longer an excited utterance,
24 but, at the same thing, it did talk about, you know, the
25 wheel, the wheel, the wheel. And so I should of objected.

1 I would agree with that, but I don't know, necessarily, that
2 it was harmful, and, again, it corroborated my client's
3 testimony.

4 Q So, it was a---

5 A He even said that, when he got put in a headlock the
6 first time, he didn't take him home. He passed that -- he
7 passed, you know, the entrance of the decedent's house.

8 Q So, it was a sort of a double edge sword in having that
9 testimony---

10 A Yes.

11 Q ---presented?

12 A Yes.

13 Q Okay. And then, moving on, there's been some
14 allegations about the Brady -- there was a Brady violation.
15 Applicant admitted a letter that you had sent him, and I'm
16 trying to look for the date, January 25th, 2011.

17 Did I, did I provide this to you?

18 A You did.

19 Q Okay.

20 A Yes.

21 Q And I'm sure you've had a chance to review it, but
22 it's -- basically indicates that you're sending him
23 discovery that you weren't able to give him prior to trial.

24 Was this all of the discovery that you were sending at
25 this point posttrial?

1 A No, I would of -- generally speaking, in South
2 Carolina, it's different here, but, in South Carolina, if a
3 Defendant requests their discovery, we give them their
4 discovery, and I think that's even in our rule in South
5 Carolina.

6 So, I do have notes of 3/16/2010, I mailed him the
7 discovery that I had, and I looked at this, and probably
8 what happened, most likely, it always happens prior to
9 trial, the State will give me something, a piece of paper
10 or, you know, another picture or something that they didn't
11 turn over earlier. And I'm guessing that's probably what
12 that was.

13 I want to say we got Detective Arterburn's, even though
14 he didn't write a report, I think I got information on him,
15 and it was a lot closer to trial. I don't have notes on
16 that, but I think that that's kind of what happened probably
17 a couple months before trial.

18 Sometimes, when I get some supplemental discovery, that
19 doesn't always make it over to the jail, and I know how
20 Mr. Marin was. Very interested in all of his papers. So,
21 I'm guessing I got something at trial or maybe he wanted a
22 jury list or something, but it, it wasn't the discovery and
23 it wasn't certainly something I discovered newly after the
24 trial.

25 Q Did you---

1 A Clearly that would of been a problem.

2 Q Did you believe there were any Brady violations or
3 failure to disclose something through the discovery process?

4 A No.

5 Q Okay. And although you provided him documents,
6 additional documents with this January 25th, 2011, letter,
7 is it -- did you review everything that the State had given
8 to you prior to trial with the Defendant?

9 A Yes.

10 Q Okay. Do you recall anything about the steering wheel
11 cover being sent to SLED for DNA analysis?

12 A I don't recall that.

13 Q Okay. Why didn't you argue to the jury that their --
14 the State's failed to present any fingerprint evidence on
15 the steering wheel and that could of been exculpatory?

16 A Why there weren't any fingerprints?

17 Q Yes.

18 In this case, there was no evidence of fingerprints on
19 the steering wheel because there was---

20 A Okay.

21 Q ---a textured cover I believe.

22 A Okay. I -- that would be more harmful than helpful
23 because we're trying to say that he was grabbing at the
24 steering wheel, and, you know, sometimes fingerprints can
25 get on the steering wheel, but, certainly, certainly,

1 usually, if you have that situation, the State will try to
2 get touch DNA rather than the fingerprints because touch
3 DNA's a little bit easier to get off of those kinds of
4 surfaces, and I don't think -- I don't think that they did
5 that.

6 You usually have to choose one or the other, and maybe
7 they tried fingerprints and they couldn't get the touch,
8 but, obviously, that's helpful to us because then we can
9 argue, and nothing contradicts us in terms he was trying to
10 grab that steering wheel. I mean it, obviously, if there
11 were no fingerprints, that undermines or undercuts that
12 argument.

13 Q Okay. On Page 5 of 8 of the Second Amended Application
14 that was filed October 4th, do you have that in front of
15 you?

16 A I have two that I'm going off on here. Page -- okay.
17 Say that again.

18 Q It's Page 5 of 8 handwritten down---

19 A Okay.

20 Q ---at the bottom.

21 A Yes. Okay.

22 Q And there's a T, U, V, and W---

23 A Yes.

24 Q All are allegations that you failed to request specific
25 things in the jury instructions.

1 A Yes.

2 Q I think that you can answer them all in one, one
3 question. I can get an answer from you.

4 Did you not request these things because you felt they
5 were a comment on the facts?

6 A Yes, these -- all of these are highly inappropriate.

7 Q And are they correct statements of the law?

8 A No.

9 MR. PRICE: Your Honor, I've been lenient as far as
10 leading questions, but I've got to object now.

11 THE COURT: Okay. That is sustained.

12 Please rephrase.

13 Q Okay. I will -- why did you not request what he's
14 listed at T, U, V, and W as jury instructions?

15 why did you not request those?

16 A Okay. T is, is, is not a correct statement of, of the
17 law. It's not part of common, or I'm sorry, self-defense,
18 and it is an absolute comment on, on the facts because we --
19 I don't know why you should judge the decedent more harshly
20 because of intoxication. That makes no sense.

21 And the other, U, the, the victim's violent behavior
22 would of been a reasonable reaction. Again, not a correct
23 statement of law, but comment on the facts. Highly
24 inappropriate.

25 V is a failure to request instructions, oh, in

1 evaluating whether -- evaluating accused had reason to
2 believe that deadly force was necessary as an element.
3 Objective rather -- oh, objective rather than subjective. I
4 would never request that in that way. I don't think that
5 that's appropriate.

6 We definitely have standards in terms of self-defense
7 that we always use we can tweak, and that clearly was one of
8 them.

9 And, W, again, nothing other than a statement on the
10 facts or first attack.

11 But none of these are, are appropriate. They're just
12 not. I would never ask that.

13 MS. GIOVANOLI: Okay. And beg the Court's indulgence
14 one moment.

15 THE COURT: Yes, ma'am.

16 (Pause.)

17 Q I have no further questions, Ms. Jones. Thank you. If
18 you'll answer any questions that Mr. Price may have.

19 A Okay. Thank you.

20 THE COURT: Okay. Mr. Price, cross.

21 MR. PRICE: Thank you.

22 CROSS-EXAMINATION

23 BY MR. PRICE:

24 Q Ms. Jones, good afternoon.

25 How are you?

- 1 A I'm fine. Thank you.
- 2 Q Good. I'm Chip Price representing the Applicant.
- 3 A Yes.
- 4 Q would like to ask you just a few questions please?
- 5 A Sure.
- 6 Q What was your theme of the defense in this case that
- 7 you discussed with Mr. Marin?
- 8 A I'm sorry. That cut off.
- 9 would you repeat?
- 10 Q What was the theme of your defense after discussing
- 11 your trial strategy with Mr. Marin?
- 12 A Our, our trial strategy, strategy was self-defense and
- 13 the Castle Doctrine.
- 14 Q Okay. You have already testified about the Castle
- 15 Doctrine, and I understand, back in 2010, things were
- 16 evolving, but do I---
- 17 A Yes.
- 18 Q Do I understand that you decided not to do a pretrial
- 19 motion on that issue rather than ask for the charge?
- 20 A Yes, that's correct.
- 21 Q Okay. As far as the self-defense, that was an integral
- 22 part of Mr. Marin's defense?
- 23 A Yes.
- 24 Q In looking at your opening statement on Page 58 and 59
- 25 of the transcript, have you reviewed that?

1 A 58 and 59?

2 Q Yes, ma'am.

3 A If you'd give me one second. I didn't print it off my
4 computer.

5 Q It starts Line 3 on 58 and all of 59.

6 A Yes, sir.

7 Q Okay. Did you mention self-defense at any point in
8 your opening statement?

9 A I don't believe that I did.

10 Q Okay. Do you believe that an opening statement is very
11 important as far as your first crack at the jury to relay
12 your theme?

13 A It depends on the case. Certainly I, I often tend to
14 be in the other camp that's conservative, and don't like to
15 over promise things to the jury because, if you can't
16 deliver, they're gonna hold it against you.

17 Q Okay. Had you and Mr. Marin talked about him
18 testifying prior to the trial?

19 A We had, yes, and I indicated to him that he was most
20 likely gonna have to testify, and a lot of times we don't
21 make a concrete decision until after the evidence is in
22 because, sometimes, you know, the evidence -- you never know
23 how the evidence is gonna shake out, right. So, we always
24 try to keep an open mind, but we certainly had that
25 conversation.

1 Q I understand fully, and, and, again, I'm, I'm
2 sitting -- standing here in hindsight and I don't mean to be
3 rude or anything, but --.

4 A No, it's fine.

5 Q You planned -- you thought that Mr. Marin would
6 testify, and you knew that self-defense was the integral
7 part of his defense.

8 A Uh-huh. (Affirmative).

9 Q Is that correct?

10 A I don't recall him being a hundred percent that he was
11 going to testify.

12 Q Sure.

13 A I think he was nervous about it to be quite frank. In
14 fact, he refused to testify, and then I had to go back, and
15 I mean I recall, when he said he wasn't going to testify at
16 the end of trial, literally begging him because I was very
17 nervous that he wasn't gonna get a self-defense instruction.
18 In fact, Judge Cole was gonna sleep on it, which probably
19 meant we wouldn't get it. Mr. Marin then had a change of
20 heart the next day, and the judge luckily let us put him on
21 the stand.

22 Q I understand.

23 Now, obviously, I've been present in your testimony
24 about the venue or jurisdiction issue.

25 A Uh-huh. (Affirmative).

1 Q And I think you were clear on that, and is it your
2 testimony that Mr. Marin was not sure where exactly the
3 actual shooting happened?

4 A That's correct. That's what I recall.

5 Q Okay.

6 A I know we just made educated guesses.

7 Q And do you also understand that your decision to agree
8 to the Tucapau Street scene where the debris was, you had --
9 you agreed to that because you felt that was favorable to
10 Mr. Marin because of his testimony about damage to the car?

11 A Yes.

12 Q Okay. So, that was part of -- that was part of your
13 trial strategy?

14 A But I think -- we did still argue venue a little bit
15 because it wasn't really a lot of testimony establishing
16 cause, obviously, Greer and there's parts of Greer that are
17 in Spartanburg County as well as Greenville County. So, we
18 did still make that argument, but the judge decided that
19 there was enough argument that -- you know, enough to send
20 it to the jury.

21 Q I understand. Let's, let's talk about Jimenez, the,
22 the witness.

23 When did you first find out that he was not gonna be
24 available to testify?

25 A That I, I don't recall. I did pull my defender data

1 notes or had them sent to me, and I do just know that one of
2 my notes indicated that, on 9/21/2010, the State informed me
3 that they were having trouble -- they wanted to bring
4 Mr. Jimenez back. They were actually gonna get one of these
5 special subpoenas, and they had a special person working on
6 it. We objected to that continuance, and, inevitably, for
7 whatever reason, they couldn't get him back here.

8 Q And when you say back, do you mean from Mexico or---

9 A Yes.

10 Q Okay.

11 A Yes.

12 Q All right. So, in any event, you knew, at least a
13 month or so prior to trial, that Jimenez would not be here?

14 A Right. And I believe I even tried to contact Mr.
15 Jimenez too. I think Ms. Reese had some sort of number. I
16 just vaguely remember that, and I want to say it was some
17 sort of telephone booth or something almost like a -- I
18 don't really have a specific memory of that, but I was never
19 able to get a hold of him either.

20 Q Okay. Let's talk about when the Officer Jeffery
21 Powell, the first officer---

22 A Okay.

23 Q ---offered the testimony of Mr. Jimenez through that so
24 called excited utterance.

25 A Uh-huh. (Affirmative).

1 Q And you objected at that point, and there was---

2 A Yes.

3 Q There was a bench conference in front of Judge Cole.

4 what happened---

5 A Yes.

6 Q what happened at that bench conference?

7 A I really don't have an independent recollection really
8 of that, but just knowing me, I would of argued that it's
9 not an excited utterance exception to the Hearsay Rule. You
10 know, the State had an opportunity to try to find Mr.
11 Jimenez and bring him back, and wasn't successful is
12 probably my standard line, and I was overruled at that
13 point.

14 Q All right. I don't, I don't know if Judge Cole ever
15 put that on the record, but I'm assuming that, when you came
16 away from that bench conference, you knew which way that the
17 testimony was gonna come in?

18 A Yes, you know, and then, then I used it to my benefit a
19 little bit too in I think I alluded, when the detective
20 testified, that obviously was an excited utterance, and
21 probably should of objected, but, at the end of the day, you
22 know, some of that information was very helpful to us.

23 Q Okay. It was, it was helpful to you about Jimenez
24 confirming the fight, the struggle over the car --

25 A Yes.

1 Q -- the wreck, and that sort of thing?

2 A Sure. And the fact that Wal-Mart, Wal-Mart, because,
3 again, we were still trying to -- we didn't really know
4 exactly where everything was, and then that just kind of
5 helped us to lead to the fact that, when these two
6 independent witnesses saw these folks, both -- I think the
7 woman testified that they both seemed pretty hysterical.

8 So, you know, everything that you're saying may not
9 come out appropriately, just, you know, screaming, Wal-Mart,
10 but happens here. It just shows a little bit more of the
11 chaos and sort of a stress and the shock that we were trying
12 to say was going on.

13 Q I understand.

14 But you also agree that it hurt Mr. Marin in that
15 Jimenez identified Marin as the shooter, the killer?

16 A I don't think that we ever questioned that Mr. Marin is
17 the one who, who pulled the trigger.

18 Q Well, up to that point though, when Mr. Jimenez
19 statement was offered, there was nothing putting Mr. Marin
20 as the shooter or the killer, was there?

21 A That I don't recall because I do know that they had
22 gunshot residue folks come in, and I think they indicated
23 that I think Mr. Marin did have some sort of gunshot
24 residue, but I can't remember when that necessarily was.

25 Q Well, absolutely. I agree with you. Later testimony

1 had Mr. Marin being positive for gunshot residue as was
2 Mr. Tabares, the victim.

3 A Uh-huh. (Affirmative).

4 Q As opposed to Mr. Jimenez, who had none, or had very
5 little, but---

6 A Right.

7 Q Basically are you saying that it was your trial
8 strategy to take the good with the bad as far as Jimenez is
9 concerned?

10 A Well, at that point when he decided to let in excited
11 utterances, sure.

12 Q Okay.

13 A I was -- I think probably what happened, and I didn't
14 object to the detective, sometimes things happen really
15 quickly and you say stuff and you don't have a chance to
16 object, and then you -- the cat's out of the bag. So, you
17 just try to make lemonade out of, out of lemons. And I
18 would never have floated the theory that was, I think, most
19 likely would of been silly for me to say that Jimenez was
20 the shooter because, ultimately, the gun was -- came back to
21 my client. It was my client's car. I don't, I don't think
22 that I would of done that.

23 Q Okay.

24 A Cause then we're offering no reason as to why this
25 person would of been shot other than, you know, cold blood

1 because they were not getting into the fight of the car.

2 Q Did you feel any need, at that time, to preserve your
3 objection after the bench conference or had you already made
4 up your mind to roll with the ruling and get the best of it
5 that you could?

6 A That I, I don't have an independent, independent
7 recollection of because certainly, again -- and Mr. Marin
8 and I had several conversations about the, the benefit and,
9 and non-benefit of Mr. Jimenez's statement. So, certainly,
10 some of those things really helped us because it
11 corroborated what our client was saying, but probably I just
12 decided to roll with it because it was gonna be helpful to
13 us in the end. But I don't know that I purposely and then
14 didn't -- if I didn't, I probably should of objected. I
15 just don't know. I don't have that memory if I didn't
16 preserve it. That's probably an error on my part cause I
17 should have.

18 Q Did you have, have an opportunity to read the Supreme
19 Court opinion on the Marin case?

20 A I did. It's been a while though.

21 Q I understand.

22 The Supreme Court brought up an issue of that --
23 understanding that you fought hard for the if you shoot once
24 you can shoot twice, but that you did not raise that in a
25 charge conference or prior to initial charges.

1 what would be your testimony on that?

2 A Do you mean why I didn't initially raise the
3 continuing, continuing to shoot?

4 Q Yes, ma'am.

5 A Okay. To be quite honest, I didn't even think to do
6 it. It, it just never crossed my mind that the State would,
7 you know, argue the first one is a free one and the second
8 one's the malice one, and that's probably a failure on my
9 part. I just didn't think of it.

10 Q Did you see the need of objecting to the solicitor's
11 statements arguing about two shots as malice?

12 Did you think that was inflammatory?

13 A At the time, I think I was caught offguard. In
14 retrospect, sure. I probably should have objected to that,
15 but, ultimately, I think I helped myself and my client out
16 by immediately requesting that jury charge.

17 Q Understood.

18 The jury came back with a question---

19 A Yes.

20 Q ---concerning malice and self-defense and manslaughter
21 and the like.

22 Do you recall that?

23 A I do.

24 Q Did you feel that a king charge would of been
25 appropriate at that time?

Tanya Jones - Cross-examination
by Mr. Price

1 A I don't even know -- I'm not familiar with the King
2 language in my career.

3 Q Okay. The King charge is basically from State v. King
4 which instructs a jury that if they are struggling between
5 murder versus manslaughter, then they are to give the
6 benefit of the doubt to the Defendant and convict him of the
7 lesser charge. That's the basic part of that.

8 A Okay.

9 Q Was a King charge requested on behalf of Mr. Marin?

10 A No.

11 Q Okay. Do you agree that the jury was struggling with
12 those issues at that point when they came back in on that
13 question?

14 A They might have been. I just, I just don't really have
15 an independent recollection cause it's so long ago. I've
16 done so many trials after that. I just don't remember how
17 long they had been out before they requested that, and then,
18 once they requested that, how long they were out again.

19 I think that would be very helpful for me to know that
20 and I try to write those things down, but, a lot of the
21 times, I sometimes forget to do that. But it could -- they
22 very well could have been, and I think, you know, you have
23 any information in terms of the time, and that would tell
24 you if they were really struggling. But I don't really
25 remember them being out an extraordinary amount of time. I

1 don't remember just hanging out for hours and hours and
2 hours and hours.

3 Q Yes, ma'am.

4 I think---

5 A I'm sure I would remember that.

6 Q I think the jury got it right around lunch.

7 A I'm sorry?

8 Q I think the jury -- it's, it's on the transcript---

9 A Oh.

10 Q ---but I believe they got it around lunchtime, and
11 their verdict -- that they came back with a question
12 mid-afternoon, and their verdict was later on that
13 afternoon.

14 A Okay.

15 Q But, anyway, that's in the record.

16 A Okay.

17 MR. PRICE: Bear with me one moment please, Your Honor.

18 THE COURT: Yes, sir, take your time.

19 (Pause.)

20 Q Ms. Jones, just a couple more questions please.

21 A Okay.

22 Q My client feels that autopsy pictures were shown to the
23 jury during the trial. There were none that were in
24 evidence.

25 Do you recall any instance in which a juror was shown

1 an autopsy picture?

2 A I don't, and, again, I don't really have a -- an
3 independent recollection of all of the trial. He may be
4 confused because we did go over all of the photos, and
5 autopsy photos are something that I do show my clients to
6 make sure they understand the seriousness of the matter and
7 the case, and, in here, autopsy photos regularly come in
8 just to make them aware. So, I always show them. So, he
9 might be confused. That's the only thing I can think of.

10 Q I understand.

11 (Pause.)

12 Q Ms. Jones, I thank you very much. That's all the
13 questions that I have.

14 A Okay. Thank you.

15 THE COURT: Any redirect?

16 MS. GIOVANOLI: Two. Just very quickly.

17 REDIRECT EXAMINATION

18 BY MS. GIOVANOLI:

19 Q Ms. Jones, you said that you objected when the State
20 tried to get the eye witness back.

21 Why is that?

22 A I'm sorry. Say that again. You were, you were walking
23 and I couldn't hear.

24 Q Oh, I'm sorry.

25 Whenever the State had a motion for continuance to get

1 Jimenez back from Mexico, you said that y'all objected to
2 that.

3 Was Marin, Marin worried that his testimony was gonna
4 be harmful for him?

5 A No, I, I always try to do what my client wants. And so
6 my client was really ready to go to trial. He really felt
7 he had a strong case. We'd been ready to, to go to trial.
8 And so we just made an objection for the record just to
9 preserve it.

10 I mean it was Judge Cole. Judge Cole pretty much let
11 the State have one continuance. I think that this case
12 hadn't been continued before. But my client wants to go
13 forward, you know, I have to make those objections. So --.

14 Q So, your client didn't want to consent to the
15 continuance to get back the one person who could corroborate
16 his testimony?

17 A You know, I -- that sounds so awful. I just don't
18 remember it being more like that. I think it was just more,
19 with the State wanting a continuance, you object knowing
20 what's gonna happen. You don't, necessarily, it was that,
21 that, but it's certain -- and, again, we've had
22 conversations that there were things that Mr. Jimenez could
23 say that were helpful and things that were harmful, and I
24 was never able to get an entrance -- interview him. So,
25 that's always a gamble too when you put somebody on the

1 stand or you list somebody on the stand and you haven't had
2 a chance to speak with them.

3 So, again, we just noted our objection. I knew it
4 wasn't gonna be granted. So, I -- so, I don't, I don't
5 think it's something to depend on.

6 Q Okay. And just the very last question, the King case
7 from which the King charge arose, that 1930 case, are you
8 aware that that was overruled by Brightman v. State in a
9 1999 case?

10 A To be quite honest, I've never -- I mean I've never
11 heard of the King charge, and, even when he said that, when
12 he explained what it was, I, I'll be honest. I did not
13 argue that. I was not aware of that case.

14 Q Okay. It's from 1930.

15 Okay. I have no further questions. Thank you very
16 much for being here today.

17 A Thank you.

18 THE COURT: Thank you, ma'am.

19 THE WITNESS: Okay. May I be excused?

20 MS. GIOVANOLI: Yes. Yes, I'm gonna hang up on you
21 now.

22 THE WITNESS: Okay.

23 THE COURT: Any, any objection to this---

24 MS. GIOVANOLI: I can call her back if he has an
25 objection.

Russell Ghent - Direct examination
by Ms. Giovanoli

1 THE COURT: ---witness being---

2 MR. PRICE: No.

3 THE COURT: ---excused?

4 MR. PRICE: None.

5 THE COURT: Okay. Thank you, ma'am.

6 Next witness.

7 MS. GIOVANOLI: And our last witness would be Mr.

8 Russell Ghent.

9 THE COURT: Okay. Let me just inquire of this Court
10 personnel.

11 Does anybody need a break before we proceed?

12 (No response.)

13 THE COURT: Okay. Mr. Ghent, please come forward, sir.

14 THE WITNESS: Yes, ma'am.

15 RUSSELL GHENT, being first duly
16 sworn, testified as follows:

17 THE COURT: Thank you, sir. Please have a seat. Make
18 yourself comfortable.

19 THE WITNESS: Thank you.

20 DIRECT EXAMINATION

21 BY MS. GIOVANOLI:

22 Q Good afternoon, Mr. Ghent.

23 A Good afternoon.

24 Q You've -- can you give us a brief background of how
25 long have you been practicing law?

1 A I think it's about 30 -- since 1977. I'm not real good
2 in math.

3 Q Okay. And what is your current position?

4 A Assistant solicitor.

5 Q Okay. And was that your -- the position you held at
6 the time of this trial and thereafter during the appeal?

7 A Yes, I was a member of the office.

8 Q And how---

9 A Fairly new.

10 Q How did you get involved in this case?

11 A I got involved because my background includes
12 prosecution, fourteen years criminal defense, working as a
13 state and federal prosecutor, and Susan Reese had tried the
14 case. We were friends. She specifically asked me to take
15 it.

16 Don Zelenka and I had been rookies pretty much
17 together. Barry Barnette, Solicitor Barnette, talked to Don
18 about me handling the case. Don had no problems. So, I
19 handled the appeal in the Court of Appeals and in the
20 Supreme Court.

21 Q So, you wrote -- you were the sole party responsible
22 for the briefs that were filed in the appeal?

23 A Yes, ma'am, I was.

24 Q Okay. And you mentioned Susan Reese. She is unable to
25 be here to directly defend the allegations made against her.

1 Is she still practicing law?

2 A She's not actively practicing. She retired several
3 years ago when she adopted another child. She and her
4 husband.

5 Q Okay. So, there's been some allegation that you lied
6 in your brief.

7 would you like to defend those allegations now to --
8 here today?

9 A Yes, ma'am, I did not lie.

10 Q Okay. And I'm gonna show you---

11 A Could I have my water over there if you would, ma'am?

12 Q Yes.

13 A Thank you.

14 Q Okay. So, some of the things that you wrote in your
15 brief involved the positioning that you argued the victim
16 was in at the time he was shot.

17 A Yes, ma'am.

18 Q Can you, can you explain why you made those arguments
19 to the Court of Appeals and the Supreme Court?

20 A Yes, ma'am, I can.

21 First of all, a couple of things. The testimony was
22 that -- the narrative started out with some people in
23 downtown Spartanburg ending the night. They had worked at a
24 club downtown, and they were ending the night sitting on
25 some stairs when the car driven by the Defendant stopped.

1 They said that two individuals got out arguing. One took a
2 gun or what appeared to be a gun out of the other one's
3 hand, threw it out down the street. They called 9-1-1.
4 9-1-1, the officers, came, and they found this individual,
5 the Defendant, dressed in white and covered in blood.

6 Q And the photo to which you refer was actually admitted
7 at trial.

8 Is that correct?

9 A I don't know.

10 Q It---

11 A These, these are---

12 Q It was. It's actually part of the record, and I think
13 counsel will agree with me.

14 A That's fine.

15 Q Actually it's this one.

16 A In the car was the body of the deceased, Mr. Tabares.

17 THE COURT: Okay. Let's wait just one second,

18 Mr. Ghent.

19 THE WITNESS: Yes, ma'am, sorry.

20 THE COURT: It's okay.

21 (Pause.)

22 Q And I don't believe we need to make these exhibits, for
23 the purpose of this hearing --

24 A Oh, okay.

25 Q -- but they were admitted at trial. So, if you would

1 like to look at them. They're part of the record. This one
2 is. This is a picture of the victim.

3 THE COURT: Okay. Thank you.

4 THE WITNESS: They said that one individual was in
5 white. That turned out to be the Defendant, Mr. Marin. The
6 other defendant was wearing a black shirt. That turned out
7 to be his former brother-in-law, Mr. Tabares, the passenger,
8 front seat passenger in the car as it turned out, and Mr.---

9 Q Jimenez.

10 A Marin.

11 Q You said Tabares.

12 A Oh, excuse me. Mr. Jimenez was the front seat
13 passenger. Mr. Tabares was the back seat passenger, right
14 side, back passenger side of the car, and the driver was the
15 defendant, Mr. Marin. The individual wearing a black shirt,
16 as described, was Mr. Jimenez. He took something away that
17 the officers later looked for. They found a gun.

18 The Defendant himself, covered with blood, didn't --
19 I've got to say this. I'm fairly certain he didn't just say
20 to Arterburn that -- Mr. Jimenez didn't just say this. It's
21 my recollection, I've got the transcript here if someone
22 want, wants to call me on it, but my recollection is that
23 the Defendant himself, when asked by somebody where all this
24 blood came from, said it was somebody else's blood because
25 she was cutting his pants leg up to try to find the source,

1 and he said I'm not shot. Somebody else's blood.

2 MR. PRICE: Your Honor, what is the -- I want to
3 object.

4 what's the relevance to the, the issues of Appellate
5 misconduct with what's going on now?

6 We're doing nothing more than -- well, we're plowing
7 new ground. It's irrelevant.

8 MS. GIOVANOLI: Well, the evidence is what he based his
9 argument to the Court of Appeals and the Supreme Court.
10 He's alleged that he lied in his brief. So, he's explaining
11 the evidence that he used to make his arguments---

12 THE COURT: Okay.

13 MS. GIOVANOLI: ---to the Appellate Courts.

14 THE COURT: Okay. And, and maybe, maybe a better way
15 will be, Ms. Giovanoli, if, if you can maybe ask the
16 question with the specific---

17 MS. GIOVANOLI: Okay.

18 THE COURT: ---reference. I think that, that Mr. Marin
19 made specific references as to where he thought Mr. Ghent
20 had misrepresented the record in the brief.

21 MS. GIOVANOLI: Right, and I thought that it was maybe
22 Pages 15, 16, and 17 of the brief. It was Page 12. It was
23 a number of pages, but Mr. Ghent is very familiar with what
24 he's alleged---

25 THE COURT: Yes.

1 MS. GIOVANOLI: ---against him.

2 And the specific question that I asked you was you made
3 a representation in your brief that he held the
4 Defendant's -- I mean the victim's head down, face down,
5 head down, and that---

6 A Right.

7 Q ---he shot him that way in the back of the head.

8 So, my question to you is what evidence did you use in
9 making that -- basing that argument?

10 A Okay. The Defendant was covered in blood. The victim
11 had been shot twice in the back of the head at close range.
12 The Defendant said he never held his head down. The
13 testimony, in fact, showed -- the Defendant said he shot
14 with a right-hand previously. In attacking me, he said he
15 shot with the right-hand. Today, he said it could be the
16 right or the left-hand.

17 I believe, based on the evidence, it had to be the
18 left-hand because the attack was coming from the right back
19 seat passenger side. The Defendant had been taken home
20 because he was drunk or was suppose to be taken home.

21 whenever they got home to the car, turns out they
22 didn't even know where he lived after they had, apparently,
23 said they did. He was -- the victim was totally out of it
24 drunk, and one of the things I would clarify is I know all
25 these routes in, in Greenville. I am, I am familiar with

1 them cause I've driven them hundreds of hours, probably
2 thousands of miles coming -- going to and from my homes to
3 Spartanburg.

4 Q Was there anything about the trajectory of the bullet
5 wounds---

6 A Yes, ma'am.

7 Q ---at the location of the bullet holes in the vehicle
8 that supported your argument?

9 A Yes, ma'am, it did.

10 MR. PRICE: I would object to the leading form of the
11 question, Your Honor.

12 THE COURT: Okay.

13 MS. GIOVANOLI: I'm asking him if that evidence
14 supported his argument. It's a yes or no question. I don't
15 think that's leading.

16 THE COURT: Can you restate the question?

17 Q What other evidence---

18 THE COURT: Just, just re -- I'm not saying rephrase
19 it. Just restate it because---

20 MS. GIOVANOLI: Oh.

21 THE COURT: ---I'm not sure that I heard exactly---

22 MS. GIOVANOLI: I said was the bullet wound trajectory
23 and the bullet hole in the car, did that have any influence
24 on your argument or was that, that -- is that a ground --
25 did you use that evidence in making your argument?

1 A Yes, I did.

2 Q Okay. And how so did you use that evidence?

3 A Okay. I'm gonna try to get this all out as quickly as
4 I can. He was covered in blood, the Defendant.

5 All right. He said it didn't come from him. It came
6 from the other guy. They found a dead guy in the vehicle,
7 Mr. Tabares. He's lying face down all from, and they've
8 already conceded it, from below the torso into the front
9 seat over into the driver's seat.

10 Their entire theory of defense appears to have been
11 self-defense. The Defendant claimed that this man came over
12 the back seat, attacked him, and there was nothing he could
13 do other than ultimately shoot him. That's nonsense.

14 Q The trajectory.

15 A The trajectory was left-hand. There was gun powder
16 residue on the back left-hand. There was -- apparently not
17 on the palm, but the palms had been covered in blood. I
18 have a photograph where he's sitting on the street, and he
19 was so soaked in blood that it shows his behind in blood.

20 The gunshot shows that -- and, again, I've got the
21 autopsy photographs that trace it. One of the shots goes on
22 an upward trajectory, the kill shot I believe it was,
23 through his head -- no, it wasn't the kill shot. It was the
24 first shot. Through his head---

25 Q Do you know which one was the first or second shot?

1 Let's clarify that.

2 When you say first shot, do you mean in time or are you
3 just saying---

4 A First shot -- I mean the -- apparently, from what
5 Doctor Wren testified, I believe he referred to them as
6 first shot. I don't think there's any way anybody could
7 know which one was first in time.

8 Q But not in time. Just as---

9 MR. PRICE: Your Honor, I would object to the
10 supposition you apparently -- as it's---

11 THE COURT: Yes, sir.

12 MR. PRICE: That's not proper.

13 THE COURT: That would be sustained.

14 Okay.

15 THE WITNESS: Your Honor, may I continue?

16 THE COURT: I, I think we were trying to clarify first
17 shot, second shot, and what y'all I think are referring to
18 is that, in photographs or in the testimony by Doctor Wren,
19 that one shot is referred to as shot number one---

20 MS. GIOVANOLI: Yes.

21 THE COURT: ---and one is referred to as shot number
22 two just to keep them straight for the record.

23 THE WITNESS: Exactly.

24 THE COURT: But -- and, further, I think that it was
25 never determined in trial which shot was the first shot,

1 which was the first shot fired, and which was the second
2 shot fired.

3 Is that correct?

4 MS. GIOVANOLI: Yes, that was not---

5 THE COURT: Okay. Okay.

6 MS. GIOVANOLI: ---determined at trial.

7 THE COURT: Okay.

8 Q So, we've got -- let's use shot one and shot two.

9 A Right.

10 Q Okay.

11 A So, at any rate, it was shot left-hand. That was my
12 theory. Still is. Merely because he took the gun out of
13 the glove compartment with his right-hand, according to his
14 testimony, took it out, took it out of a pouch, and it was
15 loaded, does not mean it remained there.

16 what I thought the evidence showed was that he moved
17 the gun to his left-hand because he was trying -- pushed the
18 guy back at some point. That some point was miles, like 20
19 miles from where this individual was killed, and I tracked
20 it, and I know it.

21 MR. PRICE: Objection, Your Honor. This---

22 A I know it firsthand. I drove it.

23 THE COURT: Okay. But with regard to the evidence that
24 was presented at trial, and, and what was in the brief---

25 MS. GIOVANOLI: Right.

1 Q And so the evidence presented at trial was that the
2 accident occurred at that Tucapau and Highway 29
3 intersection.

4 Is that right?

5 A Yes, ma'am.

6 Q Okay. And, you know, we've got Google maps and there's
7 been testimony that that was quite a long distance from
8 Bongo's where the journey started.

9 Is that correct?

10 A Yes, ma'am.

11 Q Okay. So, but the, the -- I want to get down to the
12 nitty gritty of that argument that you made of his head
13 being, I guess, down whenever the Defendant shot him.

14 Just tell me what evidence -- the trajectories, the
15 bullet holes, everything that was admitted at trial, what
16 did you do to make the basis for those arguments?

17 A One of the bullets went on a, on a, on an upward
18 trajectory through the head, and one of the bullets went out
19 the windshield on an upward trajectory. The other bullet
20 was just slightly to the side, and I've got photographs that
21 show the two points on the front of the head, and the two
22 points on the back of the head. The other shot went through
23 and one of the shots went through the brain, the cerebellum.
24 It was the kill shot. The other one was probably a kill
25 shot, went through and went through it's something like the

1 parsis (phonetic) of the ear or the ear lobe.

2 Q Right.

3 A That shows me that the shooting occurred while he was
4 down as the Defendant was struggling with him, and one of
5 the shell casings was found. The gun was an automatic. It
6 shoot -- it ejects the shells from the right side. It would
7 of then flown over the Defendant because there was a shell
8 casing found in the back seat---

9 MR. PRICE: Again---

10 A ---by the Defendant -- by the victim's toes.

11 MR. PRICE: Object. None of this was testified to at
12 the trial. All of this is speculation and supposition from
13 this witness.

14 MS. GIOVANOLI: I would disagree with that. I think
15 much of that is evidence in the transcript.

16 THE COURT: Okay. Well---

17 THE WITNESS: The Supreme Court allowed it.

18 MS. GIOVANOLI: Okay.

19 THE COURT: Well, and the question I think is, in that
20 Mr. Marin has stated that there were misrepresentations in
21 the brief authored by this witness, I need to know what this
22 witness' response is to those specific allegations. That's
23 what he's testifying about.

24 MS. GIOVANOLI: That's right.

25 THE COURT: Okay. And let's see if we can keep it to

1 that.

2 Q So, you---

3 THE COURT: So, try to explain -- because there's no
4 jury here. This is for me. Just try to be -- I've got the
5 documents. I have the brief. I've got the transcript.
6 Just try to pinpoint for me the pages that you were
7 referring to, and what this witness' response is to any
8 allegation that was made in the Application about those
9 statements.

10 MS. GIOVANOLI: Okay.

11 (Pause.)

12 Q Okay. I'm looking at your brief to the Supreme Court.
13 You have a copy of that up there, don't you?

14 A Yes, ma'am.

15 Q Okay. I believe --.

16 A I'm not sure if I do, but it's okay. Go ahead.

17 Q It's gonna take me more time to find these locations in
18 the brief where you said it, but you said the position of
19 the victim, whenever he was shot, was that his -- he was --
20 his head was down. So, that's the same question I keep
21 asking. So, I'm actually gonna move on.

22 What I'm gonna ask you is that Mr. Marin filed an ODC
23 complaint against you regarding these exact same
24 allegations, did he not?

25 A Yes, ma'am, he did.

1 Q And he actually filed it against Mr. Don Zelenka?

2 A Yes, ma'am, thinking that Don---

3 MR. PRICE: Your Honor---

4 A ---had written the brief.

5 MR. PRICE: ---I object to relevance of this testimony.

6 MS. GIOVANOLI: I think it's very relevant because the
7 same allegations have been made prior to this hearing, and
8 the, the same -- he responded to those allegations the same
9 way he's responding today---

10 THE COURT: Okay.

11 MS. GIOVANOLI: ---and that ODC complaint was
12 dismissed.

13 THE COURT: And, again, let me, let me state that I
14 don't have those documents before me.

15 MS. GIOVANOLI: Uh-huh. (Affirmative).

16 THE COURT: And if, if you're doing that to refresh Mr.
17 Ghent's memory, that's one thing.

18 Okay. But I don't have those documents before me. I
19 can't take that into consideration, that there was a
20 complaint made to ODC.

21 But with regard to the, the PCR Application, and the
22 brief, okay, I mean I thought that it was extremely specific
23 in the Application the allegations against Appellate
24 Counsel.

25 MS. GIOVANOLI: He handed me a document with page --

Russell Ghent - Direct examination
by Ms. Giovanoli

1 some highlighted portions, and it wasn't the complete --
2 this was what was admitted during this hearing, and I -- it
3 starts on Page 16. Then he made reference to a few other
4 pages, and, I'm sorry, my notes are voluminous, and I don't
5 have them right on hand, and I really don't want to waste
6 the time trying to dig for those.

7 But, on Page 16, the -- this -- the Petitioner refers
8 to is the facts, the facts of this case, and, in fact, in
9 their entirety, and, at no time, refers the jury to infer
10 malice merely from the use of a gun. This was evidence of
11 him pulling a gun from the glove compartment while holding
12 the victim face down and cocking it under a four pound pull
13 or simply taking it from a bag already cooked and at the
14 ready. This happened with malice aforethought after a
15 second attempt by the victim to escape had nearly succeeded.

16 So, that's what I kept asking you. He's claiming that
17 you're lying in this brief.

18 So, what evidence supports those arguments that the
19 victim was face down, that he cocks a gun, that he pulled it
20 out of the glove compartment, and shot him in the back of
21 the neck?

22 A The position of the body, the bullet hole through the
23 windshield, the trajectory of the bullets going through the
24 head, the blood all over the Defendant, the basic largest
25 amount of blood..

1 Their expert testified regarding blood splatter around
2 the ceiling---

3 Q Dome---

4 A ---light. The blood spatter is almost all, with some
5 exception, on the driver's side around the area where the
6 lap, which would be from approximately the waist to the
7 knees, would be.

8 Q Okay.

9 A The trajectory indicates it was upwards. The man was
10 attempt, according to the Defendant's testimony, that makes
11 it relevant, coming over the side, over the back of the
12 console, trying to get to the steering wheel, and he shoved
13 him back once. He then, later on, started up again, and a
14 big question in the case, that is relevant, is when did he
15 start it up again.

16 The blood all over the hands and clothes, there is a
17 large amount on the driver's side indicating that, if he
18 shot through the head, and there is brain residue and blood
19 on the driver's side, predominantly, he was shot through the
20 head on the driver's side.

21 MR. PRICE: And I object---

22 THE COURT: Okay.

23 MR. PRICE: ---to this testimony.

24 THE COURT: Okay. And I think, and I think -- counsel,
25 can y'all just approach for one moment because --.

1 (WHEREUPON, a bench conference was held at this time.)

2 THE COURT: Okay. Counsel.

3 MS. GIOVANOLI: I think, I think the record speaks for
4 itself.

5 My only question is going to be did you lie in this
6 brief?

7 A No.

8 Q Okay. And were all of the arguments that you made
9 supported by evidence that you found in the record?

10 A Yes.

11 Q Okay. And---

12 MR. PRICE: Object to leading questions.

13 THE COURT: Okay.

14 Q What were your arguments based on?

15 A The record, the evidence in the case, the
16 photographs---

17 Q Okay.

18 A ---from the case.

19 Q Okay.

20 A The autopsy.

21 Q But strictly from the record?

22 A Yes.

23 Q Okay. And did you receive a letter from Mr. Bob Dudek
24 informing the Court, as well as you, that he was not going
25 to be present for oral arguments at the Court of Appeals?

1 A As I recall, I did.

2 Q Okay. Do you remember what the reason, why he was --
3 sent David Alexander in his stead?

4 A He had a death penalty case.

5 Q Okay. I have no further questions. Thank you.

6 THE COURT: Okay. Mr. Ghent, please answer any
7 questions by Mr. Price, sir.

8 Yes, sir, Mr. Price, cross-examination.

9 MR. PRICE: Does that mean I get to ask him any
10 questions after we've known each other for 40 years, Judge?

11 THE WITNESS: As long as I can ask back.

12 CROSS-EXAMINATION

13 BY MR. PRICE:

14 Q Mr. Ghent, forty years we've known each other?

15 A Yes, sir.

16 Q During that 40 years that I have known and respected
17 you, you have never qualified in a Court as a ballistics
18 expert, have you?

19 A No, sir, I haven't.

20 Q Okay. Never testified as a ballistics expert?

21 A No, sir, I haven't.

22 Q Okay. You were present in Court when you heard
23 Mr. Girndt testify as an expert witness about the crime
24 scene being the interior of the automobile?

25 A Yes, sir.

1 Q And he testified that there had been no dowels run from
2 the decedent's head to the hole in the windshield or the
3 hole in the GPS thing to help determine a trajectory.

4 Do you recall that?

5 A I recall him saying he did not.

6 Q I believe that his testimony was there were no pictures
7 showing that he had been provided that that had been done.

8 A I do not recall him saying that---

9 Q Okay.

10 A ---because there are pictures, and it was done by
11 Doctor Wren, and I'm entitled to answer.

12 Q I just, just asked the question.

13 Did you hear Mr. Girndt's testimony?

14 A I do not recall him saying no pictures.

15 Q Now---

16 A I do not recall him saying no---

17 Q Doctor, Doctor Wren was who?

18 A Doctor Wren was the medical examiner who testified at
19 trial.

20 Q All right.

21 A His testimony is in here, and that's what I am relying
22 on.

23 Q I'm, I'm just asking the question who is Doctor Wren,
24 and Doctor Wren did, at autopsy, run dowels through the
25 wounds to show the angle of the wounds, correct?

1 A Mr. Price, either he did or someone assisting him did
2 because I have the pictures here---

3 Q I understand.

4 A ---and I will provide them.

5 Q I have seen those pictures.

6 That was done at autopsy, was it not?

7 A I believe that's correct, sir.

8 Q Okay. My question though, nobody did the dowels in the
9 car at the scene where the body was found from the
10 windshield down to Mr. Tabares's head from the exit wounds,
11 did they?

12 A Oh, now I see what you're saying. No, they did not.

13 Q There was no testimony of anybody doing any trajectory
14 experiments or measurements in the car when the body was
15 found, by dowels or otherwise, was there?

16 A His testimony was that one of the bullets was on a --
17 going -- entered left on an upward trajectory.

18 Q That was not my question.

19 A That was his testimony.

20 Q I'm not talking about Doctor Wren. I know Doctor
21 Wren's testimony. I'm talking about in the car, when the
22 body was found---

23 A You're correct.

24 Q ---there was no one that did any testing of trajectory
25 at that point?

1 A That's correct.

2 Q And the only testimony about so called trajectory was
3 Doctor Wren testifying, at autopsy, the trajectory of the
4 wounds in through the, through the head, correct?

5 A Going upwards and to the left.

6 Q Whatever he testified to.

7 A Right.

8 Q Now, nobody testified where Mr. Tabares head actually
9 was when he was shot, was there?

10 A Not even the Defendant.

11 Q All right. So, if there was no trajectory testing done
12 in the car, and there was no testifying where the head
13 actually was when the fatal -- when the two shots hit him,
14 then there was no testimony that Mr. Marin held Tabares's
15 face down when he shot him?

16 A I would submit that there did not---

17 Q I need you to answer my question and then you---

18 A And then I'll -- okay. No, but there didn't have to be
19 because---

20 Q I understand.

21 A ---you do not have to have an expert, which I would
22 suppose I could be testified -- qualified as much as the
23 gentleman back there as many years as I've been in criminal
24 courts in violent crime cases, but it was based on the facts
25 and circumstances, and on basically the allegations that

1 were being made by this gentleman on his appeal and in the
2 case.

3 The Defendant was claiming that he was under attack,
4 and the evidence, again, through my experience, the direct
5 and the circumstantial evidence showed that he was able to
6 control his attacker because the first attack occurred
7 approximately 15-miles from where he ultimately killed his
8 victim. Eight minute drive from Bongo's, and, again, I've
9 got a map up here that is off of the Internet that says,
10 from Loehmann's Plaza, Pelham Road, all the way to Hammett
11 Bridge Road, which is where this defendant lived, or, excuse
12 me, the victim lived in apartments, is approximately
13 4.87 miles---

14 MR. PRICE: Your Honor, I would---

15 A ---or about eight minutes.

16 MR. PRICE: None of this is responsive to my question.
17 I ask that it be stricken. I object to it.

18 THE COURT: Counsel.

19 MS. GIOVANOLI: Your Honor, I believe that the witness
20 is entitled to answer the question and elaborate, and that's
21 exactly what he was doing.

22 THE COURT: Mr. Ghent, the, the document that you were
23 referring to, the map, was that part of the record?

24 THE WITNESS: No, ma'am.

25 THE COURT: Trial record.

1 THE WITNESS: No, ma'am.

2 THE COURT: Okay. Then I will agree that it will be
3 stricken.

4 MR. PRICE: Okay.

5 THE COURT: All right.

6 Q Now, Mr. Ghent, there was no testimony from anyone that
7 Mr. Marin held Tabares's face down and shot him, was there?

8 A I believe -- no.

9 Q Okay.

10 A There was no direct testimony.

11 Q There was no testimony that Mr. Marin shot Mr. Tabares
12 with his left-hand?

13 A There was evidence -- no, there was no direct evidence,
14 no testimony, but I'm allowed to explain. There was clearly
15 circumstantial evidence, at Page 180 of the transcript,
16 which shows that the gunshot residue was on his left-hand,
17 and one of the shell casings was right at the victim's toe
18 in the back passenger seat meaning it went over the victim's
19 body into the right passenger seat.

20 Q Again, I ask you, have you ever been declared an expert
21 in the field of ballistics?

22 A It doesn't require that.

23 Q I have---

24 A I know guns and I know gravity works.

25 Q Answer my question.

1 Have you ever been declared an expert in the field of
2 ballistics?

3 A No, sir.

4 Q There was no testimony in the trial about the so
5 called -- the supposition that you just testified to?

6 A No, sir, but the Supreme Court read the record and had
7 no problem with it, and disciplinary counsel read the record
8 and had no problem with it.

9 MR. PRICE: I object to the reference to disciplinary
10 counsel, Your Honor. That's -- you've already made a ruling
11 on that.

12 THE WITNESS: I'm under attack, Your Honor. I'm
13 entitled to defend myself.

14 THE COURT: I think that he can respond and answer
15 referring to that. However, because I don't have those
16 documents, I can't use that. I'm not allowed to use that in
17 my decision making. Thank you, sir.

18 MR. PRICE: One moment, Your Honor.

19 THE COURT: Yes, sir.

20 (Pause.)

21 MR. PRICE: Your Honor, that's all I have for Mr.
22 Ghent.

23 MS. GIOVANOLI: No further questions.

24 THE COURT: Okay. Mr. Ghent, thank you so much.

25 THE WITNESS: Thank you, Your Honor.

1 THE COURT: Please step down.

2 THE WITNESS: Yes, ma'am.

3 MS. GIOVANOLI: And the State would rest.

4 THE WITNESS: Yes, ma'am.

5 THE COURT: Okay. Any reply testimony, Mr. Price?

6 MR. PRICE: No, Your Honor. We have nothing in reply.

7 THE COURT: Okay. Anything else, counsel?

8 MS. GIOVANOLI: Just, in, in closing, I would request
9 that we be allowed to submit memorandums in place of oral
10 argument due to a time constraint that we have here. I'm
11 not sure if counsel is in agreement with that or in
12 opposition, but it's just an idea I'd like to throw up
13 there.

14 MR. PRICE: That works for me as long as we have a
15 little bit of time to do it.

16 THE COURT: Yes, sir, and, and I'm not trying to limit
17 you in any way. I mean you've been on our docket for today,
18 and you can have the day. I just don't want anybody to feel
19 pressured to do things one way or another. If you-all do
20 submit the memorandum, I will give you -- counsel, what do
21 y'all propose as far as a time limit?

22 MS. GIOVANOLI: Any, anywhere -- at least 30 days.

23 THE COURT: Well, certainly at least 30 days. Just
24 tell me---

25 MR. PRICE: Thirty days will be fine.

1 MS. GIOVANOLI: Okay.

2 THE COURT: Okay.

3 MR. PRICE: Can we agree on a page limit while we're
4 here?

5 MS. GIOVANOLI: I, I would not want to make it any
6 longer than I have to to address the 49 allegations. So,
7 I'm not gonna try to make it overly wordy. I just have to
8 argue each one. So, due to the length of the allegations,
9 my memorandum may be longer than even I would want it to be.

10 THE COURT: Okay. So --.

11 MR. PRICE: We're gonna be reasonable.

12 THE COURT: Well -- and I hate to limit you-all.

13 However, you-all are both very good at what you do, and I
14 know you'll be efficient.

15 MR. PRICE: I understand.

16 THE COURT: Okay. And so, why don't we give you 45
17 days to submit that, and, if you will, I, I know that I have
18 not yet ruled on your motion for discovery with regard to
19 the -- it was a test result from SLED to see if SLED had
20 tested, and, in that, we are going to go ahead and extend
21 this by giving you time to submit documents or briefs,
22 memorandum, in support of your positions.

23 I have no problem with allowing that discovery.
24 However, we need to limit that because that could change
25 your arguments, right?

1 I mean are y'all following me?

2 If you---

3 MS. GIOVANOLI: Absolutely.

4 THE COURT: So, I don't know how much time --.

5 MR. PRICE: From my conversations with SLED earlier
6 this week, they have this case in the computer, and
7 whatever's done is done, and they ought to be able to tell
8 us if anything was done within a matter of days. I propose
9 to maybe send your clerk a proposed order.

10 THE COURT: why, why don't we do this?

11 why don't I -- let's -- let me restate those -- the
12 timeframe.

13 MR. PRICE: Uh-huh. (Affirmative).

14 THE COURT: Counsel, well, why don't we -- I'll give
15 you 30 -- I will give -- in the order, I will require 30
16 days, a 30 day deadline for SLED to respond, and then 60
17 days or an additional 30 days for you-all to, to brief or
18 submit your memorandum of, of law. So, a total of 60 days,
19 okay, to your memorandum. Thirty days for SLED to respond.

20 MS. GIOVANOLI: Thank you, Your Honor.

21 THE COURT: Okay. All right.

22

23

24 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

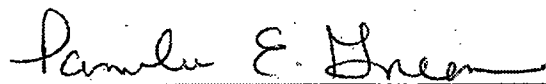
25

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 1st day of February, 2018.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

August 2nd, 2018



PAMELA E. GREEN, Court Reporter

RECEIPT FOR EXHIBITSCase No. 16-GS-42-2795Judge KniePlaintiff: Manuel MarinPlf's Atty C. PriceDefendant: StateDef's Atty. V. GiovanoliDate Trial Started 2/1/18Date Trial Ended: 2/1/18Received of Pam Green

, Court Reporter for the above case, these exhibits:

A. 1. Diagram5-1-map2. Photo2-map3. photo3-map4. letter4-map5. Prody material5-map6. Supreme Court order6-letter7. Sled info.

8. _____

9. _____

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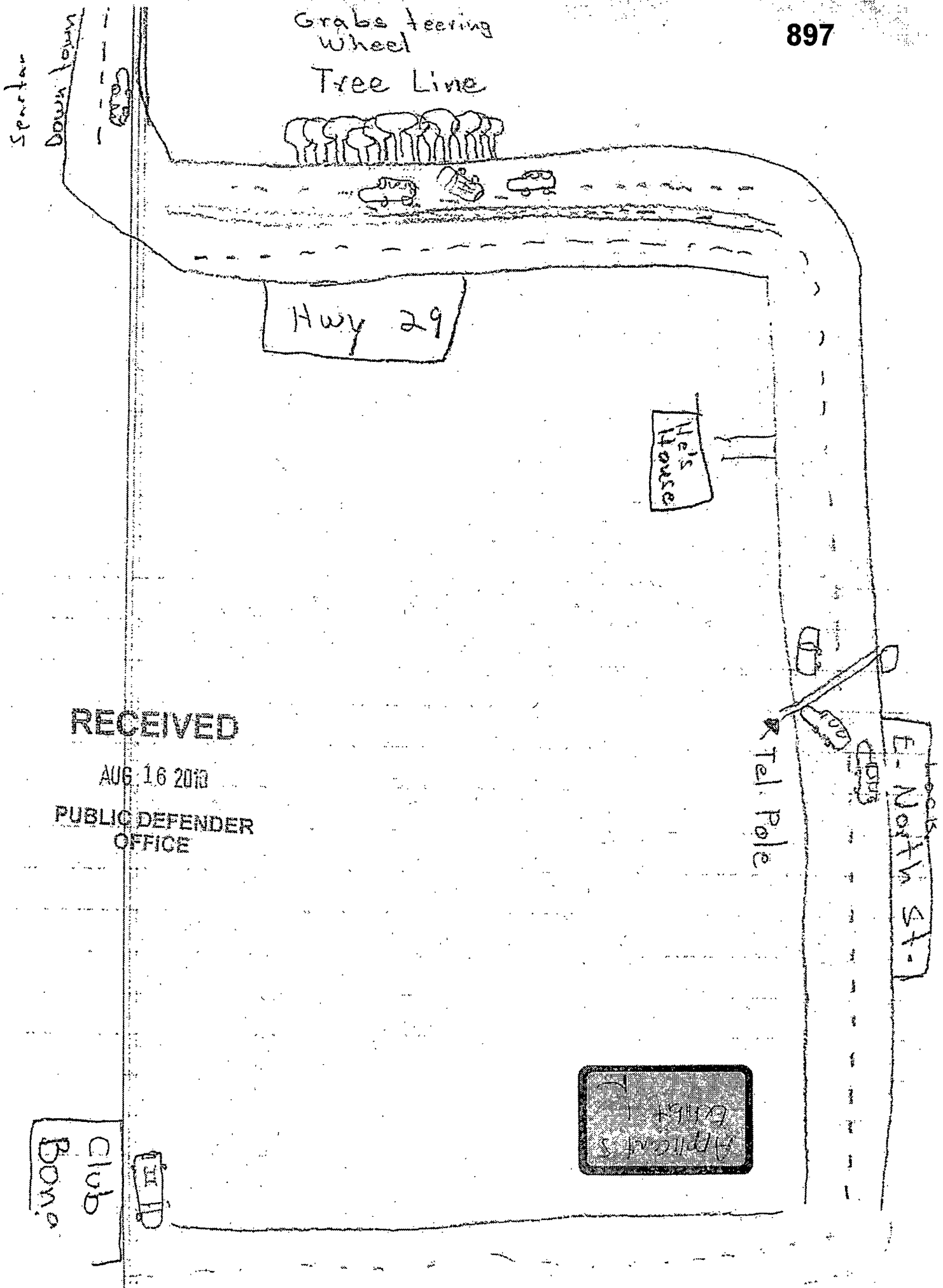
19. _____

20. _____

This 11 day of February, 2018.

Page _____ of _____

By: Campanile/Charles
SPRUELL County Clerk of Court.



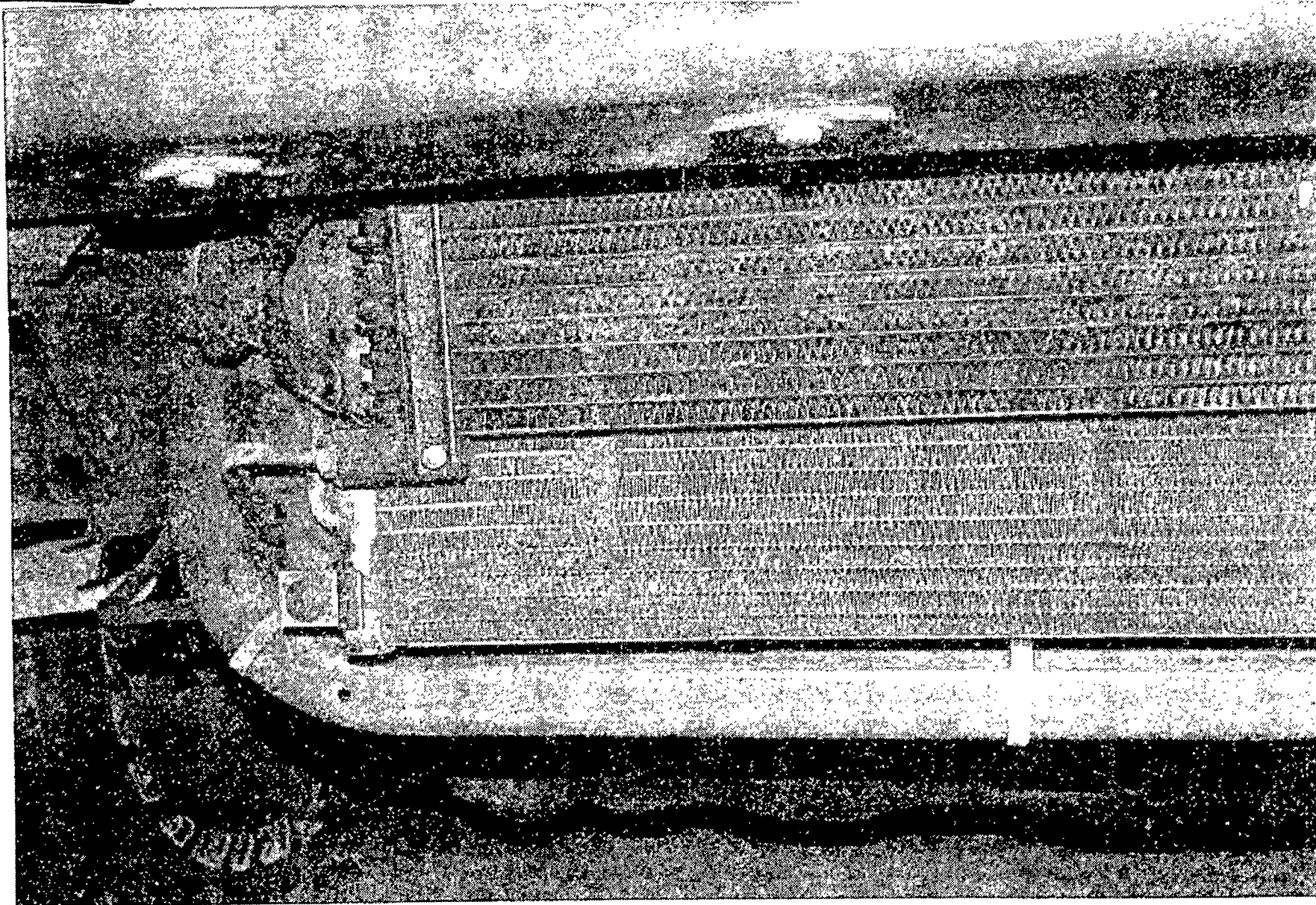
RECEIVED

AUG 16 2013

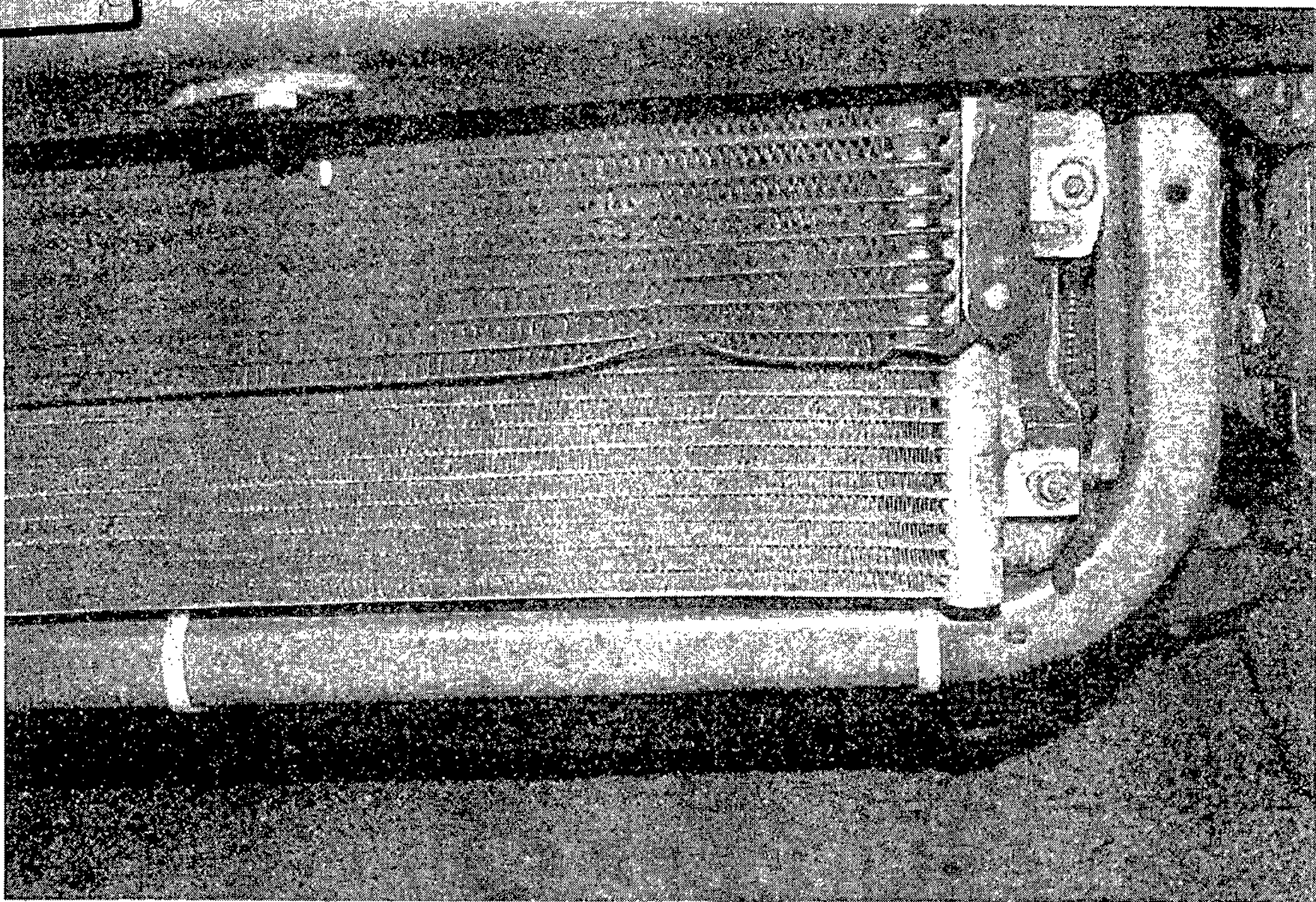
PUBLIC DEFENDER
OFFICE

Applicant's
Exhibit 2

898



Applicant's
Exhibit 3



V
5

Impeachment of 900thness
Brady Violation

SEVENTH JUDICIAL CIRCUIT PUBLIC DEFENDER

CLAY T. ALLEN
CIRCUIT PUBLIC DEFENDER

366 NORTH CHURCH STREET
SUITE 3000
SPARTANBURG, SC 29303



TELEPHONE (864) 596-2561
FAX (864) 596-2284
FAX (864) 562-4412

January 25, 2011

Manuel Antonio Marin, #343371
Lieber Correctional Inst.
136 Wilborn Ave
PO Box 205
Ridgeville, SC 29472

Re: State v. Manuel Antonio Marin
Warrant/Ticket No(s): M023052

Dear Mr. Marin:

Please find enclosed the discovery I received prior to trial that I did not get a chance to give you. Additionally, please find enclosed a copy of the Notice of Appeal. As you know, Appellate Defense will handle that appeal.

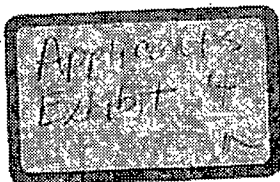
Additionally, we talked about you filing a potential PCR. I want to ensure you understand that because you are pursuing an appeal, you may not file a PCR until that process is complete. That is, once your appeal process is exhausted, you may file any PCR action you wish to pursue.

Should you have any other questions, please contact me. I appreciate your attention to this matter.

Sincerely,

Tanya R. Jones
Assistant Public Defender

Enclosure



IV
4.

Impeachment of
Witness and
Brady violation

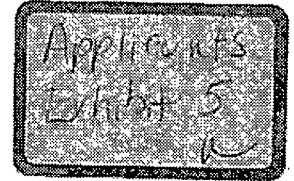
756
Page: 2

09/10/10
14:55

Spillman Data Systems, Inc.
Deputy Supplemental Report

Investigation Report
Spartanburg County Sheriff's Department

Case Number: 2008071205
Incident Type: Homicide
Victim: TABARES, Nelson Fernando
Location: W. Main St and N. Daniel Morgan Ave, Spartanburg
Incident Date: 07/21/2008
Patrol Officer: NIX, M.
Investigator: MCGRAW, L.



Between 7/22/08 and 07/28/08, I conducted a forensic examination of a computer and digital camera seized pursuant to a search warrant in reference to a homicide case. The purpose of the examination was to determine whether the electronic media contained anything of evidentiary value with regard to this investigation.

On 07/22/08, I retrieved the evidence from the ID Section. I photographed the computer and camera to document their condition. The computer was a Compaq Presario V5000 laptop computer, S/N CND5490QLS. The camera was a Canon PowerShot S3IS PC1192, S/N 2328001048 and contained a Polaroid/PNY 512MB SD card. I removed the hard disk drive (HDD) from the laptop computer. The HDD was a Toshiba MK8025GAS, 80GB IDE HDD. I protected the electronic media with the appropriate write-blockers device. I imaged the media to a forensically sterile HDD using EnCase version 6.11. When the image was completed, a verification process occurred. The acquisition and verification hashes matched and there were no errors. The computer system BIOS clock settings were examined and compared to a known standard (www.time.gov). The clock on the computer under examination was slow by 7 seconds. At some point during the initial examination, the media containing the image failed. Consequently, both the HDD and the SD card had to be re-imaged.

On 07/23/08, I prepared another forensically sterile HDD and imaged the media using EnCase version 6.11. When the image was completed, a verification process occurred. The acquisition and verification hashes matched and there were no errors. I contacted MicroSoft personnel at the Law Enforcement Portal and requested their assistance in recovering data artifacts which could reveal GPS coordinates from the installed MicroSoft Streets and Trips program. After multiple conversations with MicroSoft representatives, I determined GPS coordinate artifacts could not be recovered. An analysis of the data contained on the HDD disclosed nothing of evidentiary value to this investigation.

I also extracted photographs from the SD card installed in the Canon digital camera; two of which appeared to be photographs of the VICTIM (IMG_0024.JPG and IMG_0025.JPG).

On 07/24/08, I returned the evidence to Investigator David HOGSED in the ID Section.

On 07/25/08, I noticed what appeared to be a discrepancy with the date-time stamps relating to the recovered photographs. I retrieved the camera from the Evidence Section so I could document any discrepancy with the on-board clock on the camera. I installed a forensically sterilized and formatted 256MB SD card in the camera. I then used an office computer to access the web site of a known time standard (www.time.gov). I photographed the computer screen with the current date and time and compared it to the embedded date/time stamp applied by the camera to the photograph. I found that the onboard clock for the camera was

09/10/10
14:55

Spillman Data Systems, Inc.
Deputy Supplemental Report

Page: 756
3

slow 12 hours, 59 minutes, and 13 seconds. Taking into account this discrepancy, it is likely that the photographs of the VICTIM were taken approximately 13 hours later than indicated on the date-time stamp for the photograph.

The date/time stamp for IMG_0024.JPG indicated the photograph was taken on 07/20/08 at 13:55:04 hrs. Adjusting for the time discrepancy, this photograph was probably taken on 07/21/08 at 02:54:17 hrs.

The date/time stamp for IMG_0025.JPG indicated the photograph was taken on 07/20/08 at 13:55:25 hrs. Adjusting for the time discrepancy, this photograph was probably taken on 07/21/08 at 02:54:38 hrs.

Responsible LEO:

Approved by:

Date

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Manuel Antonio Marin, Petitioner.

Appellate Case No. 2013-002001

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

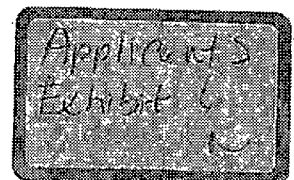
Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

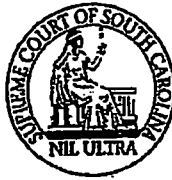
Opinion No. 27613
Heard April 8, 2015 – Filed March 23, 2016

AFFIRMED AS MODIFIED

Chief Appellate Defender Robert M. Dudek and
Appellate Defender David Alexander, both of Columbia,
for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Senior Assistant Deputy
Attorney General Donald J. Zelenka, and Assistant
Attorney General Anthony Mabry, all of Columbia; and
Solicitor Barry J. Barnette and Assistant Solicitor Russell
D. Ghent, both of Spartanburg, for Respondent.





The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1080

FAX: (803) 734-1499

www.sccourts.org

April 8, 2016

The Honorable M. Hope Blackley
PO Box 3483
Spartanburg SC 29304-3483

REMITTITUR

Re: The State v. Manuel Marin
Lower Court Case No. 2008GS4205308, 2008GS425308A
Appellate Case No. 2013-002001

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,



CLERK

cc: J. Anthony Mabry, Esquire
Russell D. Ghent, Esquire
Barry Joe Barnette, Esquire
Robert Michael Dudek, Esquire
David Alexander, Esquire

JUSTICE KITTREDGE: Petitioner Manuel Antonio Marin was convicted of murder and possession of a firearm during the commission of a violent crime. Marin appealed, and the court of appeals affirmed, rejecting his argument that the trial court committed reversible error by refusing to instruct the jury that a person acting in self-defense has the right to continue shooting until the threat has ended. *State v. Marin*, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). We issued a writ of certiorari to review the court of appeals' decision. We affirm as modified.

I.

On July 20, 2008, both Marin and Nelson Tabares (Victim) attended a Colombian Independence Day festival, followed by an after-party at a Greenville nightclub. According to Christopher McDonald, the nightclub's bouncer, Victim was extremely intoxicated and had difficulty standing and walking, but was not aggressive. Due to Victim's condition, nightclub staff members, including McDonald and owner Larry Rodriquez, determined that it would not be safe for Victim to drive. As a result, McDonald and Rodriquez attempted to find Victim a ride home.¹

Marin told McDonald that he knew where Victim lived and volunteered to drive Victim home. However, after McDonald helped Victim into the back seat of Marin's vehicle, Marin said that he needed Victim's address so that he could put it in his navigation system. McDonald looked at Victim's identification and gave the address to Marin. Marin, accompanied in the front seat by his former brother-in-law, Alfredo Jimenez, then began driving Victim home.

Marin testified that Victim was unruly and combative during the drive. According to Marin, Victim told him, "I'm sorry, but you got to go," then reached over the backseat and placed him in a headlock. Marin said he then decided not to take Victim home, but to drive to a public location and seek help. Marin further testified that Victim attempted to grab the steering wheel. However, Jimenez

¹ Rodriquez testified that Victim was not drunk, but merely ill. However, tests taken after his death revealed that Victim's blood-alcohol concentration was 0.323%, more than four times the legal limit to drive a motor vehicle. See S.C. Code Ann. § 56-5-2933(A) (Supp. 2015) (making it unlawful to drive a motor vehicle with a blood-alcohol concentration of 0.08% or higher).

stated that Victim became upset and began fighting with Marin over control of the steering wheel after Marin drove past the road on which Victim's home was located and would not stop.²

It is undisputed that Marin drove into Spartanburg County, retrieved a gun from the glove compartment, and shot Victim twice in the back of the head. Rather than ¹ stopping immediately, Marin continued driving until he arrived in downtown Spartanburg. Several witnesses observed Marin and Jimenez arguing in the street and a passerby called the police.

Marin was subsequently indicted for murder and possession of a firearm during the commission of a violent crime. Marin pleaded not guilty to both charges.

While Marin claimed he shot Victim in self-defense, he did not request any specific language for the self-defense charge at the charge conference, only ² requesting that the charge include an instruction that he had a right to act on appearances. Further, Marin did not object when, during closing arguments, the State asserted that Marin's firing of two shots was evidence of malice and ³ supported a murder conviction, nor did he ask for any additional instructions before the trial court charged the jury, in relevant part, as follows:

In this case the defendant has . . . raised what is known in the law as the defense of self-defense. The law recognizes the right of every person to defend himself or herself or a friend, relative[,] or another from death or from sustaining serious bodily harm. To do this a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable.

The right of self-defense is founded upon necessity, either actual or reasonably apparent necessity. And it is a complete defense to a charge of an unlawful homicide should you find that it exists based upon your evaluation of the evidence produced during the trial of this case. The existence of self-defense entitles a person charged with the commission of an unlawful homicide to a verdict of not guilty.

² While Jimenez did not testify at trial, his statements were admitted into evidence as excited utterances. See Rule 803(2), SCRE (excepting from the prohibition against hearsay "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition").

And although the defendant has raised the defense of self-defense, the burden of proof is not on the defendant to prove the existence of self-defense. As I have already told you, the burden is always upon the state to prove the defendant's commission of the crime alleged against him beyond a reasonable doubt. And this would therefore necessarily require that the state prove beyond a reasonable doubt the absence of self-defense.

But in order for you to consider the defense of self-defense you obviously must know what the elements are. And there are four basic elements that are required before self-defense may be established.

First, it must be shown that the defendant was without fault in bringing on the immediate difficulty which gave rise to the necessity of using deadly force which resulted in the taking of human life.

One cannot provoke, initiate[,] or otherwise through his own fault bring about a difficulty and then claim the right of self-defense in the use of deadly force against an attack which was caused by that provocation.

Secondly, it must be shown that at the time the fatal act was committed the defendant actually believed that he was in imminent danger of losing his life or sustaining serious bodily injury, or some other person was, or that the defendant actually was in such imminent danger. And the term imminent danger means an immediate or present danger and not a past or future danger.

And, thirdly, if the defense is based upon a belief of imminent danger, then it must be shown that the belief was reasonable, that is a reasonably prudent person of ordinary firmness and courage would have entertained the same belief.

If the defendant or the other person being defended actually was in imminent danger, then it must be shown that the circumstances were such as would warrant a person of ordinary prudence and courage to inflict the fatal injury in order to save himself or some other person from death or serious bodily injury.

In other words, it must be shown that a reasonably prudent person of ordinary firmness and courage if acting under the same or similar circumstances would have reached the same conclusion and entertained the same belief.

Deadly force is only appropriate when necessary and may only be exercised where the defendant entertains a reasonable belief that he or some other is about to sustain loss of life or suffer serious bodily harm.

The law of self-defense encompasses preventative action taken to protect one's own life without another [sic] if such action is taken in anticipation of imminent danger of losing one's life or sustaining serious bodily injury.

A defendant has a right to act upon appearances. He may be mistaken. The law does not hold someone to a refined assessment of the danger as might be accomplished having an adequate time to reflect, provided however that the defendant has acted as a person of ordinary reason, firmness[,] and courage would have acted or should have acted in meeting the appearance of the danger.

In other words, one does not have to wait until his or her assailant gets the advantage, for one always has the right under the law of self-preservation to prevent another from getting an advantage.

Again, there is however a requirement of objectivity. Any such belief must be reasonable, that is a reasonable and prudent person if acting under the same or similar circumstances would have so believed or would have also been warranted in acting as the defendant did.

And, fourthly, it must be shown that the defendant had no other means of avoiding the danger of losing his life or sustaining the infliction of serious bodily injury other than to act as he did under the particular circumstances as existed, because, as I have stated, self-defense is founded upon necessity.

Now, if you have a reasonable doubt as to the defendant's guilt as it relates to a proof of an unlawful homicide after considering all of the evidence received during this case, including any evidence relating to the issue of self-defense, then it would be your duty to resolve that reasonable doubt in favor of the defendant and find him not guilty.

After the jury was charged, but prior to deliberations, the trial court provided an opportunity for the parties to note any exceptions to the charges. It was at this juncture that Marin first requested that the trial court instruct the jury that "if the defendant is justified in defending himself or others in firing the first shot, then the defendant—also [may] continue—to continue [sic] shooting until it is apparent that the danger of death or serious bodily injury has . . . completely ended."

Marin represented to the trial court that *State v. Rye*, 375 S.C. 119, 651 S.E.2d 321 (2007), mandated such a charge. However, the trial court reviewed *Rye* and noted that only the dissenting opinion mentioned that language, and the reference was in

4

the context of a different legal issue. Marin then acknowledged that Rye was not on point. When the trial court asked Marin if there were any other cases that approved of such a charge, Marin's counsel responded, "I'm not a walking encyclopedia." Thus, in the absence of any supporting authority, the trial court declined to give the requested charge. (4)

A short time later, the jury requested further instruction on malice and voluntary manslaughter, but did not ask for clarification or reinstruction on self-defense. After the trial court reinstructed the jury on both malice and voluntary manslaughter, Marin renewed his request to have the "continuing to shoot" language charged to the jury. The trial court denied the request, finding that its thorough charge properly communicated the law of self-defense to the jury.

II.

Marin argues the trial court committed reversible error by failing to charge the jury that one who is acting in self-defense and has the right to fire a first shot has the right to continue shooting until it is apparent that the danger of death or serious bodily injury has ended. We disagree, for this common law rule was sufficiently encompassed in the jury charge provided by the trial court.

"[T]he trial court is required to charge only the current and correct law of South Carolina." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (alteration in original) (quoting *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)). "The law to be charged must be determined from the evidence presented at trial." *Id.* at 549, 713 S.E.2d at 603 (quoting *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007)). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2013)). "The substance of the law is what must be instructed to the jury, not any particular verbiage." *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) (citing *State v. Rabon*, 275 S.C. 459, 462, 272 S.E.2d 634, 636 (1980)). Moreover, "[t]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Brandt*, 393 S.C. at 550, 713 S.E.2d at 603 (quoting *Mattison*, 388 S.C. at 479, 697 S.E.2d at 583).

III.

The court of appeals expressed concern that "the charge Marin requested is not a correct statement of law." *Marin*, 404 S.C. at 620, 745 S.E.2d at 151. On this point the court of appeals erred, for we have previously held that "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." *State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978) (citation and internal quotation marks omitted). *But see* 40 C.J.S. *Homicide* § 189 (2014) ("[A] person who fatally wounds another, even in self-defense, is not entitled to hasten the victim's death by continuing to pump bullets into the victim's body."). While we acknowledge that the language Marin requested accurately states the law, our inquiry on appellate review is concerned only with the question of whether the jury charge, when viewed as a whole, accurately conveys the applicable law of self-defense. *See, e.g., Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." (quoting *Adkins*, 353 S.C. at 318, 577 S.E.2d at 464)). Indeed, "[t]he substance of the law is what must be charged to the jury, not any particular verbiage." *Id.* at 549, 713 S.E.2d at 603 (emphasis added) (quoting *Adkins*, 353 S.C. at 318–19, 577 S.E.2d at 464).

Here, the experienced and excellent trial judge gave a thorough and comprehensive self-defense charge, well beyond the general *State v. Davis*³ elements. While the "continuing to shoot" charge may have been appropriate, its absence does not mandate reversal. The essence of the charge was encompassed in the jury instructions, particularly the instruction that "a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable." The circumstances here are therefore unlike those in cases where the charge given completely omitted applicable principles of self-defense law. *See,*

³ 282 S.C. 45, 317 S.E.2d 452 (1984) (per curiam). The four-part self-defense instruction recommended by this Court in *Davis* was (1) the defendant was without fault in bringing about the danger; (2) the defendant believed he was, or the defendant actually was, in imminent danger of death or serious bodily harm; (3) the defendant's belief or action was reasonable; and (4) the defendant had no other probable means of avoiding the danger, except that a defendant on his own premises has no duty to retreat. *Id.* at 46, 317 S.E.2d at 453.

e.g., *State v. Fuller*, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) (holding "the trial judge erred in charging the jury only the *Davis* charge without considering the facts and circumstances of the case").

IV.

The dissent relies in part on *Fuller* to support its conclusion that the trial court inadequately instructed the jury on the law of self-defense as the law applied to the facts of this case. The dissent's approach would extend the *Fuller* holding to the point it both conflicts with our well-settled standard of review and risks offending our constitutional prohibition against judges "charg[ing] juries in respect to matters of fact." S.C. Const. art. V, § 21.

The facts in *Fuller* were as follows:

On the night of September 20, 1986, Fuller, a black man, solicited a white prostitute, Susan Phillips, on Two Notch Road, in the parking lot of the Columbia Motor Lodge. Fuller agreed to meet Ms. Phillips back at her trailer. Ms. Phillips lived in a trailer on Blume Court, next to the Ole Place Club and behind the Columbia Motor Lodge. Fuller drove to Blume Court while Ms. Phillips ran down Two Notch Road to Blume Court. Fuller parked his car and waited on Blume Court while Ms. Phillips went in the trailer. Upon arriving at her trailer, Ms. Phillips found that another prostitute already had a "bag" (a man) in the bedroom. Since the trailer was occupied by another prostitute, Fuller left to find a friend's party.

Unsuccessful in finding the party, Fuller returned to Blume Court. Upon returning, Fuller encountered a car driven by a white woman blocking the entrance to Blume Court. Fuller asked her to move. Mr. Dixon, the owner of the private Ole Place Club, and Mr. Phillips, the Ole Place Club's bouncer, approached Fuller's car and asked him what he was "trying to do to that white lady." Fuller denied that he was "doing anything." While grabbing Fuller's door, Mr. Dixon responded, "Nigger, don't lie to me." Mr. Dixon then grabbed Fuller by the throat[] and stated, "[T]hat is why we have got to take care of niggers like you."

Fuller, threatened by Mr. Dixon, reached down to the floorboard of his car and retrieved his gun. He then fired a warning shot between Dixon and Phillips. Not knowing Blume Court was a dead end street, Fuller drove to the end of Blume Court. As he began

to turn around in an attempt to leave, he saw Dixon and Phillips open the trunk of their car. Both Dixon and Phillips then got in their car and tried to block Fuller's car from exiting Blume Court.

Maneuvering past Dixon's car, Fuller turned right on Two Notch Road. After entering Two Notch Road, Fuller's car crashed into a steel rail at the road's curb. Fuller could not move his car off of the steel rail. The testimony was unclear as to whether the Dixon car forced Fuller off the road or whether he lost control of his car. After Fuller crashed his car, Dixon and Phillips drove their car into Fuller's car. Fuller testified that one of the two men yelled, "[W]e're going to take care of you."

Fuller testified that after his car had been rammed, the two men began to exit their car. He cautioned them to stay in their car. Fuller testified that when the door of the car opened, he saw something shiny in Dixon's hand and thought it was a gun. Fuller fired four shots at the men's car and killed both men. A gun was never found in Dixon's car.

Fuller, 297 S.C. at 441-42, 377 S.E.2d at 329-30.

This Court held "it was error for the trial judge to charge *Davis* as an exclusive self-defense charge." *Id.* at 443, 377 S.E.2d at 330. In charging only the general self-defense law from *Davis*, we held the trial court failed to charge the jury on applicable principles of law that were directly implicated by the facts of the case, such as the right to act on appearances,⁴ that words accompanied by hostile acts may establish self-defense,⁵ and that an individual has no duty to retreat if doing so would place him at an increased risk of death or serious bodily harm.⁶ *Id.* at 443-44, 377 S.E.2d at 331 (citations omitted).

⁴ "[Fuller] testified that he saw Dixon and Phillips open the trunk of their car and also thought he saw a shiny object in Dixon's hand." *Id.* at 444, 377 S.E.2d at 331.

⁵ "Testimony presented at trial revealed that Dixon stated 'he was going to take care' of Fuller; that Dixon grabbed Fuller by the throat; and[] that Dixon and Phillips called Fuller a 'nigger.' Testimony also revealed that Dixon and Phillips rammed Fuller's car" *Id.* at 444, 377 S.E.2d at 331.

⁶ "Testimony elicited at trial revealed that Dixon and Phillips rammed Fuller's car door when he tried to leave his car. Fuller also testified that he did not believe it was safe to leave his car and run from the scene." *Id.* at 444, 377 S.E.2d at 331.

Here, unlike in *Fuller*, the trial court gave a thorough self-defense instruction that far exceeded the requirements of *Davis*. *Fuller* does nothing to alter the recognized principles that an appellate court must consider the jury charge as a whole and a trial court need not use the precise verbiage requested by a party as long as the legal principle is included in the charge. Adopting the dissent's expansive interpretation of *Fuller* would therefore place the law on jury instructions at odds with settled law by encouraging appellate courts to ignore the standard of review and encouraging trial courts to make unconstitutional comments on the facts. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). Indeed, while maintaining it was reversible error to not charge the "continuing to shoot" language, the dissent concedes the charge is "alarmingly close to an impermissible charge on the facts."

V.

Because the thorough jury charge included consideration of the applicable principles of self-defense, the failure to incorporate the precise "continuing to shoot" verbiage does not rise to the level of reversible error. As the court of appeals correctly observed, "[c]onsidered as a whole, the trial court's charge explained this principle of law." *Marin*, 404 S.C. at 622, 745 S.E.2d at 152. We therefore affirm the court of appeals' decision as modified.

AFFIRMED AS MODIFIED.

BEATTY, HEARN, JJ., and Acting Justice Jean H. Toal, concur.
PLEICONES, C.J., dissenting in a separate opinion.

CHIEF JUSTICE PLEICONES: I dissent from the majority's decision because in my view, the trial judge's refusal to charge the legal principle contained in the requested charge was reversible error. Accordingly, I would reverse Marin's conviction and sentence and remand for a new trial.

I agree with the majority that the language requested by Marin was a correct statement of law. However, in my opinion, the charge given did not encompass the charge requested, and, therefore, based on the evidence at trial, it was reversible error for the trial judge to refuse to give the requested charge. *See State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial" (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003))); *State v. Day*, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (finding a trial judge's refusal to specifically tailor the self-defense charge to adequately reflect the facts and theories presented by the defendant is reversible error (citation omitted)); *State v. Fuller*, 297 S.C. 440, 443, 337 S.E.2d 328, 330 (1989) (holding a trial judge's refusal to include an additional requested jury charge on self-defense is reversible error where the facts and circumstances presented at trial warrant such a charge). First, it is my opinion that Marin was entitled to a charge explaining that where a defendant is justified in using deadly force, the defendant may continue to use such force until the danger dissipates.⁷ *See State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978) (holding a person justified in firing the first shot in self-defense may continue to shoot until the apparent danger to his life or body has ceased). Marin, who was employed as a newspaper marketing director and manager of a car rental company, testified he was being attacked from the backseat when he twice shot the victim out of fear for his safety, and evidence presented at trial corroborated Marin's version of events. Specifically, law enforcement testified skid marks and debris in the roadway were

⁷ I find the specific language "continuing to shoot" alarmingly close to an impermissible charge on the facts. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); *State v. Hartley*, 307 S.C. 239, 241, 414 S.E.2d 182, 183–84 (Ct. App. 1992). Regardless, Marin's requested charge was based on a correct principle of law, and the trial judge was required to charge that principle to the jury. *See Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 (holding when a party requests the trial judge charge a correct and applicable principle of law, the court must charge it (citation omitted)).

consistent with damage observed to the front of Marin's vehicle corroborating Marin and Jimenez's statements after the incident that there was a struggle over control of the steering wheel; the crime scene investigator found the victim's body slumped over the center console of Marin's vehicle between the driver's and front passenger's seat, with his left arm positioned palm-up in the driver's seat, and with one foot on the backseat floorboard and one foot on the backseat;⁸ and the pathologist who performed the autopsy on the victim testified there were two gunshot wounds to the head—one fatal, and one potentially fatal—and it was not possible to determine which gunshot wound came first, only that the gunshots "came close together," and both were fired at extremely close range. As to why Marin shot the victim twice, Marin testified at trial, "It happened real fast — boom, boom."

In closing argument, the solicitor argued, "Ladies and gentlemen, I submit this is malice. Two shots, not one, two shots to the back of the head." The solicitor further argued, "Would a reasonable person shoot someone twice in the back of the head?" While the solicitor's statements do not singularly require the trial judge give the requested charge, in my view, the statements effectively highlight the importance of the charge requested in light of the facts of this case. Additionally, in my opinion, it is worth noting that after the trial judge gave the original jury charge, the jury requested additional guidance as to malice and voluntary manslaughter, and the trial judge again refused to include Marin's requested verbiage regarding the principle of "continuing to shoot."⁹ *See State v. Blessingame*, 271 S.C. 44, 46-47, 244 S.E.2d 528, 530 (1978) (finding that when a jury submits a question to the court following a jury charge, it is reasonable to assume the jury is focusing "critical attention" on the specific question asked, and that the information relayed by the trial judge to the jury is given "special consideration.").

Second, in my view, the language cited by the majority as encompassing Marin's requested charge—"a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable"—merely explains that a defendant may take a human life in self-defense, and utterly fails to further define

⁸ The crime scene investigator further found no indication the victim's injuries were sustained in the backseat or any other location other than where his body was positioned between the front seats of the vehicle.

⁹ The jury returned its verdict approximately one hour after the trial judge provided the additional instruction.

for the jury reasonable self-defense conduct under the facts of this case. In my opinion, the charge requested by Marin goes a step further, and elucidates reasonableness in this case, i.e., a person entitled to exercise self-defense may continue using deadly force until the perceived danger has dissipated.

Accordingly, in light of the solicitor's closing argument, I find the language cited by the majority is not remotely sufficient to explain or clarify for the jury that the two shots fired by Marin were not necessarily indicative of malice. *See Brandt*, 393 S.C. at 549, 713 S.E.2d at 603; *Day*, 341 S.C. at 418, 535 S.E.2d at 435; *Fuller*, 297 S.C. at 443, 337 S.E.2d at 330 (1989). Thus, I do not find the jury charge included the requested, applicable principle of self-defense.

For the reasons given above, I would find the trial judge committed reversible error by failing to charge the principle embodied in the requested "continuing to shoot" language, reverse Marin's conviction, and remand to the lower court for a new trial.

SOUTH CAROLINA LAW ENFORCEMENT DIVISION
FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor



REGINALD I. LLOYD
Director

DNA ANALYSIS DEPARTMENT

Inv. Demetric Glenn
Spartanburg County Sheriff's Office
PO Box 771
Spartanburg, SC 29304-0771

November 20, 2009
SLED Lab Number: L08-11693
Your Case Number: 2008071205
Incident Date: 7/21/2008
[V] Nelson Tabares
[S] Manuel Marin

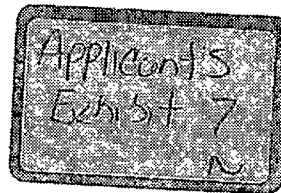
The requirements for routine analysis by the SLED DNA Casework Department have not been met.

Known DNA standard(s) are needed to initiate DNA testing. Please submit a buccal swab (preferred) or liquid blood sample from the subject(s) for comparison purposes.

If the requested DNA standards are not submitted within three months, the evidence will be returned to the submitting agency without analysis. If a standard cannot be obtained or analysis is necessary prior to the submission of the requested standard(s), please contact the SLED DNA Casework Department at (803) 896-7383.

Sincerely,

Jennifer L. Clayton
Forensic Scientist





SLED LABORATORY FORENSIC SERVICES REQUEST

SLED LAB No. L08-11693
Submission: 2 8/13/2008 11:31:22AM

Name of Investigating officer: <u>Det. Demetric Glenn</u>	ORI No: <u>SC0420000</u>
Agency: <u>Spartanburg County Sheriff's Office</u> Phone No: <u>864-596-2540</u>	Agency Case No: <u>2008071205</u>
Fax No: _____ Email: _____	Offense: <u>DEATH</u> <u>INVESTIGATION</u>
Mailing Address: <u>PO Box 771</u>	County: <u>Spartanburg</u>
City / State / Zip: <u>Spartanburg, SC 29304-0771</u>	Offense Date: <u>07/21/2008</u>
CC: _____	Officer Involved Shooting: ☐ Yes
	Rush: ☐ Yes

Is this evidence related to another lab number?
☐ Yes ☒ No
 If yes, Lab Number: _____

SLED ITEM No. LAB ONLY	Agency Item No.	Description of Evidence	Analysis Requested
2		Swab(s) - Swabs from stain off concrete median at in	DNA ANALYSIS
3		Item - Paper with stain from roadway	DNA ANALYSIS
4		Item - Paper with stain from roadway	DNA ANALYSIS
5		Gun shot residue - GSR kit from victim: Nelson Fernan	TRACE EVIDENCE
6		Cartridge cases - WIN 9mm Luger cartridge casing	FIREARMS
7		Cartridge cases - WIN 9mm Luger cartridge casing	FIREARMS
8		Item - Steering wheel cover from vehicle	EVIDENCE PROCESSING
9		Swab(s) - Swab from driver's floorboard of Dodge Du	DNA ANALYSIS
10		Swab(s) - Swab from driver's seat of Dodge Durango	DNA ANALYSIS
11		Swab(s) - Swab from front center console of Dodge C	DNA ANALYSIS
12		Swab(s) - Swab from passenger front seat of Dodge I	DNA ANALYSIS
13		Swab(s) - Swab from front center cup holder of Dodge	DNA ANALYSIS
14		Swab(s) - Swab from interior of drivers door of Dodge	DNA ANALYSIS
15		Swab(s) - Swab from center front overhead storage c	DNA ANALYSIS
16		Swab(s) - Swab from center front overhead storage c	DNA ANALYSIS
17		Swab(s) - Swab from interior door frame by backrest	DNA ANALYSIS
18		Blood standard - Blood swabs: DNA standard of victir	DNA ANALYSIS
19		Shirt - White colored t-shirt-Nelson Tabares	EVIDENCE PROCESSING
20		Fingernail scrapings - (2) papers containing fingernail	DNA ANALYSIS

SLED item No LAB ONLY	Agency Item No.	Description of Evidence	Analysis Requested
A2	2	Swabs of lifted blood off concrete median at intersection of Daniel Morgan & W. Main St	DNA Comparison (Victim / Suspect)
A3	3	Paper with blood on it from roadway	Check blood on paper for DNA Comparison (Victim / Suspect)
A4	4	Paper with blood on it from roadway	Check blood on paper for DNA Comparison (Victim / Suspect)
B5	5	GSR Kit. Victim: Nelson Fernando Tabares	Test
C6	9	WIN 9mm Luger cartridge casing	Firearms exam to weapon
C7	14	WIN 9mm Luger cartridge casing	Firearms exam to weapon
~~W8~~ A8	16	Steering wheel cover from vehicle	Check for blood & DNA Comparison (Victim / Suspect)
A9	19	Blood swab. Driver's floorboard of Dodge Durango	DNA Comparison (Victim / Suspect)
A10	20	Blood swab. Driver's seat of Dodge Durango	DNA Comparison (Victim / Suspect)
A11	21	Blood swab. Front center console of Dodge Durango	DNA Comparison (Victim / Suspect)
A12	22	Blood swab. Passenger front seat of Dodge Durango	DNA Comparison (Victim / Suspect)
A13	23	Blood swab. Front center console cup holder of Dodge Durango	DNA Comparison (Victim / Suspect)
A14	24	Blood swab. Interior of driver's door of Dodge Durango	DNA Comparison (Victim / Suspect)
A15	25	Blood swab. Center front overhead storage compartment of Dodge Durango	DNA Comparison (Victim / Suspect)
A16	26	Blood swab. Center front overhead storage compartment of Dodge Durango	DNA Comparison (Victim / Suspect)
A17	27	Blood swab. Interior door frame by backrest of passenger front seat of Dodge Durango	DNA Comparison (Victim / Suspect)
D18	28	Blood swabs. DNA standard of victim Nelson F. Tabares	DNA test for victim standard
19	29	White colored t-shirt off Nelson Tabares	Test for GSR at back neckline and DNA of blood on shirt - (LFT)
	XX	XXXXX	compare to Victim / Suspect)
D20	33	Two papers containing fingernail scrapings from hands of victim, Nelson Tabares	Check blood for DNA Comparison to victim & suspect
E21	35	Underwear off suspect, Manuel A. Marin	Check blood for DNA Comparison to victim & suspect
E22	36	Pair of socks off suspect, Manuel A. Marin	Check blood for DNA Comparison to victim & suspect
Comments			

Anita Mullinax
Print Name of Delivering Officer

Anita Mullinax
Signature of Delivering Officer

SLED Item No LAB ONLY	Agency Item No.	Description of Evidence	Analysis Requested
	2	Swabs of lifted blood off concrete median at intersection of Daniel Morgan & W. Main St	DNA Comparison (Victim / Suspect)
	3	Paper with blood on it from roadway	Check blood on paper for DNA Comparison (Victim / Suspect)
	4	Paper with blood on it from roadway	Check blood on paper for DNA Comparison (Victim / Suspect)
	5	GSR Kit. Victim: Nelson Fernando Tabares	Test
	9	WIN 9mm Luger cartridge casing	Firearms exam to weapon
	14	WIN 9mm Luger cartridge casing	Firearms exam to weapon
	16	Steering wheel cover from vehicle	Check for blood & DNA Comparison (Victim / Suspect)
	19	Blood swab. Driver's floorboard of Dodge Durango	DNA Comparison (Victim / Suspect)
	20	Blood swab. Driver's seat of Dodge Durango	DNA Comparison (Victim / Suspect)
	21	Blood swab. Front center console of Dodge Durango	DNA Comparison (Victim / Suspect)
	22	Blood swab. Passenger front seat of Dodge Durango	DNA Comparison (Victim / Suspect)
	23	Blood swab. Front center console cup holder of Dodge Durango	DNA Comparison (Victim / Suspect)
	24	Blood swab. Interior of driver's door of Dodge Durango	DNA Comparison (Victim / Suspect)
	25	Blood swab. Center front overhead storage compartment of Dodge Durango	DNA Comparison (Victim / Suspect)
	26	Blood swab. Center front overhead storage compartment of Dodge Durango	DNA Comparison (Victim / Suspect)
	27	Blood swab. Interior door frame by backrest of passenger front seat of Dodge Durango	DNA Comparison (Victim / Suspect)
	28	Blood swabs. DNA standard of victim Nelson F. Tabares	DNA test for victim standard
	29	White colored t-shirt off Nelson Tabares	Test for GSR at back neckline and DNA of blood on shirt -
	XX	XXXXX	compare to Victim / Suspect)
	33	Two papers containing fingernail scrapings from hands of victim, Nelson Tabares	Check blood for DNA Comparison to victim & suspect
	35	Underwear off suspect, Manuel A. Marin	Check blood for DNA Comparison to victim & suspect
	36	Pair of socks off suspect, Manuel A. Marin	Check blood for DNA Comparison to victim & suspect
Comments			

Print Name of Delivering Officer _____

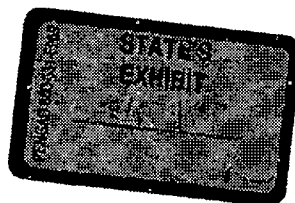
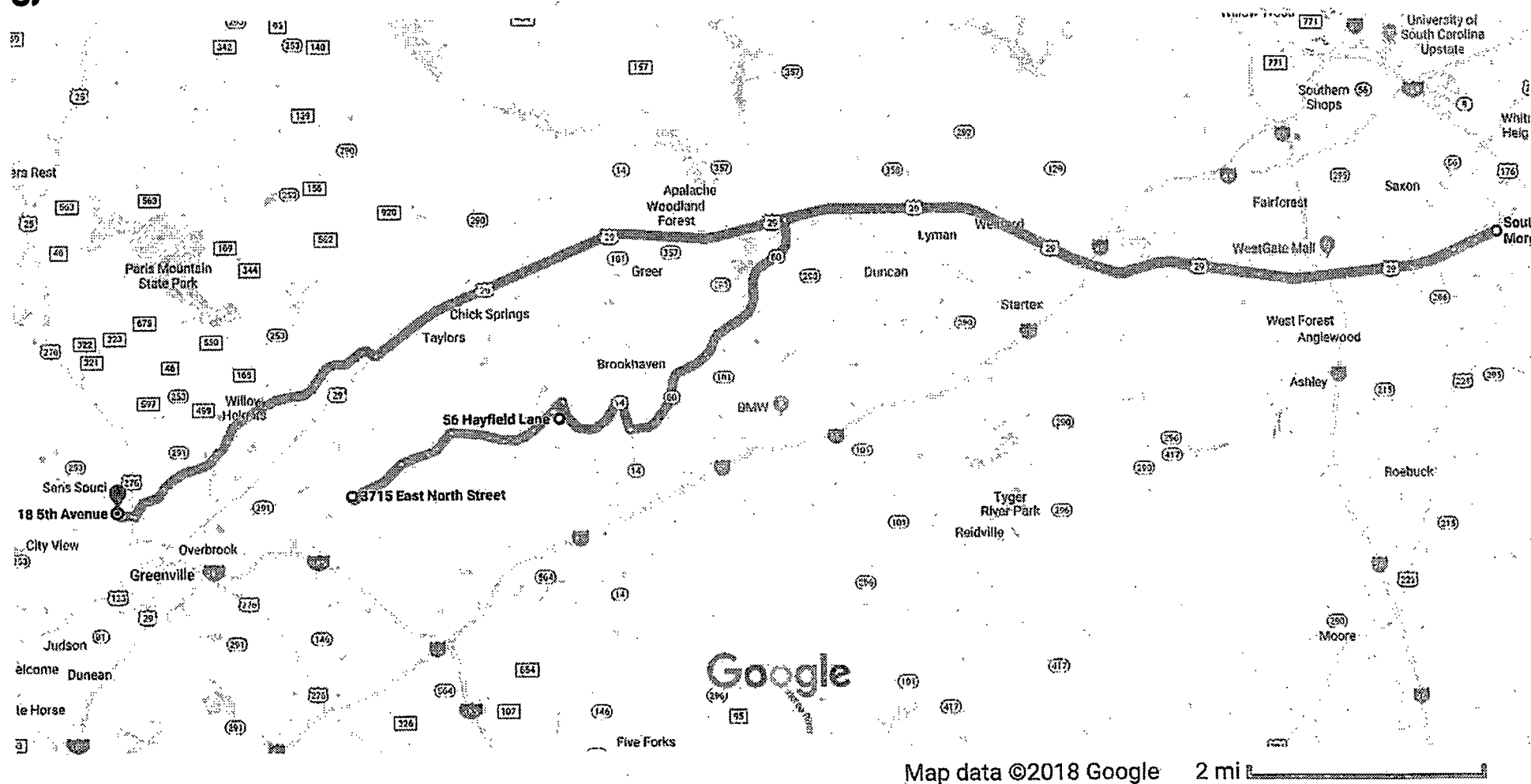
Signature of Delivering Officer _____

921

Google Maps

3715 E North St, Greenville, SC
29615 to 18 5th Ave, Greenville, SC 29609

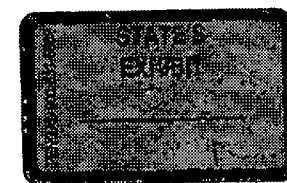
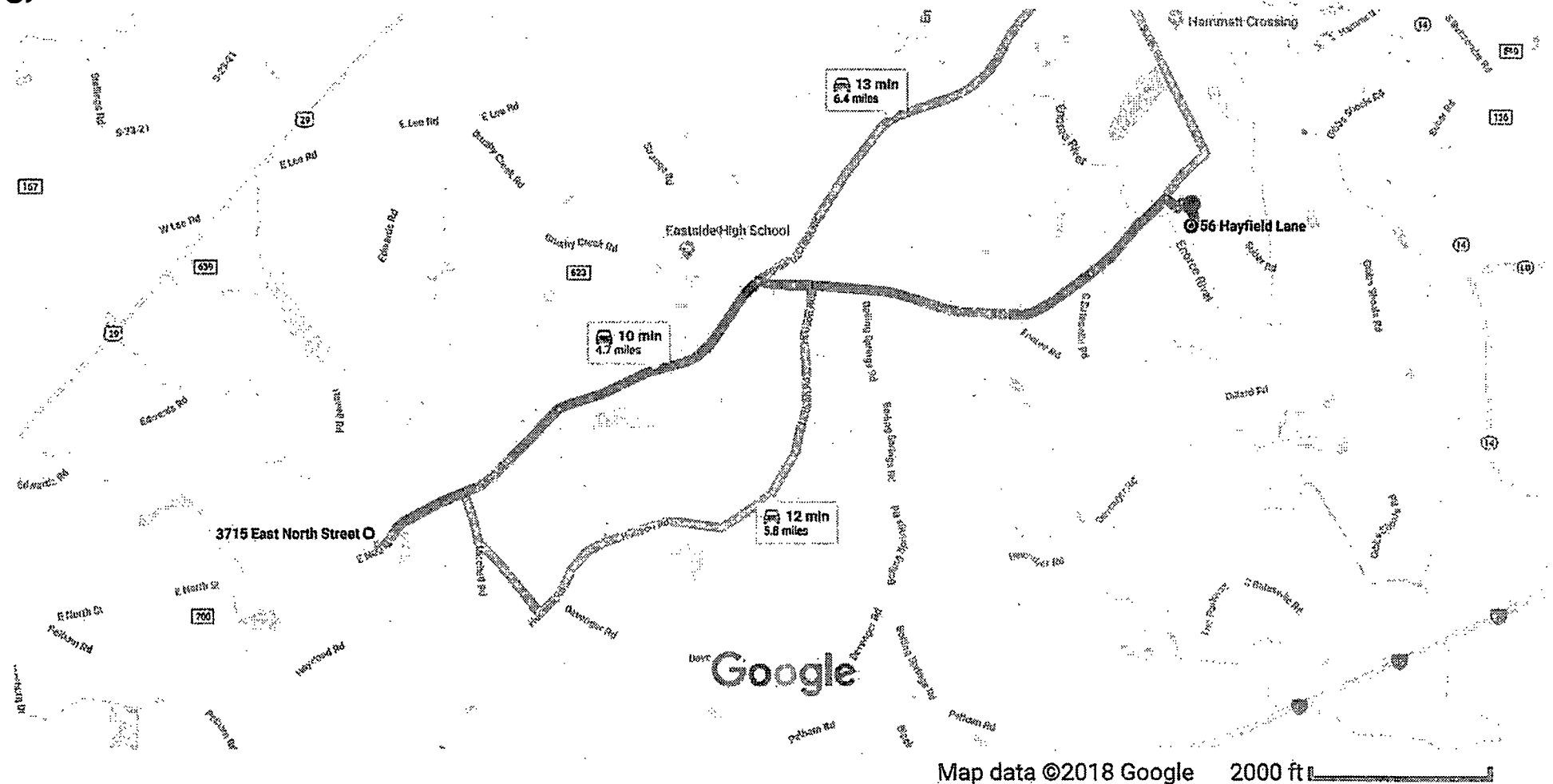
Drive 57.1 miles, 1 h 46 min



922 Google Maps

3715 East North Street, Greenville, SC to
56 Hayfield Lane, Greer, SC

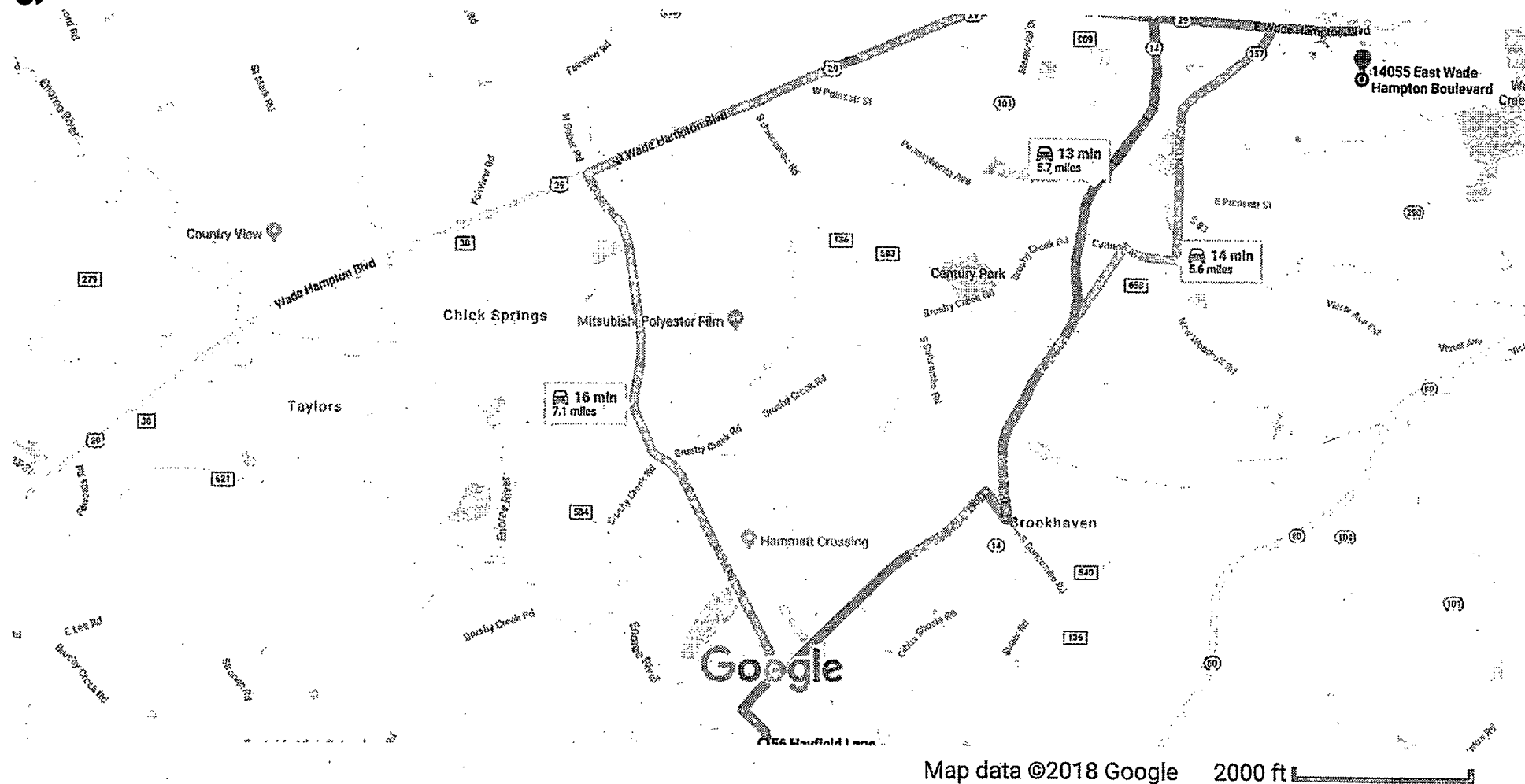
Drive 4.7 miles, 10 min



923
Google Maps

56 Hayfield Lane, Greer, SC to 14055 E
Wade Hampton Blvd, Greer, SC 29651

Drive 5.7 miles, 13 min



Map data ©2018 Google

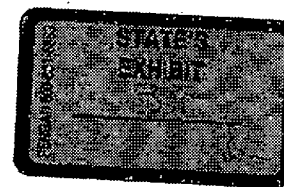
2000 ft



via Hammitt Bridge Rd and SC-14 W/S Main St



This route has restricted usage or private roads.



13 min

5.7 miles

1/8/2018

56 Hayfield Lane, Greer, SC to 14055 E Wade Hampton Blvd, Greer, SC 29615 - Google Maps

924



via Hammett Bridge Rd

14 min

5.6 miles



via S-23-540/S Suber Rd and US-29 N

16 min

7.1 miles

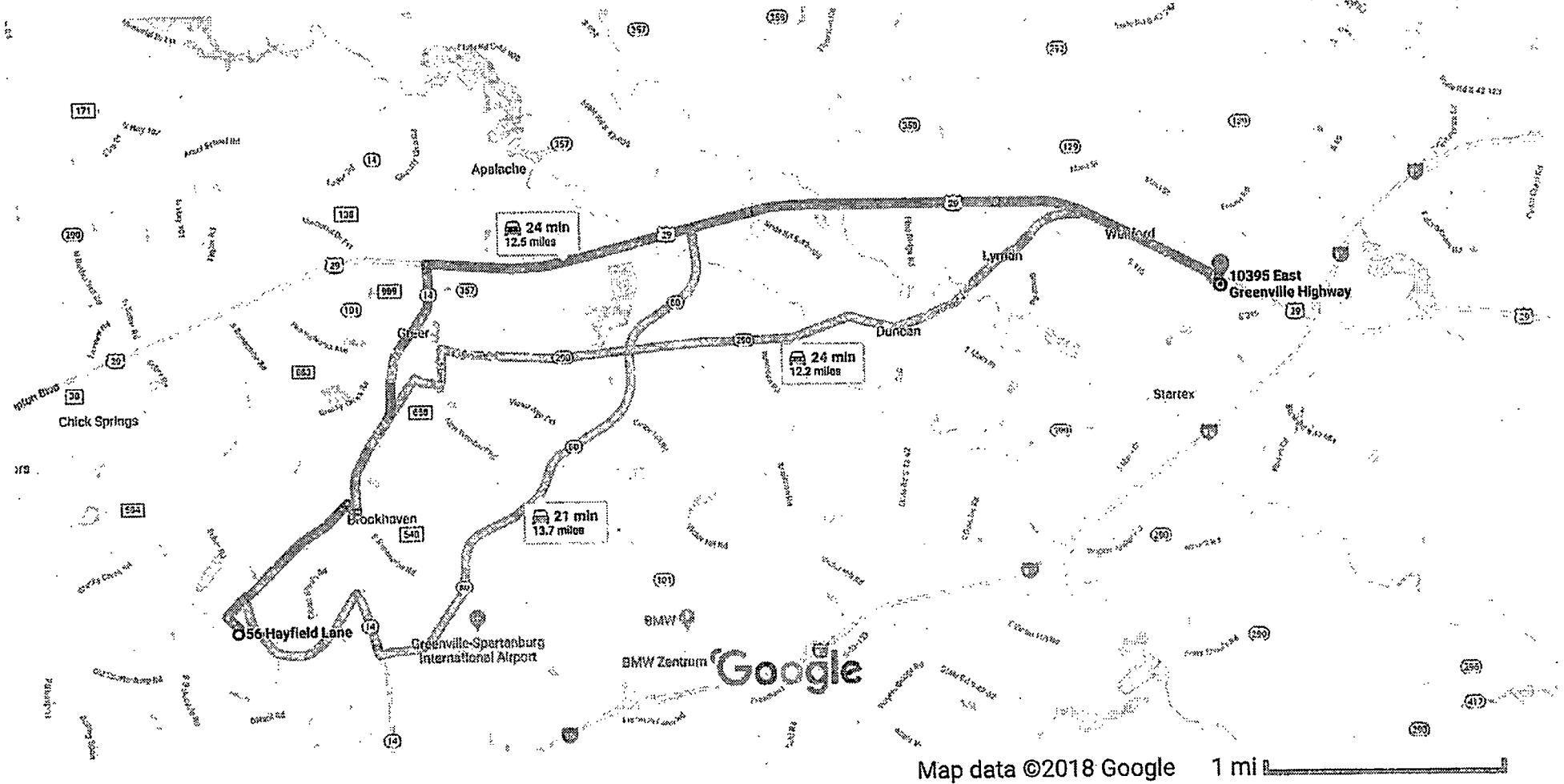
1/8/2018

56 Hayfield Lane, Greer, SC to 10395 E Greenville Hwy, Wellford, SC 29385 - Google Maps

925 Google Maps

56 Hayfield Lane, Greer, SC to 10395 E Greenville Hwy, Wellford, SC 29385

Drive 12.5 miles, 24 min

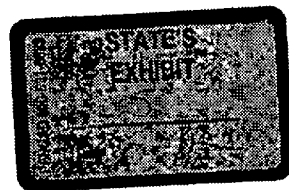
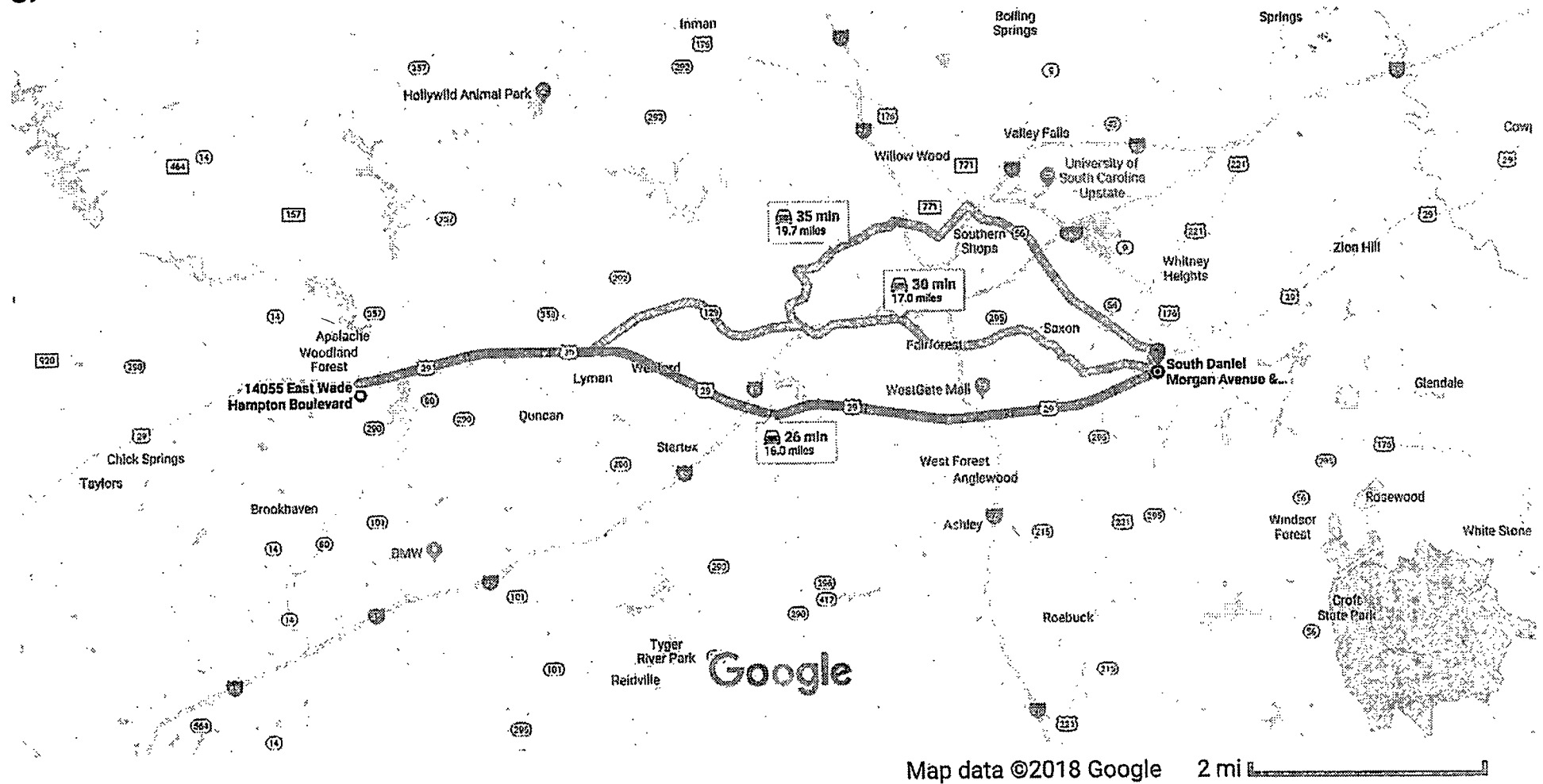


1/8/2018

14055 E Wade Hampton Blvd, Greer, SC 29651 to S Daniel Morgan Ave & W Main St - Google Maps

926 Google Maps

14055 E Wade Hampton Blvd, Greer, SC Drive 16.0 miles, 26 min
29651 to S Daniel Morgan Ave & W Main St





Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-4397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 19, 2015

Manuel Antonio Marin, #343371
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

Re: Your case

Dear Mr. Marin:

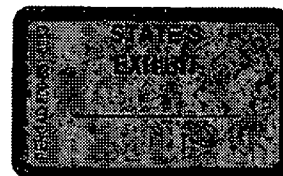
The Supreme Court has scheduled oral argument in your case for Wednesday, April 8, 2015 at 10:30 a.m. If you are incarcerated on the date of the oral argument, there are, unfortunately, no provisions for you to be present in the Supreme Court for this oral presentation of your case. Members of your family and friends may attend, however, inasmuch as the Supreme Court's proceedings are open to the public. **Please have family and friends call me in advance if at all possible so that I can explain the workings of the Court in advance.** The Supreme Court of South Carolina is located in the Supreme Court Building at the corner of Gervais and Sumter Streets in Columbia.

It is impossible to predict how the Court will rule or how long it will be before they issue a decision. I will, however, let you know as soon as I hear something. Please notify me if your address changes.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/rdf



STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Manuel Antonio Marin, #343371,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2016-CP-42-2795

MEMORANDUM OF LAW

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 MAR 15 AM 8:58
M. HOPE BLACKLEY

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Manuel Antonio Marin (Applicant) on July 28, 2016. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on February 1, 2018 at the Spartanburg County Courthouse. Applicant was present and represented by James H. Price, III, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant also presented testimony from Detective Dale Arterburn of the Greer City Police Department and Don Girdnt, a forensic consultant. Respondent presented the testimony of Tanya R. Jones ("Counsel") and Assistant Solicitor Russell D. Ghent ("Solicitor"). This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the direct appeal records, the PCR application, Respondent's return, Applicant's supplemental application, and all exhibits admitted during the hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted

by the August 2008 term of the Grand Jury for Spartanburg County for murder and possession of a firearm during the commission of a violent crime (2008-GS-42-5308). Applicant was represented by Tanya R. Jones, Esquire, at trial. Susan B. Reese, Esquire, and Jennifer A. J. Jordan, Esquire, represented the State. On October 27, 2010, Applicant proceeded to a jury trial.

Applicant was found guilty as indicted of both counts and then sentenced by the Honorable J. Derham Cole to life imprisonment for murder. No sentence was imposed for count two because a life sentence was imposed for count one.

Applicant filed a timely notice of appeal. Applicant was represented throughout the appellate process by Robert M. Dudek, Esquire, and David Alexander, Esquire. The issues argued to the Court of Appeals were whether the TC erred in refusing to charge the jury with a "continue to shoot" instruction – that if Applicant was acting in self-defense, he was entitled to continue shooting until it was apparent that the danger of death or serious bodily injury had ended. Applicant also raised the issue of whether the trial court erred in failing to charge part of the Protections of Persons and Property ("PPP") Act, where the trial court instructed the jury on the portion of the PPP Act that says there is no duty to retreat in one's vehicle and one can stand their ground, but not the portion that said one justified in using deadly force under the castle doctrine is immune from prosecution. The Court of Appeals heard oral arguments and then affirmed Applicant's conviction on July 3, 2013. State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). Applicant petitioned the Court of Appeals for a rehearing, but was denied in an order filed August 22, 2013.

Applicant then petitioned the Supreme Court of South Carolina for writ of certiorari, only arguing the first issue – the failure to give a "continuing to shoot" charge. Certiorari was granted and briefs were submitted by both parties. Another oral argument was held before the Supreme

Court. Ultimately, the Court affirmed the decision of the Court of Appeals as modified. State v. Marin, 415 S.C. 475, 783 S.E.2d 808 (2016). The Remittitur was returned on April 8, 2016.

In his *pro se* application, Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel, in that;
 - a. "Failing to object to witness Diane Tabares's statement, 'He was a cancer survivor.'"
 - b. "Failing to object to witness Diane Tabares's statement that she was pregnant and was due to deliver on the day of the incident."
 - c. "Failing to recall the witness Larry Rodriguez to the stand and impeach the witness for lying on the stand."
 - d. "Failing to object to and allowing the autopsy photographs to be entered into evidence."
 - e. "Failing to have an evidentiary hearing to have defendant's camera excluded from the evidence, since the camera was tampered with prior to a warrant being secured for the contents inside defendant's truck."
 - f. "Failing to have an evidentiary hearing to have the weapon excluded from the evidence since it was tampered with by Officer Jerry Powell."
 - g. "Trial counsel was ineffective for not being prepared for trial by citing the wrong cases on point for a proposition."
 - h. "Failing to object to prosecutor's highly inflammatory and prejudicial argument that the jury could infer malice because two shots were fired."
 - i. "Failing to raise the King defense after the jury came back from the deliberations, and asked the trial judge to reinstruct or repeat the instructions on murder and manslaughter."
 - j. "Failing to claim immunity under the Protection of Persons and Property Act as a pretrial motion instead of claiming it as a jury instruction."
 - k. "Failing to claim as a pretrial motion that Spartanburg Superior Court lacked jurisdiction to try the case since the incident occurred before Walmart in Greenville County."
2. Ineffective Assistance of Appellate Counsel
 - a. "Appellate counsel Robert M. Dudek was ineffective in failing to claim the directed verdict of self-defense since it was dispositive issue in this case."

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 CLERK OF COURT
 SPARTANBURG COUNTY
 2016 MAR 15 AM 8:58
 M. HOPE BLACKLEY

- b. "Appellate counsel Robert M. Dudek or appellate court was ineffective in failing to give Marin the same treatment as in State v. Curry."
- 3. Various allegations of Judicial Error
 - a. "The Court of Appeals wrongfully ruled on the continuing to shoot proposition since the directive went to the heart of Marin's case."
 - b. "The South Carolina Supreme Court erred by citing law against Marin which was enacted after Marin's indictment (July 21, 2008)."
 - c. Trial judge abused his discretion by not citing State v. Hendrix, after trial counsel cited such case for the continuing to shoot proposition.

On October 4, 2017 and December 2, 2017, Applicant, through counsel, filed amended applications¹ adding the following allegations::

- 1. Ineffective Assistance of Counsel, in that
 - a. "Failing to request the court produce expert witness for the defense."
 - b. "Failing to clearly explain to the jury on opening statements from the start that this was a self-defense case."
 - c. "Failing to object to prosecutor's statements that 'defendant would not stop.'"
 - d. "Failing to disclose important Brady discovery material to defendant until well after trial."
 - e. "Failing to request complete charge on Article 6, instead of only § 16-11-450(a)."
 - f. "Failure to argue why the second shot was necessary in order for the court to instruct the charge requested."
 - g. "Failing to cite State v. Hendrix in a timely manner for the continuing to shoot proposition."
 - h. "Failing to argue the lack of fingerprints from the steering wheel as exculpatory evidence since other fingerprint evidence was presented."
 - i. "Failing to request jury instruction that the defendant had a right to judge the conduct of the deceased more harshly than otherwise because of his intoxication."
 - j. "Failing to request instruction to the jury that victim's violent behavior was an unreasonable reaction to defendant having passed his road."

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2018 MAR 15 AM 8:56
 M. HOPE BLACKLEY

¹ During the pendency of this action, Applicant attempted to file various *pro se* amendments, despite being represented by counsel. Respondent only considers those amendments filed by counsel part of this action.

- k. "Failing to request jury instruction that the standard for evaluating whether a defendant accused of murder had reasonable belief that deadly force was necessary to prevent great bodily harm to himself, as element of self-defense is objective rather than subjective."
 - l. "Failing to request jury instruction that the jury could consider the first attack by the victim on the defendant after passing his road when weighing self-defense on the second attack by trying to run the vehicle off the road."
 - m. "Trial counsel was ineffective in failing to object to or allowing falsified direct physical evidence to be introduced by Det. Dale Arterburn."
 - n. "Trial Counsel was ineffective in failing to object to hearsay testimony by Det. Dale Arterburn about the scene or location of the shooting since it was falsified testimony by Det. Dale Arterburn."
2. Ineffective Assistance of Appellate Counsel, in that:
 - a. "Appellate counsel Robert M. Dudek was ineffective in failing to claim the issue on the directed verdict on venue."
 - b. "Appellate counsel Robert M. Dudek was ineffective in skipping a crucial step in the appellate process."
 - c. "Appellate counsel Robert M. Dudek was ineffective in failing to raise the issue that evidence was insufficient that the defendant acted with malice."
 - d. "Appellate counsel Robert M. Dudek was ineffective in failing to be present at the most critical part of the appeal; Oral Argument."
 - e. "Appellate Counsel Robert M. Dudek was ineffective in failing to cite State v. Day along with Fuller for the trial judge's refusal to give the requested charge to the jury."
 - f. "Appellate counsel Robert M. Dudek was ineffective in failing to raise State v. Belcher to the Court of Appeals for the prosecutor's charge to the jury that they could infer malice because two shots were fired instead of one."
 3. Subject matter jurisdiction
 - a. "Subject matter jurisdiction lacked by Spartanburg Superior Court to try indictments 2008-GS-42-5308 and 2008-GS-42-5308(a)."
 4. Prosecutorial Misconduct and Malicious Prosecution
 - a. "Ass.Att.Gen Donald J. Zelenka lied on his brief to the Appellate Courts about the evidence and facts of the case."
 - b. "Prosecutor Susan Reese lied to the jury about evidence and facts of the case."
 - c. "Det. Dale Arterburn lied on the stand about physical (direct) evidence and lied about the location of the alleged incident, or

FILE
CLERK OF COURT
SPARTANBURG COUNTY
2018 MAR 15 AM 8:58
M. HOPE
BLACKLEY

where the actual shooting took place by introducing falsified evidence.”

- d. “Suppression of evidence by prosecutor Susan Reese. Prosecutor Susan Reese maliciously suppressed the steering wheel cover, which was collected as evidence and sent to SLED for DNA testing. Prosecutor Susan Reese suppressed the evidence because it was exculpatory evidence and would have had the decedent’s DNA and proven that decedent was trying to run the vehicle off the road and kill everyone in the vehicle.”
5. Abuse of Discretion by Trial Court:
 - a. “Trial court violated Due Process by refusing to give defendant a preliminary hearing as timely requested.”
 - b. “Trial court abused its discretion by refusing to direct a verdict on self-defense since defendant proved self-defense as a matter of law.”
 - c. “Trial court abused its discretion by refusing to direct a verdict on venue since the evidence proved the incident occurred before Wal-Mart in Greer, which is located in Greenville County.”
 - d. “Trial court abused its discretion by refusing to acknowledge State v. Hendrix for the continuing to shoot proposition.”
 - e. “Trial court abused its discretion by failing to protect defendant’s Constitutional Rights and Due Process of Law.”
6. Abuse of Discretion by Appellate and Supreme Court
 - a. “Appellate court abused its discretion by refusing to grant the continuing to shoot proposition since it went to the heart of appellant’s case, and because of prosecutor’s highly prejudicial closing arguments.”
 - b. “Supreme Court abused its discretion by citing law against Marin that contradicts itself with other law.”
 - c. “Supreme court abused its discretion by citing law against appellant that was enacted after appellant’s case entered the appellate courts. (Four years after)”
 - d. “Supreme and Appellate court abused its discretion by not giving Marin the same equivalence as Belcher for the prosecutor’s charge to the jury, that they could infer malice from two shots. The prosecutor said to the jury: “Ladies and gentlemen, I submit this is malice! Not one, two shots!”

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CLERK OF COURT
SPARTANBURG COUNTY
2018 MAR 15 AM 8:58
M. SHOE BLANCHARD

FACTS ADDUCED AT TRIAL

The underlying facts were that the victim was heavily intoxicated at a Latin nightclub.

Both the victim and Applicant had been celebrating at the Colombian Independence festival in

Greenville which led them to the after party at Bongo's in Greenville. Towards the end of the night, the Bongo's staff was trying to find the victim a ride home because he was too intoxicated to drive. Applicant offered to take the victim home, claiming he knew where the victim lived. However, when the bouncer carried the victim to Applicant's car, Applicant had to retrieve the victim's license to get his address and then put the address into his navigation system.

The victim was placed in the back of Applicant's Durango SUV while Applicant's then-brother in law, Jiminez, rode in the passenger seat. At trial, Jiminez could not be found and it was believed he returned to his home country of Mexico. However, some of his statements were admitted at trial as excited utterances. He was heard saying Applicant shot the victim because they had passed the victim's house and the victim continually asked Applicant to stop but that Applicant refused to stop.

There was evidence presented that the shooting occurred on highway 29 headed toward Spartanburg near the intersection of Tacupau Road where the US Lumber Company is located. After Applicant shot the victim in the back of the head twice, he continued driving another 10 miles until Jiminez jumped out of the car at an intersection in downtown Spartanburg. The two were seen arguing outside the car and the cops were called. When the cops arrived, Jiminez was visibly upset while Applicant sat calmly on the side of the road. The victim's body was found dead in the vehicle with two gunshot wounds to the back of the head. Applicant was covered in blood. Witnesses saw Jiminez struggle for the gun and eventually take the gun from Applicant and throw it to the side of the road. When police arrived, Jiminez showed them where the gun was. The gun was retrieved by law enforcement. Applicant testified at trial that he shot the victim in self-defense because the victim was trying to run the vehicle off the road by grabbing at the steering wheel.

ARGUMENT

Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every decision of trial counsel in hindsight. Rather, Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient and that the deficiency prejudiced the outcome of his trial. Applicant has failed to do so.

Respondent notes Applicant has attempted to pick apart every minute detail of Counsel's performance and make ample recommendations of what should have or could have been done differently, in hindsight. But, the purpose of PCR is to highlight errors significant enough to carry with them constitutional implications, such that would cause this Court to question the fairness of the trial and undermine this Court's confidence in the outcome. For the Sixth Amendment does not exist for its own sake. The fundamental purpose of the Sixth Amendment is *not* to assess overall attorney performance, but to ensure the adversarial process functions fairly and reliably and that an accused receives a fair trial.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the 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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117 (citing Strickland). Second, counsel's deficient performance must have prejudiced the 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.

A. Diane Tabares

Applicant alleged Counsel was ineffective for failing to object to testimony from Diane Tabares. Tabares was the State's first witness at trial. Tabares was the victim's sister. It is apparent from her testimony, that the State called her to give some background information about the victim and to set the scene on the events that unfolded that day and into the night. The testimony Applicant insists was objectionable was Tabares's testimony that the victim was a cancer survivor and that Tabares was pregnant and due to deliver the day of the incident. (Tr. pp. 64-65). This testimony, in the context it was given, to be objectionable. Counsel did not find it objectionable either. The testimony was simply background information elicited to show where Applicant was the day of the incident and why; as well as why Tabares herself was not there accompanying him. It is not improper for the jury to learn a little bit about the victim, since his death was the whole reason for Applicant's trial. This testimony did not influence or

affect the jury's verdict in any manner whatsoever. Therefore, even if Counsel had objected, there is not reasonable probability the outcome would have changed.

Counsel's failure to make any conceivable objection is not deficient *per se*. Objections are calculated to achieve a tactical end in keeping with a party's theory of the case. Counsel, on the whole, reasonably calculated her objections to achieve the stated end. In any trial, decisions of Counsel can be, and will be, questioned. However, tactical trial decisions that do not serve to acquit the defendant do not, by definition, prove deficiency. In this matter, Counsel's performance was more than adequate and clearly within the standards of professional conduct.

B. Larry Rodriguez

Applicant alleged Counsel was ineffective for failing to recall Larry Rodriguez the stand and impeach him for lying on the stand. Again, this Court finds no merit in the allegation. Larry Rodriguez was called as a witness during the State's case-in-chief. Rodriguez was the owner of the nightclub, Bongo's, in Greenville. Applicant and the victim had been at Bongo's that evening into the early morning hours celebrating the Colombian Independence Day. Applicant takes issue with Rodriguez's testimony that he closed the nightclub at 2:00 AM. Applicant claims that because photos from his camera showed the victim was put into Applicant's vehicle at 2:54 AM, that Rodriguez lied.²

It is apparent from the record, Applicant made this request to Counsel during the trial and Counsel addressed it on the record. (Tr. p. 267). Counsel also testified that she did not believe recalling Rodriguez on that minor point would serve any legitimate purpose because the timing

² It is worth noting that Applicant also alleged Counsel was ineffective for failing to exclude his camera that was found at the crime scene. (See 1st PCR application, allegation 11:c; and 2nd amended application, allegation 1:e). The camera, to which Applicant refers had these photos of the victim being loaded into his vehicle, is also the same camera collected by law enforcement during the investigation. Officer Lindsey McGraw testified as an expert in computer forensics that after adjusting the time stamps on the photos extracted from Applicant's camera, the photos appear to have been taken at 2:54 AM (Tr. p. 213). Although Applicant alleged the camera evidence should have been objected to because it was "tampered with," he also uses that "tampered with" evidence to support his argument that Rodriguez lied.

was never an issue at trial. Whether Applicant left at 1:54 AM (as the original date stamps on the photos taken from his camera indicated) or at 2:54 AM is of no consequence to the issue of whether Applicant shot the victim in the back of his head twice in self-defense. Regardless, there was little, if any, impeachment value in recalling Rodriguez to question him on what time he closed his nightclub. The jury had the evidence presented and could decide if Rodriguez was credible based on any alleged time discrepancy. Applicant has failed to meet his burden of proving this allegation.

C. Failure to suppress or object to evidence

Applicant has alleged Counsel was ineffective for failing to suppress or object to various items in evidence. This allegations lack merit and Applicant has failed to prove them.

Autopsy Photos

Applicant claimed "gruesome autopsy" photos should have been excluded. However, the record reveals that no such autopsy photos were ever admitted at trial nor did Applicant provide this Court with evidence that such photos were in any way presented to the jury.

Applicant's Camera

Applicant claimed his camera was "tampered with" prior to a warrant being secured to search his vehicle and therefore should have been inadmissible. First, Applicant is mistaken that a warrant was needed to investigate and process the crime scene. The victim's lifeless body was found in Applicant's vehicle at an intersection in downtown Spartanburg. When law enforcement arrived, Applicant was sitting on the side of the road covered in blood. Applicant's passenger claimed Applicant had shot the victim. Applicant's vehicle was the crime scene. A warrant was not required to investigate and process the crime scene.

CLERK OF COURT
SPARTANBURG COUNTY
2018 MAR 15 AM 8:58
M. HOPE BLACKLEY

Secondly, the testimony from Officer David Hogsed revealed Applicant's camera was found hanging from the driver's seat headrest. (Tr. p. 170 and photos admitted at trial 168). Hogsed also testified that the camera was moved in order for crime scene investigators to examine the body more closely without damaging the camera in the confined space. The camera was taken into evidence. (Tr. pp. 170-171). The removal of the camera from the vehicle and into evidence does not constitute "tampering." Applicant has offered no actual evidence that the camera was in fact tampered with. Therefore, Counsel was not deficient for not objecting to its admission into evidence at trial.

Murder Weapon

Applicant claimed the murder weapon was inadmissible at trial because it had been "tampered with" prior to the crime scene photographer arriving to take photos of it. This allegation is meritless. Officer Jeffery Powell testified that after Jiminez showed him where the gun was, he took the weapon, removed the round in the chamber to make it safe, and collected the weapon as evidence. (Tr. pp. 114-115). This does not constitute tampering that would render the gun inadmissible at trial. Applicant has failed to prove the gun was tampered with and therefore Counsel was not deficient in not objecting to its admission into evidence.

D. Continuing to shoot charge and two shots equaling malice

Applicant made various allegations surrounding the fact that he shot the victim twice and the request for the trial court to instruct the jury on continuing to shoot. This Court is not persuaded by any of Applicant's arguments on the issue. The evidence presented at trial showed Applicant shot the victim in the back of the head twice. Based on this evidence, the prosecutor argued that the two shots were evidence of malice, a requisite element of murder. In response to her argument, Counsel requested a "continue to shoot charge." In requesting the charge, Counsel

originally cited to State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007). (Tr. p. 395). Later, Counsel also cited State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). Although Applicant complains Counsel failed to first cite Hendrix, the issue is moot. Counsel did bring the Hendrix opinion to the trial court's attention and the issue was thereafter exhaustively litigated through both of our state appellate courts. Ultimately, the Supreme Court found the failure to give the continuing to shoot charge was not error. The Court stated,

While the "continuing to shoot" charge may have been appropriate, its absence does not mandate reversal. The essence of the charge was encompassed in the jury instructions, particularly the instruction that "a person may use such force as is reasonably necessary even to the point of taking human life where such is reasonable."

Marin, 415 S.C. at 483, 783 S.E.2d at 813. Counsel was not deficient. And even if she had cited Hendrix first, the outcome would not have changed.

Applicant also complains that Counsel did not object to the prosecutor's argument that the two shots was evidence of malice. This issue was also used to support Applicant in his arguments on appeal. However, the argument was proper and not objectionable. Counsel did not find the argument objectionable, but, rather, in response to it, she argued for the "continue to shoot" charge. Counsel's performance in this regard was reasonable and sound. Likewise, Counsel's closing arguments were also reasonable, despite Applicant's allegation Counsel should have argued why the second shot was "necessary." Not only does the evidence not support such an argument³, but such an argument was not likely to change the outcome of the trial.

Lastly, the law from Hendrix states that "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has

³ At trial, Applicant testified he shot twice, "real fast - - boom, boom" (Tr. p. 313-314) within seconds. Therefore, how could he have known if the second shot was "necessary"

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 MAR 15 AM 8:58
M. HOPE BLACKLEY

ceased.” Hendrix, 270 S.C. at 661, 244 S.E.2d at 507. The more relevant issue for the jury to determine in this case, was if Applicant was even justified in shooting the heavily intoxicated victim in the back of the head two times after the victim had, on more than one occasion, pleaded for Applicant to stop or turn around after Applicant had passed his home at 3:00 AM and continued to drive farther and farther from the victim’s home. The victim had even “attacked” Applicant from the backseat prior to the fatal attack and Applicant was able to push him off and into the backseat. At no point in time between that attack and the 10 miles Applicant continued to drive did he consider pulling over and kicking Applicant out of the car. Nor did Applicant consider simply slowing down and kicking Applicant out of his car during the second attack in which Applicant alleged the victim was trying to “kill them all” by running the car off the road. Instead, Applicant chose to reach over to his glove compartment,⁴ pull out a pouch containing a gun, put the pouch between his legs, unzip the pouch, pull out the gun, then press the gun firmly against the back of the victim’s head/neck and fire two rapid shots, all while still driving the car while passenger Jiminez sat by idly offering no assistance in subduing the alleged “attacker” that was trying to “kill them all.” The record reveals the most relevant issue was the credibility of Applicant’s self-defense claim, rather than whether there was malice because he fired two shots. Counsel was not deficient. Had Counsel done any of the things Applicant insists she should have, the facts would not have changed, and therefore the outcome would not have changed.

E. Proposed Jury Instructions

Applicant has alleged Counsel was ineffective for failing to request various different jury instructions. However, there is no merit to any of the allegations. All of the proposed

⁴ The evidence seems to indicate that Applicant would have had to reach to his glove compartment for the secured gun while Applicant was not “attacking” him, but, rather, while he was subdued in the backseat.

instructions are without basis in any authority in South Carolina law and are essentially an unconstitutional comment on the facts. "Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21; See also Marin, 415 S.C. at 486, 783 S.E.2d 808. Further, some of the proposed instructions are not even a correct statement of the law nor good law. Counsel was not deficient in failing to request Applicant's proposed jury instructions.

F. Protections of Persons and Property Act ("PPP Act")

Applicant alleged Counsel was ineffective for both failing to request immunity under the PPP Act in a pre-trial motion, rather than as a jury instruction. This allegation lacks merit. At the time of Applicant's trial, it was a common practice to request the PPP Act be read as jury instruction. It was not until 2011 in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), that the proper procedure to hear PPP Act claims in a pre-trial hearing before the judge was laid out. The Supreme Court also held that the PPP Act should not be read as jury instructions, but that the reading of the PPP Act to the jury benefitted a criminal defendant.

Since Counsel's performance is analyzed based on a standard of reasonableness in light of *prevailing professional norms*, Counsel cannot have been deficient for not requesting a pre-trial immunity hearing under the PPP Act when doing so was not the prevailing professional norm. Additionally, even if Counsel had requested such a hearing, it would most likely not have benefitted Applicant. Applicant's self-defense claim was not credible and he could neither convince a jury of twelve nor an experienced and excellent trial judge that he acted in self-defense. A pre-trial hearing would have been futile and would have served only to pre-try his case.

Applicant also alleged Counsel should have requested the entire PPP Act have been read to the jury, and not just the duty to retreat provision. However, the PPP Act is not an appropriate jury charge and Applicant got part of it read to the jury anyway. Importantly, Applicant received the most integral part of the PPP Act as a jury charge which was that he had no duty to retreat in his own vehicle. Therefore, Counsel was not deficient and Applicant was not prejudiced.

G. Venue/Jurisdiction

Applicant has made various allegations regarding questions about venue and/or jurisdiction, the first of which is an allegation that Counsel was ineffective for failing to have a pre-trial motion "that Spartanburg Superior Court lacked jurisdiction to try the case since the incident occurred before Walmart in Greenville County." Applicant also alleged the court lacked subject matter jurisdiction to hear the case and that Detective Arterburn lied on the stand regarding evidence of where the shooting took place.

First, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, 363 S.C. 93; See also S.C. Const. Art. V, § 7. Thus, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction. Applicant has failed to present any evidence to refute the record that the convictions he challenges in this application are in a class over which the circuit court does not have the authority to provide.

Second, with regard to the allegation of ineffective assistance, Counsel never had a reason to challenge the venue based on the location of the shooting. Applicant could never explain to Counsel where the shooting took place. This is consistent with Applicant's testimony at trial. At trial, Applicant testified *twice* that he "did not know where [he] was at (sic)" after

being specifically asked if he saw whether the 24-hour Wal-Mart was open. (Tr. p. 311). When asked if the Waffle House was opened, he again stated, "I didn't see anything." (Tr. p. 311). Conveniently, over seven years later, at his PCR hearing, he remembered that he shot the victim before the Walmart in Greer, which he claims is in Greenville County.⁵ During the PCR hearing, when asked why he did not present that information to the jury, and instead testified he did not know where he was, he simply responded that he was not asked the question – again blaming his predicament on Counsel. Applicant's testimony was not credible. Applicant is merely trying to back door in a new argument in an effort to vacate his murder conviction and life sentence.

With regard to Applicant's allegation that Detective Arterburn lied regarding the location of the shooting, Applicant's testimony is, again, not credible. Detective Arterburn testified that he took Jiminez and tried to re-route the path taken the night of the shooting. Based on what Jiminez told him, as well as fresh skid marks and vehicle debris, Detective Arterburn established the shooting occurred at near the intersection of Tacupau Road and Highway 29 by the US Lumber Company. This was never refuted or disputed by the defense. In fact, Counsel went to the scene and took pictures of the area that she ultimately admitted at trial. The purpose of the pictures were to show the jury the landscape and show why Applicant could not simply "turn around" like the victim allegedly wanted and to show the danger Applicant faced with the victim grabbing at the wheel when "telephone polls" and "trees" littered the area. (Tr. p. 280; 296; 297; 303). Furthermore, Detective Arterburn's testimony was credible and Applicant's testimony was not credible. Applicant's testimony regarding the front bumper found at the shooting location was not only lacking in credibility, it was also confusing. Applicant failed to meet his burden to prove any of this allegations regarding venue and jurisdiction.

⁵ Respondent asks that this Court take judicial notice, in addition to it having been testified to, that the Greer Wal-Mart referenced in this case is located in the city of Greer, but is also in Spartanburg County. Greer is situated in both Spartanburg and Greenville County.

Respondent submits our state's law in cases where the exact location of a crime is not certain is as follows:

A criminal defendant is entitled to a directed verdict when the State fails to present evidence that the offense was committed in the county alleged in the indictment. *State v. Evans*, 307 S.C. 477, 415 S.E.2d 816 (1992); *State v. McCoy*, 98 S.C. 133, 82 S.E. 280 (1914). For the purpose of establishing jurisdiction in a criminal prosecution, it is not necessary that the county in which the crime was committed be proved affirmatively if there is sufficient evidence from which it can be inferred. *State v. McLeod*, 303 S.C. 420, 401 S.E.2d 175 (1991); *334 *State v. Wharton*, 263 S.C. 437, 211 S.E.2d 237 (1975); *State v. Henderson*, 285 S.C. 320, 329 S.E.2d 448 (Ct.App.1985). Moreover, venue, like jurisdiction, in a criminal case need not be affirmatively proved, and circumstantial evidence of venue, though slight, is sufficient to establish jurisdiction. *State v. Owens*, 293 S.C. 161, 359 S.E.2d 275 (1987); *Wray v. State*, 288 S.C. 474, 343 S.E.2d 617 (1986); *State v. Wharton*, *supra*. Generally, it can be inferred that the crime was committed in the state as well as county where the body is found. *United States v. Rees*, 193 F.Supp. 849 (D.Md.1961). Furthermore, where some acts material to the offense, and requisite to its consummation, occur in one county, and some in another, venue is proper in either county. *State v. McLeod*, *supra*; *State v. Gasque*, 241 S.C. 316, 128 S.E.2d 154 (1962).

State v. Williams, 321 S.C. 327, 333-34, 468 S.E.2d 626, 630 (1996). There was more than sufficient evidence that the actual shooting took place in Spartanburg County.

H. Expert Witness

Applicant alleged Counsel was ineffective because she failed to call an expert witness. Applicant failed to meet his burden to prove this claim. At the PCR hearing, Applicant offered Don Girdnt as an expert in crime scene reconstruction. Girdnt testified that upon his review of the case materials, the crime scene was consistent with Applicant's version of events that the victim had reached from the back seat to grab the steering wheel. The fact that the victim was reaching from the backseat for the steering wheel was never in dispute or a material issue at trial.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2018 MAR 15 AM 09:50
M. HOPE BLACKLEY

In fact, the State admitted photos of the crime scene showing the victim's body half in the back seat while his upper torso was over the console and into the front seat. Additionally, Jiminez told law enforcement that Applicant passed the victim's home and would not stop so the victim reached over the driver's side. Applicant fails to acknowledge that it was not the action of the victim that was at issue, but rather the reasonableness of his response to his actions by shooting him in the head twice. Therefore, Counsel was not deficient in failing to call Girdnt or any other expert in the area of crime scene reconstruction.

I. Opening Statements

Applicant alleged ineffective assistance because Counsel did not tell the jury in opening statements that the case was about self-defense. Applicant has failed to prove either deficiency or prejudice on this allegation. Counsel testified that she always would rather under-promise rather than over-promise the jury during her opening. In this case, Counsel was unsure if Applicant was going to testify and therefore unsure if she could present sufficient evidence to get a self-defense jury charge. In fact, Applicant had indicated to Counsel that he wished not to testify, even though she encouraged him to testify. Counsel's testimony on this issue is credible.

The record corroborates Counsel's testimony. At the end of the State's case, the trial judge engaged in a colloquy with Applicant regarding his right to testify. Applicant told the judge he wished to remain silent and not testify. Thereafter, the defense rested before the jury. The next day, Counsel had to request Applicant be allowed to testify since Applicant had a change of heart. The trial judge permitted him to testify. Therefore, because Counsel was not sure at the start of the trial if she would be entitled to a self-defense jury instruction, she did not want to over-promise the case to the jury. This was not only reasonable, but prudent. Regardless, Applicant did testify to self-defense, Counsel requested a self-defense charge, and

FILED
CLERK OF COURT
SPARTANBURGH, SOUTH CAROLINA
2018 MAR 15 AM 8:58
M. HOPE BLACKLEY

the jury was given a charge on self-defense. Therefore, even if Counsel had mentioned self-defense in opening, there is no likelihood it would have affected the outcome of the trial.

J. Failing to object to prosecutor's comment

Applicant alleged Counsel should have objected when the prosecutor stated, in closing, that Applicant "would not stop." (Tr. p. 349). However, Applicant has failed to present any evidence as to why this comment was objectionable. The comment was in reference to evidence presented at trial. Jiminez's excited utterances were admitted. Jiminez said Applicant was supposed to take the victim home, passed the victim's home, the victim got upset and tried to get Applicant to stop the car, and Applicant "just wouldn't stop." (Tr. p. 122). Applicant himself testified he never stopped even after the victim allegedly kept trying to reach for the wheel and Applicant pushed him back. (Tr. p. 303). Therefore, the prosecutor's comment was not objectionable and Counsel was not deficient.

K. Failure to disclose Brady material

Applicant alleged Counsel was ineffective for failing to disclose Brady material to him. Applicant failed to prove this allegation. Counsel testified, credibly, that she met with Applicant numerous times and reviewed his discovery and the entire case in depth. Applicant has presented no credible evidence to show Counsel failed to disclose any of the State's evidence to Applicant.

L. Steering wheel

Applicant made various allegations regarding the steering wheel of his car. The first allegation is that Counsel was ineffective for failing to argue that the lack of fingerprints on the steering wheel was exculpatory. Applicant's reasoning behind this argument is perplexing. Regardless, the testimony at trial revealed the vehicle was processed for fingerprints and only

FILED
CLERK OF DISTRICT COURT
SPARTANBURG COUNTY
2018 MAR 25 AM 8:38
M. HOPE BLAKEY

two prints were found. Applicant's fingerprint was found on the left-side rear door and Jiminez's fingerprint was found on the right-side front door. (Tr. p. 198) Officer Thomas Murphy also testified that fingerprints are more likely to be lifted from slick or shiny surfaces, as opposed to textured surfaces. (Tr. p. 197). The photos admitted at trial reveal Applicant had a textured steering wheel cover, which would tend to be why no prints could be found or lifted from the steering wheel. Therefore, Counsel ineffective for failing to argue that no fingerprints were found on the steering wheel nor was Applicant prejudiced.

Applicant also alleged prosecutorial misconduct, in that the State failed to disclose DNA testing performed on the Applicant's steering wheel cover. This Court granted Applicant discovery to resolve whether such DNA testing had been done. SLED thereafter provided all documentation surrounding the testing of a sample collected from the steering wheel cover which revealed no testing had ever been done, because the requirements for routine analysis had not been met. Therefore, Applicant has failed to prove this allegation.

M. Failing to object to Detective Arterburn's testimony

Applicant alleged Counsel should have objected to evidence and testimony from Detective Arterburn because it was "falsified." As more thoroughly fleshed out in the prosecutorial misconduct section below, Applicant has failed to prove any evidence was falsified in this case. Therefore, Counsel was not deficient for not objecting to evidence on the basis it was falsified.

II. Ineffective Assistance of Appellate Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel.

Evitts v. Lucey, 469 U.S. 387 (1985). “However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) (“For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . ”)).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 611 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

In Applicant's direct appeal, Chief Appellate Defender, Robert M. Dudek, and Assistant Appellate Defender, David Alexander, raised the following issues to the South Carolina Court of Appeals:

- I. The court erred by refusing to instruct the jury on self-defense that a defendant acting in self-defense had the right to continue shooting until it was apparent that the danger of death or serious bodily injury had ended since this was a widely accepted correct instruction on the law, and appellant had a right to have the instruction crafted to the facts of the case.

- II. The court erred by refusing to charge South Carolina Code § 16-11-450(a) that a person protected by the Castle Doctrine who was acting lawfully was immune from criminal or civil prosecution, since the judge erred by refusing to give a full jury instruction on the Castle Doctrine where it was raised by the evidence in this case.

By opinion filed July 3, 2013, State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013), the South Carolina Court of Appeals affirmed Applicant's convictions. Applicant appealed to the South Carolina Supreme Court, arguing only the "continuing to shoot" jury instruction issue, and the Court granted certiorari. By opinion filed March 23, 2016, the Supreme Court of South Carolina affirmed as modified the Court of Appeals decision. The remittitur was returned to the circuit court on April 8, 2016.

Applicant alleged appellate counsel was ineffective for failing to raise various issues and case law on appeal. Applicant further alleged appellate counsel was ineffective for "skipping" oral argument.

Applicant has failed to meet his burden of proving either appellate counsel was deficient or that Applicant was prejudiced by such alleged deficiencies. Applicant proposed that appellate counsel should have briefed issues that are either without basis in any authority in South Carolina law, or were actually raised, or are clearly inferior to the issues which were raised. Applicant failed to present any evidence to convince this Court that the issues raised were not the most meritorious issues available on appeal. This is evident by the fact that the case was called to oral argument at the Court of Appeals, resulted in a published opinion from the Court of Appeals, the Supreme Court granted certiorari to review the case, the Supreme Court called the case for oral argument, and resulted in a published opinion from the Supreme Court. Further, none of the case law Applicant insisted should have been used to be of any benefit to the arguments made on appeal.

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With regard to the allegation that appellate counsel, Dudek, missed the oral argument, the allegation without merit. First, Applicant fails to realize he was represented by two appellate defenders, Dudek and Alexander. The evidence presented to this Court shows Alexander argued in the Court of Appeals while Dudek was handling a death penalty case. Further, the oral argument in the Court of Appeals is essentially irrelevant since the Supreme Court reviewed the case and also heard oral arguments that resulted in a modified opinion from the Supreme Court. Both Dudek and Alexander argued on Applicant's behalf before the Supreme Court. (Archived argument found at media.sccourts.org/videos/2013-002001.mp4).

III. Prosecutorial Misconduct/Malicious Prosecution

In his application, Applicant alleged prosecutorial misconduct and malicious prosecution. However, prosecutorial misconduct is not typically an issue for post-conviction relief. ¹ Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-2-20(b). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 364 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised these issues during trial and on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794 (1989).

To the extent Applicant raises these allegations as being newly discovered, and therefore could not raise the issues at trial or on appeal, the allegations are without merit. Applicant essentially claims that every State actor "lied" in every step of his criminal case – from the investigation through trial and even on appeal. Applicant has set forth no credible evidence to support his allegations of prosecutorial misconduct, other than his self-serving testimony.

Furthermore, a reading of the record reveals neither Detective Arterburn, Assistant Solicitor Susan Reese, nor Assistant Solicitor Russel Ghent lied during any phase of Applicant's trial and appeal. Detective Arterburn was consistent in the testimony he provided at both trial and during the PCR hearing regarding how he established the location of the shooting. Applicant did not present any credible evidence to support his contention that evidence was "falsified." Additionally, both Reese's and Ghent's arguments to the jury in closing and in the briefs on appeal were based on the evidence presented at trial and reasonable inferences to be made therefrom. Therefore, Applicant has failed to meet his burden to prove prosecutorial misconduct by a preponderance of the evidence.

IV. Summary Dismissal

Although this Court allowed ample leeway and flexibility in allowing Applicant to present all of his allegations and complaints at his PCR hearing, any and all allegations of trial and appellate court error improper for PCR. An Applicant may commence a post conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy...

S.C. Code Ann. § 17-27-20.

Applicant's allegations do not support a cognizable claim for post-conviction relief under any of the statutory grounds. Post-conviction relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

Allegations of trial court or appellate court error are direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. For these reasons, the allegations should be denied and dismissed.

CONCLUSION

Applicant raised 50 separate grounds for relief. With no disrespect intended to opposing counsel's admirably zealous advocacy, when a party raises a dozen or more grounds to vacate a conviction, that usually means there are none. See Fifth Third Mortgage Co. v. Chicago Title Ins. Co., 692 F.3d 507, 509 (6th Cir. 2012); Pierce v. Visteon Corp., 791 F.3d 782, 788 (7th Cir. 2015) (raising 13 issues on appeal violates principle that counsel must concentrate attention on the best issues). Taken together, it is apparent that the application may be effectively summarized as provided by Applicant's overall complaint: Applicant feels Counsel could have done better. However, Monday-morning quarterbacking and hindsight analysis do not provide for post-conviction relief. The relevant question is only whether or not Counsel's performance was so deficient as to deprive Applicant of a fair trial, and deprive the judiciary of confidence in

the outcome. For all the reasons set forth above, Applicant has failed to meet his burden under Strickland as to any of the allegations, and the application for post-conviction relief should be denied.

WHEREFORE, the Respondent respectfully requests the court deny this application for post-conviction relief.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT
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Columbia, SC 29211

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March 12, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

2016-CP-42-2795

MANUEL ANTONIO MARIN, #343371)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

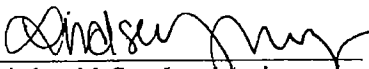
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1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Memorandum of Law** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James H. Price, III, Esquire
Price Law Firm P.A.
644 East Washington Street
Greenville, South Carolina 29601

DATED this 12th day of March, 2018.


Lindsey McCoy, Legal Assistant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	Case No.: 2016-CP-42-2795
Manuel A. Marin, #343371	)	(Post-Conviction Relief)
	)	
Applicant,	)	
	)	BRIEF
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

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This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Manuel Antonio Marin (Applicant) on July 25, 2016. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on February 1, 2018, at Spartanburg County Courthouse. Applicant was present and represented by James H. Price, III, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant also presented testimony from Detective Dale Arterburn of the Greer City Police Department and Don Girdnt, a forensic consultant. Respondent presented the testimony of Tanya R. Jones ("Counsel") and Assistant Solicitor Russell D. Ghent ("Solicitor"). This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the direct appeal records, the PCR application, Respondent's return, Applicant's supplemental application, and all exhibits admitted during the hearing.

PROCEDURAL HISTORY

Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel, in that:

- a. "Failing to object to witness Diane Tabares' statement, "He was a cancer survivor."
- b. "Failing to object to witness Diane Tabares' statement that she was pregnant and was due to deliver on the day of the incident."
- c. "Failing to recall the witness Larry Rodriguez to the stand and impeach the witness for lying on the stand.:
- d. "Failing to object to and allowing the autopsy photographs to be entered into evidence."
- e. "Failing to have an evidentiary hearing to have defendant's camera excluded from the evidence, since the camera was tampered with prior to a warrant being secured for the contents inside defendant's truck."
- f. "Failing to have an evidentiary hearing to have the weapon excluded from the evidence since it was tampered with by Officer Jerry Powell."
- g. "Trial counsel was ineffective for not being prepared for trial, by citing the wrong cases on point for a proposition."
- h. "Failing to object to prosecutor's highly inflammatory and prejudicial argument that the jury could infer malice because two shots were fired."
- i. "Failing to raise the King defense after the jury came back from the deliberations and asked the trial judge to reinstruct or repeat the instructions on murder and manslaughter.:
- j. "Failing to claim immunity under the Protection of Persons and Property Act as a pretrial motion instead of claiming it as a jury instruction."

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- k. "Failing to claim as a pretrial motion that Spartanburg Superior Court lacked jurisdiction to try the case since the incident occurred before Walmart in Greenville County."
2. Ineffective Assistant of Appellate Counsel:
 - a. "Appellate counsel Robert M. Dudek was ineffective in failing to claim the directed verdict of self-defense since it was dispositive issue in this case."
 - b. "Appellate counsel Robert M. Dudek or appellate court was ineffective in failing to give Marin the same treatment as in State v. Curry."
 3. Various allegations of Judicial Error:
 - a. "The Court of Appeals wrongfully ruled on the continuing to shoot proposition since the directive went to the heart of Marin's case."
 - b. "The South Carolina Supreme Court erred by citing law against Marin which was enacted after Marin's indictment (July 21, 2008)."
 - c. Trial judge abused his discretion by not citing State v. Hendrix, after trial counsel cited such case for the continuing to shoot proposition.

On October 4, 2017, and December 2, 2017, Applicant, through counsel, filed amended applications adding the following allegations:

1. Ineffective Assistance of Counsel, in that:
 - a. "Failing to request the court produce expert witness for the defense."
 - b. "Failing to clearly explain to the jury on opening statements from the start that this was a self-defense case."
 - c. "Failing to object to prosecutor's statements that 'defendant would not stop.'"

- d. "Failing to disclose important Brady discovery material to defendant until well after trial."
- e. "Failing to request complete charge of Article 6, instead of only § 16-11-450(a)."
- f. "Failure to argue why the second shot was necessary in order for the court to instruct the charge requested."
- g. "Failing to cite State v. Hendrix in a timely manner for the continuing to shoot proposition."
- h. "Failing to argue the lack of fingerprints from the steering wheel as exculpatory evidence since other fingerprints evidence was presented."
- i. "Failing to request jury instruction that the defendant had a right to judge the conduct of the deceased more harshly than otherwise because of his intoxication."
- j. "Failing to request instruction to the jury that victim's violent behavior was an unreasonable reaction to defendant having passed his road."
- k. "Failing to request jury instruction that the standard for evaluating whether a defendant accused of murder had reasonable belief that deadly force was necessary to prevent great bodily harm to himself, as element of self-defense is objective rather than subjective."
- l. "Failing to request jury instruction that the jury could consider the first attack by the victim on the defendant after passing his road when weighing self-defense on the second attack by trying to run the vehicle off the road."
- m. "Trial counsel was ineffective in failing to object to or allowing falsified direct physical evidence to be introduced by Det. Dale Arternum."

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- n. "Trial Counsel was ineffective in failing to object to hearsay testimony by Det. Dale Arternurn about the scene or location of the shooting since it was falsified testimony by Det. Dale Arternurn."
2. Ineffective Assistance of Appellate Counsel in that:
- "Appellate counsel Robert M. Dudek was ineffective in failing to claim the issue on the directed verdict on venue."
 - "Appellate counsel Robert M. Dudek was ineffective in skipping a crucial step in the appellate process."
 - "Appellate counsel Robert M. Dudek was ineffective in failing to raise the issue that evidence was insufficient that the defendant acted with malice."
 - "Appellate counsel Robert M. Dudek was ineffective in failing to be present at the most critical part of the appeal; Oral Argument."
 - "Appellate counsel Robert M. Dudek was ineffective in failing to cite State v. Day along with Fuller for the trial judge's refusal to give the requested charge to the jury."
 - "Appellate counsel Robert M. Dudek was ineffective in failing to raise State v. Belcher to the Court of Appeals for the prosecutor's charge to the jury that they could infer malice because two shots were fired instead of one."
3. Subject matter jurisdiction:
- "Subject matter jurisdiction lacked by Spartanburg Superior Court to try indictments 2008-GS-42-5308 and 2008-GS-42-5308(a)."
4. Prosecutorial Misconduct and Malicious Prosecution:

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- a. "Ass. Att. Gen Donald J. Zelenka lied on his brief to the Appellate Courts about the evidence and facts of the case."
 - b. "Prosecutor Susan Reese lied to the jury about evidence and facts of the case."
 - c. "Det. Dale Arternum lied on the stand about physical (direct) evidence and lied about the location of the alleged incident, or where the actual shooting took place by introducing falsified evidence."
 - d. "Suppression of evidence by prosecutor Susan Reese. Prosecutor Susan Reese maliciously suppressed the steering wheel cover, which was collected as evidence and sent to SLED for DNA testing. Prosecutor Susan Reese suppressed the evidence because it was exculpatory evidence and would have had the decedent's DNA and proven that decedent was trying to run the vehicle off the road and kill everyone in the vehicle."
5. Abuse of Discretion by Trial Court:
- a. "Trial court violated Due Process by refusing to give defendant a preliminary hearing as timely requested."
 - b. "Trial court abused its discretion by refusing to direct a verdict on self-defense since defendant proved self-defense as a matter of law."
 - c. "Trial court abused its discretion by refusing to direct a verdict on venue since the evidence proved the incident occurred before Wal-Mart in Greer, which is located in Greenville County."
 - d. "Trial court abused its discretion by refusing to acknowledge State v. Hendrix for the continuing to shoot proposition."

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- e. "Trial court abused its discretion by failing to protect defendant's Constitutional Rights and Due Process of Law."
6. Abuse of Discretion by Appellate and Supreme Court:
 - a. "Appellate court abused its discretion by refusing to grant the continuing to shoot proposition since it went to the heart of appellant's case, and because of prosecutor's highly prejudicial closing arguments."
 - b. "Supreme Court abused its discretion by citing law against Marin that contradicts itself with other law."
 - c. "Supreme court abused its discretion by citing law against appellant that was enacted after appellant's case entered the appellate courts. (Four years after)."
 - d. "Supreme and Appellate court abused its discretion by not giving Marin the same equivalence as Belcher for the prosecutor's charge to the jury, that they could infer malice from two shots. The prosecutor said to the jury: Ladies and gentlemen, I submit this is malice! Not one, two shots!"

FACTS ADDUCED AT TRIAL

The underlying facts were that the deceased was heavily intoxicated at a Latin nightclub. Both the deceased and Applicant had been celebrating at the Columbian Independence festival in Greenville which led them to the after party at Bongo's in Greenville. Towards the end of the night, the Bongo's staff was trying to find the deceased a ride home because he was too intoxicated to drive. Applicant offered to take the deceased home.

The deceased was placed in the back of Applicant's Durango SUV while Applicant's then- brother-in-law, Jiminez, rode in the passenger seat. At trial, Jiminez could not be found and

it was believed he returned to his home country of Mexico. His statement at the scene was that Applicant shot the victim, Tabares.

There was evidence presented that the shooting occurred on Highway 29 headed toward Spartanburg near the intersection of Tacupau Road where the US Lumber Company is located. After Applicant shot the deceased in the back of the head twice, he continued driving until the car stopped at an intersection in downtown Spartanburg. Applicant and Jiminez were seen arguing outside the car and the cops were called. The deceased's body was found dead in the vehicle with two gunshot wounds to the back of the head, but the deceased was partially in the front of the car. When police arrived, Jiminez showed them where the gun was. The gun was retrieved by law enforcement. Applicant testified at trial that he shot the deceased in self-defense because the deceased was trying to run the vehicle off the road by grabbing the steering wheel thereby putting his life in danger.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1e, SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the 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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286, S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the Applicant must prove the counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117 (citing Strickland). Second, counsel's deficient performance must have prejudiced the 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.

The following arguments are in addition to those raised by Applicant in his initial application a, Attachment number II with supporting cases.

A. Continuing to shoot charge and two shots equaling malice

Applicant alleged the fact that he shot the victim twice and his request for the trial court to instruct the jury on continuing to shoot. The testimony presented at trial by Applicant showed Applicant shot the victim in the back of the head twice in self-defense. Based on this evidence, the prosecutor argued that the two shots were evidence of malice, a requisite element of murder. In response to her argument, Counsel requested a "continue to shoot charge." In requesting the charge, Counsel originally cited to State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007). (Tr. p. 395). Later, Counsel also cited State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978). Counsel failed to first cite Hendrix. Counsel eventually did bring the Hendrix opinion to the trial court's attention.

It is clear from the transcript and the Order of the South Carolina Supreme Court that Applicant's Counsel lost golden opportunities to have the proper charges submitted to the jury and protect Applicant's appeal rights. The opinion of the South Carolina Supreme Court dated March 23, 2016 (Opinion 27613) clearly confirms this by stating:

While Marin claimed that he shot victim in self-defense, he did not request any specific language for the self-defense charge at the charge conference, only requesting that the charge include an instruction that he had a right a right to act on appearances. Further, Marin did not object when, during closing arguments, the State asserted that Marin's firing of two shots was evidence of malice and supported a murder conviction, nor did he ask for any additional instructions before the trial court charged the jury...

ISN'T THE ABOVE LANGUAGE TAKEN DIRECTLY FROM THE OPINION A FINDING THAT APPLICANT'S ATTORNEY WAS INEFFECTIVE CONCERNING THE INSTRUCTIONS GIVEN TO THE JURY? ABSOLUTELY YES!

The court further found evidence of ineffective assistance of counsel by stating in the opinion that:

Marin represented to the trial court that State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007) mandated such a charge. However, the trial court reviewed Rye and noted that only the dissenting opinion mentioned the language, and the reference was in the context of a different legal issue. Marin then acknowledged that Rye was not on point. When the trial court asked Marin if there were any other cases that approved of such a charge, Marin's counsel responded, "I am not a walking encyclopedia." Thus, in the absence of any supporting authority, the trial court declined to give the requested charge.

Doesn't the above language again indicate that counsel's performance was deficient to the extent that not only was Applicant prejudiced but that such prejudice was fatal? Although it is correctly stated that counsel, after the lunch break, did supply the court with the proper case (State v. Hendrix) by this time the mind of the trial judge was made up and the requested charge was not given to the detriment and prejudice of Applicant. Applicant submits that had his attorney had the correct legal cases, cites, etc., with the correct arguments the outcome would have been different.

The trial transcript and the Supreme Court Opinion in Applicant's case clearly reveals that after a short period of deliberation the jury requested further instruction on malice and voluntary manslaughter but did not ask for clarification or reinstruction on self-defense. After the

trial court reinstructed the jury on both malice and voluntary manslaughter Applicant' renewed his request to have the "continuing to shoot" language charged to the jury which was denied. At this point Applicant's attorney missed a golden opportunity to ask the court for a charge to the effect that it is incumbent upon the State to disprove sudden heat and passion in a case in which a jury is being asked to consider murder and manslaughter. See Mullaney v. Wilbur, Opinion No. 74-13 (1975, U.S. Sup. Ct.). Also see People v. Breverman, 19 CAL. Fourth 142, (1998).

It is clear from the South Carolina Supreme Court Opinion affirming Applicant's conviction that trial counsel was ineffective in connection with jury charges and said ineffectiveness was prejudicial to Applicant both at the trial level and appellate level.

B. Larry Rodriguez

Applicant alleged Counsel was ineffective for failing to recall Larry Rodriguez to the stand and impeach him for lying on the stand. Larry Rodriguez was called as a witness during the State's case-in-chief. Rodriguez was the owner of the nightclub, Bongo's, in Greenville. Applicant and the victim had been at Bongo's that evening into the early morning hours celebrating the Colombian Independence Day. Applicant takes issue with Rodriguez's testimony that he closed the nightclub at 2:00 a.m. Applicant claims that because photos from his camera showed the victim was put into Applicant's vehicle at 2:54 A.m., that Rodriguez lied about the time Applicant left Bongos.

It is apparent from the record Applicant made this request to Counsel during the trial and Counsel addressed it on the record. (Tr. P. 267). Counsel also testified that she did not believe recalling Rodriguez on that minor point would serve any legitimate purpose because the timing was never an issue at trial.

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It is a fundamental legal principal that a defendant must be allowed to make his own choices about the proper way to protect his own liberty. Once Mr. Marin made his decision to plead not guilty and hold the prosecution to its burden of proof, His lawyer was bound by the Sixth Amendment, the Common Law of Agency, and the Professional Disciplinary Rules to follow her client's instructions. Under the principals of agency law, a lawyer is an assistant – hopefully, educated and well trained – but an assistant never less. The client remains the master and controls all lawyer client relationships.

It is clear from the record that Mr. Marin wanted his trial tried based on his objectives, not his attorney's. One of his objectives had to do with the reasonableness of his actions and the time frame in which these occurred. This was important as far as the testimony of Mr. Rodriguez and lead to Mr. Marin unequivocally telling his lawyer to recall Mr. Rodriguez. The failure by the attorney for Applicant was clearly against Mr. Marin's wishes and prejudicial to Mr. Marin. The issue of an attorney refusing to follow his client's instructions during the trial is presently pending before the Supreme Court of the United States in the case of Robert Leroy McCoy v. Louisiana, as Case Docket No. 16-8255.

C. Failure to suppress or object to evidence

Applicant has alleged Counsel was ineffective for failing to suppress or object to various items in evidence. This argument as to autopsy photos only was waived by Applicant because no autopsy photos were admitted during the trial. Applicant claims that his camera was "tampered with" prior to a warrant being issued to search his vehicle and therefore should have been inadmissible. Although Applicant's car was technically a crime scene, the car belonged to Applicant. Applicant did not lose his constitutional rights to the vehicle, and law enforcement should not have removed evidence from the vehicle in the manner in which it was done.

Secondly, the testimony from Office David Hogsed revealed Applicant's camera was found hanging from the driver's seat headrest. (Tr. P. 170 and photos admitted at trial 168). Hogsed also testified that the camera was moved in order for crime scene investigators to examine the body more closely without damaging the camera on the confined space. The camera was taken into evidence. (Tr. Pp. 170-171).

Applicant argues that the murder weapon was inadmissible at trial because it had been "tampered with" prior to the crime scene photographer arriving to take photos of it. Officer Jeffery Powell testified that after Jiminez showed him where the gun was, he took the weapon, removed the round in the chamber to make it safe, and collected the weapon as evidence. (Tr. pp. 114-115). Applicant was denied a photograph showing the position of the pistol at the time he defended himself which was prejudicial to him.

D. Diane Tabares

Applicant alleged Counsel was ineffective for failing to object to testimony from Diane Tabares. Tabares was the State's first witness at trial. Tabares was the victim's sister. It is apparent from her testimony, that the State called her to give some background information about the victim and to set the scene on the events that unfolded that day and into the night. The testimony Applicant insists was objectionable was Tabares's testimony that the victim was a cancer survivor and that she was pregnant due to deliver the day of the incident. (Tr. Pp. 64-65). This testimony, in the context it was given, was objectionable as irrelevant and prejudicial. Counsel did not object. Applicant testified that such testimony clearly created bias against him.

E. Expert Witness

Applicant alleged Counsel was ineffective because she failed to call an expert witness. At the PCR hearing, Applicant offered Don Girdnt as an expert in crime scene reconstruction.

Girdnt testified that upon his review of the case materials, the crime scene was consistent with Applicant's version of events (that the victim had reached from the back seat to grab the steering wheel). Although photos of the crime scene showing the victim's body half way in the back seat and half in the front seat were admitted, what actually happened was in great dispute throughout the trial. Because of the absence of Jiminez through no fault of his own the Applicant was placed in a precarious position: on one hand he had no witnesses to verify his version but on the other hand the State, **WITHOUT OBJECTION TO PRESERVE THE RECORD BY APPELLATE'S COUNSEL (EMPHASIS ADDED)** was allowed to introduce "excited utterances" of Jiminez to the effect that Applicant was the shooter/killer. An expert witness such as called by Applicant at his PCR hearing, Mr. Don Girdnt, was absolutely essential to verify Applicant's version of the events and to rebut the State's argument that Applicant was unreasonable in his actions. No expert witness was called by trial counsel. An expert witness would have helped as was done in Applicant's PCR hearing. Applicant was prejudiced and the failure to call an expert witness was deficient.

F. Opening Statements

Applicant alleged ineffective assistance because Counsel did not tell the jury in opening statements that the case was about self-defense.

The opening statement is thought by most trial attorneys to be the most crucial part of a client's case. An opening statement paves the way for a successful trial. This is the only time that an attorney has the jury's complete and undivided attention. This was trial counsel's opportunity to put Applicant's case in front of the jury and grab the jury's attention to completely discuss and flesh out Applicant's claim of self-defense and why his actions were reasonable in shooting the deceased. From the transcript it is clear that Applicant's attorney's opening statement was two

pages long. Trial counsel wasted a golden opportunity to humanize Applicant and set his defense in front of the jury to Applicant's detriment and prejudice.

G. Prosecutorial Misconduct

During the trial of this matter Applicant's counsel brought the following to the attention of the court:

1. Chain of Custody forms sending a steering wheel cover to SLED which requested DNA analysis of the cover;
2. A response from SLED to the effect that the sample did not comport with SLED regulations referring the matter back to the Spartanburg County Sheriff's Office.

At the request of Applicant's counsel this court issued an Order of Discovery requiring SLED to provide written confirmation to both the Applicant and the State as to whether DNA analysis of the steering wheel cover was ever performed. Pursuant to the Order SLED provided a letter to the effect that the matter was sent back to Spartanburg County Sheriff's Office in no further action was taken (a copy of same is attached to this Brief as Exhibit 1).

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

danger in fear of his life/danger and justifying Applicant's self-defense shooting of the deceased/victim. Applicant urges the Court to consider the following argument.

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

The prosecutor must employ whatever means are necessary to discharge her obligation. The unfortunate series of events in this case makes clear that the better practice is for the prosecutor herself to review such materials.

Because the government's failure to turn over exculpatory information in its possession is unlikely to be discovered and thus largely unreviewable, it is particularly important for the prosecutor to ensure that a careful and proper Brady review is done.

Delegating the responsibility to a non-attorney police investigator to review this own and other officer's rough notes whether they contain Brady, Bagley, and Giglio information is clearly problematic...

U.S. v. Rodriguez, 917 F.2d 1286, prohibits suppression by the government of evidence that is favorable to accused and that is material to either guilt or punishment, irrespective of good faith or bad faith of prosecution, applies to both impeachment evidence and exculpatory evidence. U.S.C.A. Const. Amends 5, 14. Brady v. Maryland, 373 U.S. 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); U.S. v. Alvarez, 86 F.3d 901 CA. 9 (Cal) 1996: Suppression by prosecution of evidence favorable to accused upon request violates due process where evidence is material to either guilt or to punishment, irrespective of good faith or bad faith of prosecution. United States

v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985); Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L. Ed.2d 104 (1972). Evidence is material under Brady if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Jencks Act I.S.C. § 3500. Under the Jencks Act, witness statements, including reports prepared by testifying officers, must be turned over to the defense. Although an officer’s “rough notes” need not be disclosed pursuant to the Jencks Act as witness statements, United States v. Anderson, 813 F.2d 1450, 1459 (9th Cir. 1987), they must be disclosed pursuant to Brady if they contain material and exculpatory information. In order to find that a defendant’s due process rights have been violated by the failure to disclose evidence, so as to entitle him to a new trial, such evidence must have been exculpatory, in nature. Const. Art. 3, § 14. A prosecutor that withholds evidence which is made available would tend to exculpate on accused by creating a reasonable doubt as to his guilt violates due process of law. Const. Art. 3, § 14.

Rule 3.4 of SCRC Fairness to opposing party Rule 3.4 (a). A lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person do any such act. Rule 3.4 (d) a lawyer shall not fail to make a reasonably diligent effort to comply with a legal proper discovery request by an opposing party.

(1) The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

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

Rule 3.8 Special Responsibilities of a Prosecutor. The prosecutor in a criminal case shall: make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor...

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

Regardless of whether it was the investigator's decision or negligence or the prosecutor's not to provide the requested samples to SLED for comparison purposes in Lab No. L08-169, the fact remains that it was the prosecutor's responsibility.

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

II. Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985).

In Applicant's direct appeal, Chief Appellate Defender, Robert M. Dudek, and Assistant Appellate Defender, David Alexander, raised the following issues to the South Carolina Court of Appeals:

- I. The court erred by refusing to instruct the jury on self-defense that a defendant acting in self-defense had the right to continue shooting until it was apparent that the danger of death or serious bodily injury had ended since this was a widely accepted correct instruction on the issue, and appellant had a right to have the instruction crafted to the facts of the case.
- II. The court erred by refusing to charge South Carolina Code § 16-11-450(a) that a person protected by the Castle Doctrine who was acting lawfully was immune from criminal or civil prosecution, since the judge erred by refusing to give a full jury instruction on the Castle Doctrine where it was raised by the evidence in this case.

By opinion filed July 3, 2013, State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013), the South Carolina Court of Appeals affirmed Applicant's convictions. Applicant appealed to the South Carolina Supreme Court, arguing only the "continuing to shoot" jury instruction issue, and the Court granted certiorari. By opinion filed March 23, 2016, the Supreme Court of South Carolina affirmed as modified the Court of Appeals decision. The remittitur was returned to the circuit court on April 8, 2016.

Applicant alleged appellate counsel was ineffective for failing to raise various issues and case law on appeal as set out in his application. Applicant's primary appellate complaint is that his appeal attorney failed to file a Reply Brief, thereby conceding the State's factual conclusions.

At Applicant's PCR hearing the State offered Assistant Solicitor Russell Ghent as the State's witness concerning Applicant's appeal issues. Although Mr. Ghent was an Assistant

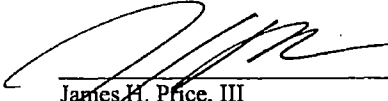
Solicitor for the Seventh Judicial Circuit at the time of Applicant's trial Mr. Ghent, obviously, got involved with the case and wrote the appeal for the State which was signed off by both Mr. Ghent and the Deputy Attorney General. Although there was no testimony to this effect during the trial Mr. Ghent, on page 16 of the Brief of Respondent, opined that:

"This" was evidence of pulling a gun from the glove compartment while holding the victim down, then cocking it under a four-pound pull, or simply taking it from a bag, already cocked and at the ready."

There was nothing in the record to confirm that Applicant held Tabares' head down as described by Mr. Ghent. On cross-examination Mr. Ghent admitted that these were conclusions on his part and there was nothing in the record to confirm this. He also admitted that there was nothing in the record concerning the trajectory of the bullets and that his testimony about Applicant holding Tabares' head down was speculation and conjecture. When Mr. Ghent testified that the Supreme Court had upheld his conclusions he was correct – because there was no Brief from Applicant's appellate counsel to dispute this! Without contesting these inflammatory statements against Applicant the Supreme Court had no choice but to accept them. This was not Applicant's fault but was prejudicial to him. Applicant's appellate counsel should have filed a Reply Brief contesting these factual conclusions unsupported by the record.

For the reasons cited in this Brief and by the Applicant in his application with supporting documents Applicant submits that he has met his burden of proof. Trial and appellate counsel were ineffective for the reasons cited therein, Applicant was prejudiced, and Applicant is entitled to a new trial.

Respectfully Submitted,



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March 22, 2018

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(a) Sister's testimony, that decedent was a cancer survivor was highly prejudicial and it was calculated to arouse the sympathies of the jury, and it was irrelevant as to provative facts or guilt on the case. Therefore trial counsel was ineffective in failing to object to such testimony. See State v. Langly, 515 S.E.2d 98 (S.C. 1999), sister's testimony was not relevant to defendant's guilt. See also Strickland v. Washington, 104 S.C. 2052 (1984).

(b) Sister's testimony, that she was pregnant and due to deliver on the same day of the incident was highly prejudicial and it was calculated to arouse the sympathies of the jury, and it was irrelevant as to provative facts or guilt on the case. Therefore, trial counsel was ineffective in failing to object to such testimony. See State v. Langly supra; see also Strickland v. Washington supra.

(c) Witness Larry Rodrigues lied on the stand under oath that he had closed the night club @ 2:00 a.m., when photographs taken outside the night club with defendant's camera at the time the decedent was placed into defendant's truck showed time stamp on the camera to be 07/21/08 @ 02:54:17 hrs. therefore trial counsel was ineffective in failing

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to impeach the witness Larry Rodriguez after defendant brought this matter to the attention of trial counsel. See State v. McMillian, 561 S.E.2d 602 (S.C. 2002), he was prevented from showing that if a given witness lied in the past or was now lying about a minor point, then he could very well be lying about a mayor point. Therefore trial counsel was ineffective in failing to recall the witness Larry Rodriguez back to the stand and impeach the witness for lying on the stand under oath.

(d)

Grusom autopsy photographs should have been excluded since prejudicial effect of photographs outweighed any evidentiary value. See State v. Middleton, 339 S.E.2d 692 (S.C. 1986), prejudicial effect of photographs of one murder victim clearly outweighed any evidentiary value, and thus such photographs were inadmissible. Prejudice created by color autopsy photographs of victim, one of which depicted scalp pulled away from victim's skull, and another...

Although photographs may be used to corroborate other evidence, see State v. Robinson, 201 S.C. 230, 22 S.E.2d 587 (1942), it is well established that photographs calculated to arouse the sympathies and

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prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial. see State v. Edwards, 194 S.C. 412, 195 S.E.2d 587 (1940); see also State v. Waitus, 224 S.C. 12, 775 S.E.2d 256 (1993); see also State v. Langley, 515 S.E.2d 98 (S.C. 1999).

(e)

Trial counsel was ineffective in failing to have an evidentiary hearing to have defendant's camera excluded from the evidence since it was tampered with prior to a warrant being secured for items inside defendant's truck. see State v. Tindal, 518 S.E.2d 287 (S.C. App. 1999), Thomas Taylor, a police instructor with experience in crime scene investigation, explained the standard procedure for securing the crime scene would not normally include removing items from the crime scene. According to Taylor, removal of any item would contaminate the crime scene.

(F)

Trial counsel was ineffective in failing to have an evidentiary hearing to exclude the ~~weapon~~ ^{weapon} from the evidence since it was tampered with prior to crime scene photographer arrived. ^{PHOTOGRAPHER} Officer Jeffery Powell picked up the weapon from the crime scene and put it in the trunk of his police car instead of following proper procedure. see State v. Tyndal ^{supra}, Officer Dana Wingate the crime scene investigator, observed

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the hammer lying on the floor. Before the crime scene photographer arrived, officer Wingate removed the hammer from the floor, apparently for safety purposes, and placed it in his car. He mistakenly forgot to include the hammer in the crime scene diagram. Thomas Taylor, a police instructor with experience in crime scene investigation, explained the standard procedure for securing the crime scene would not normally include removing the weapon from the crime scene. According to Taylor, removal of any item would contaminate the crime scene.

(9)

Trial counsel was ineffective in not being prepared for trial by citing the wrong cases for a given proposition. When trial counsel asked for instructions that "If defendant is justified in firing the first shot, then the defendant is also justified in continuing to shoot until it is apparent that the danger of death or serious bodily injury has completely ended." Trial counsel cited State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007), which was a dissenting case. And the case on point was actually: State v. Hendrix, 244 S.E.2d 503 (S.C. 1978). When trial judge asked trial counsel if there were any other cases that approved of such a charge, trial counsel responded: "I'm not a walking encyclopedia. Trial counsel should have been prepared for trial by researching

II.

the right cases in the Law Encyclopedia prior to trial. See Strickland v. Washington, 104 S.C. 2052 (1984). The right to counsel plays a crucial role in the adversarial system embodied in the sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942); see also: Powell v. Alabama, supra, 287 U.S. at 68, 69, 53 S.Ct. 63, 64. Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a Federal or State crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however is not enough to satisfy the Constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to

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be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

[2] For that reason the Court has recognized that the right to counsel is the right to effective assistance of counsel?

[7-9] Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See *Cuyler v. Sullivan*, supra, 466 U.S., at 346, 90 S.Ct., at 1717. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See *Powell v. Alabama*, 287 U.S., at 68-69, 53 S.Ct., at 63-64. See *Strickland v. Washington*, Supra. Indeed, counsel's incompetence can be so serious that it rises to the level of constructive denial of counsel which can constitute constitutional error without showing of prejudice. See *Cronic*,

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466 U.S. at 659-660, 104 S.Ct. at 2047; Javor v. United States, 724 F.2d 831, 834 (CA9 1984) ("Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all").

(h)

Prosecutor's closing argument that jury could infer malice because two shots were fired instead of one was highly inflammatory and prejudicial, and it is a misrepresentation of the law. See State v. Hendrix, supra. See also: State v. Davis, 239 S.C. 280, 122 S.E.2d 633; See also State v. Linder, 287 S.E.2d (S.C. 1981). While solicitor should prosecute vigorously, her duty is not to convict a defendant but to see justice done, and solicitor's closing argument must be based upon this principle and therefore must be carefully tailored so as not to appeal to personal bias of juror, nor be calculated to arouse his passion or prejudice. See also: State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976); State v. White, 246 S.C. 502, 144 S.E.2d 841 (1965). A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics. Appellate court Rule 407, Rules of Prof. Conduct, Rule 3.B comment.

(i)

Trial counsel was ineffective in failing to raise the King defense when the jury came back

II.

from deliberations and asked the trial judge to reinstruct them on the law of (malice) murder and voluntary manslaughter. Tr. pg 343-346. See State V. King, 158 S.C. 251, 155 S.E. 409 (1930), in King, the Court concluded that a charge must clearly and correctly instruct that if they have a reasonable doubt as to whether the defendant was guilty of murder or manslaughter, it was their duty to resolve that doubt in his favor and find him guilty of the lesser offense. See also: State V. Jackson, 389 S.E.2d 650 (S.C. 1990); Carter V. State, 392 S.E.2d 184 (S.C. 1990). As both crimes were submitted to the jury, counsel was ineffective in failing to request the King charge; State V. Robinson, 414 S.E.2d 142 (S.C. 1992); Chalk V. State, 437 S.E.2d 19 (S.C. 1993); State V. Gorum 428 S.E.2d 884 (S.C. 1993).

(j)

Trial counsel was ineffective in failing to claim immunity under the Protection of Persons and Property Act (Article 6) as a pre-trial motion instead of claiming it as a jury instruction. See State V. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013). Marin also argues the trial court erred in refusing to charge the immunity from prosecution provision contained in South Carolina Code Subsection 16-11-450(A). We find the trial court ~~erroneously~~ correctly

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ectly refused to charge this subsection because it does not contain any substantive provisions of law. Rather, it is a procedural subsection under which the circuit court may grant immunity from prosecution before a trial begins if the court finds the defendant acted lawfully in self-defense. See *id* (providing [a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action; see also: *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) (standing subsection 16-11-450(A) was not intended as an affirmative defense but rather as a procedure for determining immunity prior to trial). In this case, the trial court fully charged self-defense - the substantive point of law upon which subsection 16-11-450(A) depends. Subsection 16-11-450(A) is a procedural provision that is not relevant to the work of a jury. In fact, if a defendant is entitled to the relief set forth in the subsection, defendant is shielded from trial and no jury will ever hear the case. 392 S.C. at 410, 709 S.E.2d at 665. Thus, the trial court correctly refused the requested charge.

(K) Trial counsel was ineffective in failing to ask for the directed verdict on venue as a pre-

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trial motion instead of a jury charge since the same principals apply to venue as in the immunity from the Protection of Persons and Property Act. (Article 6). It is a pre-trial motion, and if the court lacks jurisdiction than a trial can not comense and the defendant is shielded from a trial in such jurisdiction and a jury will never hear the case in said jurisdiction. Therefore trial counsel was ineffective in failing to ask for the directed verdict on venue as a pre-trial motion rather than a jury instruction.

(L)

Appellate counsel Robert M. Dudek was ineffective in failing to claim the directed verdict on self-defense since it was ruled upon by the trial judge and therefore it was preserved for appellate review and this issue ^{was} ~~was~~ ^{disposi-} ~~disposi-~~ ^{tive} of this case. Tr. 269, 20-270, 18. We would make a directive verdict motion regarding the sufficiency of the evidence. My client is charged with murder. There has been no testimony, or offered into evidence, regarding my client acting with malice or with a cold heart, Your Honor... Tr. 271, 24-272. The Court: "All right, well based upon my consideration of the evidence I do find that there is substantial circumstantial evidence establishing both the element of malice... So the

and then

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defense's motion for a directed verdict are denied". Tr. 318, 13-17. "We would again move for a directed verdict based upon the insufficiency of the evidence. Your Honor, again, there was no indication that my client acted in malice. In fact, he was acting in self-defense -- and for all the other reasons we articulated earlier yesterday..." Tr. 319, 3-15. "And we would argue under the castle doctrine, Your Honor, that he is qualified for immunity in these circumstances Tr. 322, 8. The Court: "I'm going to deny your motion for a directed verdict."

Defendant wrote a letter to appellate counsel Robert M. Dudek on Jan 17, 2012 also left a voice mail in Mr. Dudek's voicemail on Jan 18, 2012 @ about 11:00 a.m. with the same message as in the letter: "Dear Mr. Dudek, my case is parallel to the Hendrix case. State V. Hendrix, 244 S.E.2d 503(S.C.1978). And we proved self-defense as a matter of law, and I was entitled to a directed verdict of acquittal; and my case should be overturned and remanded for a verdict of acquittal, not a new trial. Appellate defender Robert M. Dudek was ineffective in failing to claim the directed verdict on self-defense since this issue was dispositive of this case. See State V. Russell 546 S.E.2d 202(S.C. App. 2001), "We find the argument was raised to the trial court and is

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preserved. See also: Jones V. Burns, 463 U.S. 745 (1983), Appellate counsel has a professional duty to choose among potential issues according to their merit.

(m)

Appellate counsel Robert M. Dudek was ineffective in failing to claim the issue of the directed verdict on venue since it was ruled upon by the trial court, therefore it was preserved for appellate review; and since it was an issue that was dispositive of this case because Spartanburg Superior Court had no jurisdiction over this case. Tr. 119, 10-11, Officer Jeffery Powell: "I asked him [Alfredo Jimenez, the eye witness said under excited utterance] were it happened at and he would just say Wal-mart. He did say Wal-mart."

Tr. 138, 21-23 Det. Dale Arterburn.

A. The call came in that there had been a homicide that had occurred in the City of Greer, yet the vehicle and the victim were located downtown Spartanburg.

Tr. 140, 17-25

A. The area that we had arrived to based on information showed fresh skid marks on the roadway and particles of debris that appeared to be consistent with the vehicle's condition that had had some damage to the front end. But it appeared to be damage to a vehicle or

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vehicle particles in the roadway. They were freshly, freshly applied, I mean, not something that was all debris, but it was new. Obviously, and that's where his--I'm sorry--where we were taken to.

Tr. 141, 18-23.

- A. We then drove the, the witness back to Spartanburg, made contact with Spartanburg Officials and advised them what had been stated to us. That information was turned over to them, along with the witness. After that we then left, left them with the witness and the information that we had passed on to them.

Tr. 143, 22-144, 22

- A. Essentially, we were primary investigators involved at the scene. The information led to us or passed onto us was this occurred in the City limits of Greer, in front of the Wal-mart in Greer.

- A. So we were, we were actually advised that was where it occurred. So at that time we, we were obviously using any witness we could use to establish jurisdiction yes.

- Q. Okay. You indicated you are a detective.

- A. Yes, ma'am.

- Q. How long have you been on the Force?

- A. Been there 14 years.

- Q. Fourteen years. So I would imagine you've done

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a lot of homicide investigations, correct?

A. Yes

Q. Okay. And isn't it fairly important in any type of investigation to write a few notes in your report?

A. I would agree on the investigation yes.

Q. Okay. It's not good just to rely on hearsay and telling folks anything. You should always write it down in a report, correct?

A. For anything that happens in Greer yes.

Q. Okay. In fact, you didn't write up any police report, isn't that correct?

A. On this case, no, ma'am.
Tr. 145, 18-147, 13.

Q. Okay. And, in fact you were initially -- thought it was at wal-mart correct?

A. That's the information that was passed to us yes that it occurred in front of wal-mart in Greer.

Q. And that's actually off Highway 29 correct?

A. That's correct.

Q. How far is Highway 29 to Tacapaw? It's a little bit of ways, isn't it?

A. Yes.

Q. Probably about 10 or 15 miles?

A. Maybe.

Q. Okay. And, in fact, when you got to Tacapaw and Highway 29 you actually did see skid marks, correct?

A. Yes.

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Q. And some debris, in the road correct?

A. Yes.

Q. Okay. did you take pictures?

A. It's not in the City of Greer. No I did not.

Q. Okay. You didn't want to assist the City or the County in their investigation of this case?

A. Are you asking me if I would?

Q. Yes.

A. I believe we had at that point established that we were assisting them by establishing jurisdiction, not in Greer.

Q. Okay. Who did you pass that information along, hey, there's skid marks and looks like there's some fresh debris in the road?

A. At that time we passed it on to Spartanburg County or Spartanburg City officers who were present on the scene over at the City Hall. I apologize.

Q. Okay. Do you recall who that would have been?

A. I have no idea who we spoke with. There was, there was multiple investigators, were called out, and they were doing a role-call. And there was, there were a lot of people around, but I don't know who we spoke to directly, no.

Q. Okay. And that debris--I think you indicated it could have been car pieces or plastic or something that came from a car?

A. It was plenty of fragmentation, particles of,

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of debris in that area where the skid marks were, yes.

Q. And it looked like it came from a car?

A. That could have come from anything. It looks like the vehicle or something had struck something and, and part of it was falling from it yes Tr. 164, 9-165, 8. Sgt. David Hogsted:

A. I am currently assigned to the crime scene unit, Sergeant over the night shift.

Q. And what does that mean, you are assigned to the crime scene unit?

A. Basically, the crime scene unit with the Sheriff's office, any time a patrol officer, they need to call us out for a crime scene, whether it be just to take photographs or process a crime scene for latent prints, blood evidence, pretty much anything, we respond and process those crime scene

Q. And how long have you been working in law enforcement?

A. Twenty-one years.

Q. And were you working on July the 21st of 2008?

A. Actually, no, I was not.

Q. What happened that morning?

A. About 6:00 a.m. that morning I was called at home by Sergeant Burges, and informed me of the incident and told me that it was actually located in the city of Spartanburg. There was some jurisdiction issues that it appeared that the

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incident had initially taken place in Greer. At that time the Sheriff's Office had an agreement with the Greer Police Department that we would respond to and process crime scenes within the City of Greer. So it was requested that we respond and I responded from my residence.

Tr. 185, 12-186, 22.

Q. You indicated that you were notified that this incident may have happened within the City limits of Greer, is that correct?

A. That's correct.

Q. And you actually have some type of agreement with Greer to help them investigate?

A. We did at that time, yes ma'am.

Q. Okay. And was information relayed to you that the actual shooting incident probably took place around Topacau Road?

A. Yes. I recieved a phone call that an area around the Tacapau Road area had been pointed out, that's where the shooting had actually taken place.

Q. Okay. And that's actually in the Wellford area is that correct?

A. That's correct.

Q. Okay. That's not in Greer?

A. No. Actually several miles from Greer.

Q. Okay. Were you told as an investigating officer that there were skid marks on the road on Highway 29 heading to Spartanburg?

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A. I do not recall being told that.

Q. Would that have been something you would have wrote down and investigated?

A. Yes.

Q. Probably went out and took some pictures of it?

A. Yes, ma'am.

Q. Were you told that there was any debris in the road that probably looked like a car or something something fresh in the road?

A. I do not recall being told that.

Q. And again, if you had been told that, would that have been something you would have wrote a note on and taken a look at exactly what it was?

A. Knowing me and the way I am I would have been on the phone getting somebody out there.

Tr. 270, 19-271, 8.

The second issue we would bring up is we would a motion to dismiss based on venue...

Tr. 271, 24-272, 4.

The Court: "So the defense's motions for a directed verdict are denied."

Tr. 318, 18-21.

Again, we would renew our motion regarding venue

Tr. 322, 8 The Court: "I am going to deny your motion for a directed verdict."

Defendant wrote a letter on Jan 17, 2012 and also left a voicemail on Appellant's defender Robert M. Dudek's voicemail on

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M. HOPE BLACKLEE

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Jan 8, 2012 @ 11:00 a.m.: Also the incident happened in front of Wal-Mart, which is in Greer, Greenville County, and I was entitled to a directed verdict of acquittal on venue, pursuant to State V. Wiggins, 184 S.E.2d 697 (S.C. 1971); and also State V. Allen, 224 S.E.2d 881 (S.C. 1976), so my case should have been overturned and remanded for a verdict of acquittal, not a new trial.

My trial counsel asked for those directed verdicts, and they were ruled on by the trial judge, Tr. 269, 20-272, 4 and again Tr. 318, 13-322, 8. And therefore those issues were preserved for appellate review. Appellate counsel Robert M. Dudek was ineffective in failing to raise those directed verdicts on appeal since those issues were dispositive of this case.

(n)

Appellate defender Robert M. Dudek or the Court of Appeals was ineffective in failing to give Marin the same treatment as in State V. Curry, 406 S.C. 364, 752 S.E.2d 963, S.C. 2013. Dec. 04, 2013, since Marin also did not have the benefit of Duncan and Marin's trial was in Oct 27, 2010. State V. Curry: Appellant moved for immunity under the Act at the directed verdict stage, calling it a "slightly unusual procedure." We note that our decision in Duncan was published after this case was tried. In fairness to the parties and the trial court,

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the Act is silent on the procedure to follow when an accused seeks immunity. While Duncan interprets the Act to require a pre-trial determination by the trial court, because appellant and the trial court here did not have the benefit of Duncan, we elect to treat the matter as preserved through the directed motion.

Marin was discriminated by not being given the same treatment as Curry supra. Tr. pg. 320, 6-10. And I think there is, at least in talking to some other practitioners on our list, there was some discussion as to whether or not it's actually a motion--here it is--whether or not a judge can sua sponte dismiss it, or if it's something that actually just goes to the jury. (The Act).

(o)

The Court of Appeals wrongfully ruled on the continuing to shoot issue since the directive went to the heart of the case, and because of the prosecutor's highly inflammatory and prejudicial closing arguments

(p)

The South Carolina Supreme Court erred by citing law against Marin which was enacted after Marin's indictment. Writ of Certiorari pg. 7. The Court of Appeals expressed concern that the charge Marin requested is not a correct statement of law.

Marin, 404 S.C. at 620, 745 S.E.2d at 151. On this point

Form 5, PCR, Attachment, pg. 21-B

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the court of appeals erred, for we have previously held that when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased... And then the Supreme Court contradicts itself: "But see: 40C.J.S. Homicide §189(2014) (1A) person who fatally wounds another, even in self-defense is not entitled to hasten the victim's death by continuing to pump bullets into the victim's body." (emphasis added). The Supreme Court is contradicting itself by acknowledging the continuing to shoot proposition in Hendrix Supra and enacting a law that contradicts said proposition. And: 40C.J.S. Homicide §189(2014) was enacted after Marin's indictment on July 21, 2008. Trial judge abused his discretion by not citing State v. Hendrix Supra, Tr. 404, 1-406, 1-2. After the trial judge recharged the jury on murder (malice) and voluntary manslaughter at the request of the jury, defense counsel told trial judge the cases on point for the continuing to shoot proposition previously requested were Douglas V. State and also State v. Hendrix. The trial judge discussed the Douglas case, but refused to discuss the Hendrix case which was the main case for the requested proposition. See Strickland V. Washington Supra.

Form 5, PCR, Attachment, pg. 22-B

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Criminal Law § 641.12(1). Government violates right to effective assistance of counsel when it interferes in certain ways with ability of counsel to make independent decisions about how to conduct defense U.S.C.A. Const. Amend. 6.

CLERK
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M. HOPE BLACKLEY

[Signature]

- Speedy Trial: Wheeler v. State 247 S.C. 397, 147 S.E.2d 999 (1966).
- Article 6: Protection of Persons and Property Act.
- State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011)
- Venue = State v. Wiggins, 184 S.E.2d 697 (S.C. 1971)
- Venue = State v. Allen, 224 S.E.2d 881 (S.C. 1976)
- Removal = State v. Tyndall, 518 S.E.2d 278 (S.C. App. 1999)
- Directed Verdict = State v. Hendrix, 244 S.E.2d 503 (S.C. 1978)
- Impeachment = State v. McMillian, 561 S.E.2d 602 (S.C. 2002)
- Duty of Judge = State v. Adkinson, 311 S.E.2d 79 (S.C. 1984)
- 0. Sister's Testimony = State v. Langley, 515 S.E.2d 98 (S.C. 1999)
- 1. Prejudicial Photos = State v. Middleton, 339 S.E.2d 692 (S.C. 1986)
- 2. Unqualified Expert = State v. Ellis, 345 S.C. 175 (2001) 547 S.E.2d 490
- 3. Failure to Charge = State v. Day, 535 S.E.2d 431 (S.C. 2000)
- 4. Failure to Charge = State v. Fuller, 377 S.E.2d 328 (S.C. 1989)
- 5. Failure to Charge = State v. Hill, 433 S.E.2d 848 (S.C. 1993)
- 6. Preserved for App. = State v. Russell, 546 S.E.2d 202 (S.C. App. 2001)
- 1. Closing Argument = State v. Linder, 278 S.E.2d (S.C. 1981)
- 3. Closing Argument = State v. Davis, 239 S.C. 280, 122 S.E.2d 633
- 1. No Duty to Retreat = State v. Sales, 328 S.E.2d 619 (S.C. 1985)
- 0. King Defense = Chalk v. State, 437 S.E.2d 19 (S.C. 1993)
- 1. King Defense = State v. Gorum, 428 S.E.2d 884 (S.C. 1993)
- 2. King Defense = Carter v. State, 392 S.E.2d 184 (S.C. 1990)
- 3. King Defense = State v. Robinson, 414 S.E.2d 142 (S.C. 1992)
- 4. King Defense = State v. Jackson, 389 S.E.2d 650 (S.C. 1990)
- 5. Exculpatory Evidence = Anderson v. Leek, 248 S.E.2d 120
- 6. Failure to Charge = State v. Sullivan, 345 S.C. 169 (2001) 587 S.E.2d 183
- 17. Failure to Charge = State v. Burkhardt, 565 S.E.2d 298 (S.C. 2002)
- 18. Directed Verdict = State v. Johnson, 362 S.E.2d 480 (S.C. 1987)
- 19. Directed Verdict = State v. Shrock, 322 S.E.2d 450 (S.C. 1984)
- 20. Self-Defense simple = State v. Davis, 317 S.E.2d 453 (S.C. App. 1984)
- 21. Malice Instruction = State v. Woods, 316 S.E.2d 673 (S.C. 1984)

12. Cross-exam of Witness = Food Lion V. Cox, 513 S.E.2d 860 (N.C. 1999)
13. Objections by Couns. = State V. Primus, 535 S.E.2d 152 (S.C. App. 2000)
14. Once Objection Made = State V. Holliday, 509 S.E.2d 280 (S.C. App. 1998)
15. Judge cannot Preside = Floyd V. State, 400 S.E.2d 145 (S.C. 1991)
16. Malice from Use of Weapon = State V. Belcher,
17. Definition of Murder and Manslaughter = State V. Blassingame, 344 S.E.2d 528 (S.C. 1978)
18. Ineffective Assl. of Couns. = Scott V. State, 513 S.E.2d 100 (S.C. 1999)
19. Moral Turpitude = State V. Hall, 411 S.E.2d 441 (S.C. App. 1991)
20. Medical Deliberate Indifference
1. ~~State~~ Directed Verdict of acquittal = State V. Warren, 213 S.E.2d 53 (Georgia)
2. Castle Doctrine = State V. Douglas 411 S.C. 307, 768 S.E.2d 232