

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2018-000553

GEORGE W. HUGHES,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

SECOND REVISED PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the lower court err in denying Petitioner relief where he met his burden of proof with regard to his allegation that Trial Counsel was ineffective for making opening arguments to the jury at Petitioner's trial which undermined Petitioner's trial strategy to present a claim of self-defense? **Allegation 1, Am. App. for PCR.**

2. Did the lower court err in denying Petitioner relief where he met his burden of proof with regard to his allegations relating to the testimony of Ketcherside concerning his claim that he took photographs of a knife in Petitioner's car at the scene because he wanted to verify it was the same brand and type as the knife found at the scene? **Allegations 5, 6, 7 and 8 Am. App. for PCR.**

3. Did the lower court err in denying Petitioner relief where he met his burden of proof concerning the failure of Trial Counsel to adequately investigate and utilize the forensic evidence in Petitioner's case and his failure to adequately cross-examine the prosecution's witnesses concerning the forensic evidence in this case? **Allegations 18, 19, 20, 36, 48, 49, 50, 51 and 52 Am. App. for PCR.**

4. Did the lower court err in denying Petitioner relief where he met his burden of proof with regard to his allegations that Trial Counsel was ineffective for neglecting to discuss the decision concerning whether to argue against a verdict of the lesser-included offense of voluntary manslaughter to the jury with him, for failing to advise him concerning the risks inherent in proceeding only on the charge of murder, for neglecting to advise him that he could assert his claim of self-defense while at the same time arguing that the evidence presented by the State failed to establish malice beyond a reasonable doubt and for neglecting to advise Petitioner that while asserting a claim of self-defense he could alternatively argue that if the jury did not find that he acted in self-defense, they should consider the absence of proof beyond a reasonable doubt of malice as the basis for a finding of guilt only as to the lesser-included offense of voluntary manslaughter? **Allegations 12, 13 and 14, 52, Am. App. for PCR.**

5. Did the lower court err in denying Petitioner relief where he met his burden of proof with regard to his allegation that Trial Counsel was ineffective for failing to adequate review for the jury in closing arguments all the evidence adduced at trial by the State and Petitioner which supported a finding of self-defense? **Allegation 10, Am. App. for PCR.**

STATEMENT OF THE CASE

Petitioner acknowledges that the statement of the case found in the Order of Dismissal is accurate. He would add that at the conclusion of the PCR hearing the Court granted leave for both sides to submit memoranda or proposed orders in support of their respective positions in lieu of closing arguments. The lower court's Order of Dismissal was filed on January 18, 2018, but was not received by Counsel for Petitioner until February 26, 2018. Petitioner's timely Notice of Appeal was filed on March 30, 2018. Petitioner's Original Petition for Writ of Certiorari was filed on August 14, 2019. Thereafter, he filed a Petition to Exceed the twenty-five (25) page limit on the length of his Certiorari Petition imposed by Rule 243(e)(3), SCACR. That petition was denied. Petitioner filed a Revised Certiorari Petition on March 27, 2019. In said Petition, Counsel for Petitioner incorporated by reference the Summary of Relevant Testimony, the arguments and authorities advanced in the Memorandum in Support filed by her in support of Petitioner's Questions Presented 6-22. In so doing, Petitioner submitted that it was impossible to address all the meritorious allegations perfected in this collateral review action in the allotted twenty-five (25) pages and further argued that Petitioner's cause presented an ideal case for this Honorable Court to address the open question in South Carolina concerning whether cumulative prejudice might serve as the basis for the grant of relief on Collateral Review. Respondent subsequently filed a Petition to Strike the portions of the Amended Petition for Writ of Certiorari addressing Questions Presented 6 – 22. Those Questions were as follows.

6. Did the lower court err in denying Petitioner relief where he met his burden of proof with regard to his allegation that Trial Counsel was ineffective for making statements during his

closing arguments which undermined the strength of Petitioner's claim of self-defense? **Allegation 11, Am. App. for PCR. Memorandum in Support, Section F, pgs. 124-126**

7. Did the lower court err in denying Petitioner relief where he met his burden of proof concerning his allegation that Trial Counsel was ineffective for neglecting to request a jury instruction which would have clarified the standard for self-defense to insure that the jury was aware that they could properly evaluate the evidence of self-defense in light of Petitioner's age and physical condition? **Allegation 17, Am. App. for PCR. Memorandum in Support, Section G, pgs. 126-127.**

8. Did the lower court err in denying Petitioner relief where he met his burden of proof with regard to his allegation that Trial Counsel was ineffective for failing to introduce into evidence the report issued by the South Carolina Law Enforcement Division concerning the toxicology screen conducted on the victim? **Allegation 25, Am. App. for PCR, Memorandum in Support, Section H, pgs. 127-128.**

9. Did the lower court err in denying Petitioner relief where he met his burden of proof concerning his allegation that Trial Counsel was ineffective for failing to object to numerous portions of the State's closing argument which were either factually inaccurate, addressed matters not in evidence or which were calculated to appeal to the passions and prejudices of the jury? **Allegation 15, Am. App. for PCR, Memorandum in Support, Section I, pgs. 128-133.**

10. Did the lower court err in denying Petitioner relief where he met his burden of proof with regard to his allegation that Trial Counsel was ineffective for failing to object to improper jury instructions given at Petitioner's trial which were contrary to South Carolina Law and which improperly diluted the State's burden of proof? **Allegation 62, Am. App. for PCR, Memorandum in Support, Section J, pgs. 133-136.**

11. Did the lower court err in denying Petitioner relief where he met his burden of proof concerning his allegation that Trial Counsel was ineffective for failing to introduce evidence concerning *Petitioner's positive reputation* for truthfulness and veracity in the community? **Allegation 28, Am. App. for PCR, Memorandum in Support, Section K, pgs. 136-137.**

12. Did the lower court err in denying Petitioner relief where he met his burden of proof with regard to his allegation that he was prejudiced by Trial Counsel's failure to fully explain to Petitioner all the relevant considerations concerning a waiver of the right to a direct appeal before asking Petitioner to sign a waiver of his right to a direct appeal? **Allegation 29 and 30, Am. App. for PCR, Memorandum in Support, Section L, pgs. 137 -139.**

13. Did the lower court err in denying Petitioner relief where he met his burden of proof with regard to his allegations addressing Trial Counsel's failure to adequately cross-examine Corp. Lamonte Edwards, and Trainee Jeffrey Rivas, concerning their claim that Petitioner told them the entire incident took place on the front porch and in the doorway to the trailer where the deceased was shot, as well as the failure of Trial Counsel to adequately cross-examine Corp. Lamont Edwards concerning why he would not have felt it necessary and appropriate to reduce any oral statement he took from Petitioner to writing and to give him the opportunity to review it

for accuracy to make necessary changes and to sign it to verify he had read it and agreed with its accuracy? **Allegations 32, 33 and 63, Am. App. for PCR, Memorandum in Support, Section M, pgs. 139-141.**

14. Did the lower court err in denying Petitioner relief where he met his burden of proof concerning his allegation that Trial Counsel was ineffective for neglecting to make a Motion to Strike, and a request for an appropriate curative charge, after a defense objection to testimony from Investigator Ketcherside was sustained on the ground that the witness was not qualified to give the opinion testimony concerning the amount of blood you would expect to find on a knife if it had been in the victim's hand as compared with the amount of blood on the weapon found in the hand of the deceased at the scene where and had not been qualified by the court in the field of blood evidence? **Allegation 38 and 39, Am. App. for PCR, Memorandum in Support, Section N, pgs. 141-142**

15. Did the lower court err in denying Petitioner relief where he met his burden of proof concerning his allegation that Trial Counsel was ineffective for failing to request a jury charge informing the jury that the standards for expert witnesses only applied to witnesses expressly qualified as expert witnesses, and even then, only applied to their testimony concerning areas in which that witness was qualified by the court as an expert? **Allegation 42, Am. App. for PCR, Memorandum in Support, Section O, pgs. 142-143.**

16. Did the lower court err in denying Petitioner relief where he met his burden of proof concerning his allegation Trial Counsel was ineffective for failing to object to testimony from Investigator Ketcherside in which he stated his opinion concerning the direction in which blood found at the scene of the shooting appeared to be moving, advanced his opinion that there was a single blood trail leading in from the front door, speculated that the volume of blood located at one place at the scene appeared to be due to the fact that the victim may have been trying to hide, where this witness had not been qualified as an expert witness in the field of blood splatter evidence and where his testimony was based on sheer conjecture and appealed to the passions and prejudices of the jury without evidentiary foundation and was prejudicial to Petitioner claim of self-defense? **Allegations 41 and 44, Am. App. for PCR, Memorandum in Support, Section P, pgs. 144-145.**

17. Did the lower court err in denying Petitioner relief where he met his burden of proof concerning his allegation Trial Counsel was ineffective for failing to object to testimony from Investigator Ketcherside concerning fingerprint evidence, and more specifically, the fact that the knife found in the victim's hand was not a viable surface from which to get fingerprints, where this witness had not been qualified by the Court as an expert in fingerprint technology? **Allegation 46, Am. App. for PCR, , Memorandum in Support, Section P, pgs. 144-145.**

18. Did the lower court err in denying Petitioner relief where he met his burden of proof concerning his allegation that Trial Counsel was ineffective for neglecting to cross-examine Ketcherside concerning his education and training with regard to forensic evidence? **Allegation 40, Am. App. for PCR, , Memorandum in Support, Section P, pgs. 144-145.**

19. Did the lower court err in denying Petitioner relief where he met his burden of proof concerning his allegations Trial Counsel was ineffective for failing to impeach State witness Sean Garvin with his statement to law enforcement in which he acknowledged that Petitioner had previously taken out a restraining order against him, for failing to cross-examine this witness concerning his motive for testifying against Petitioner at trial and for failing to be prepared to utilize testimony from Daniel Ruppel to impeach Garvin's credibility by demonstrating his prior statements to Ruppel admitting he was going to testify against Petitioner because of that incident? ? **Allegation 68, Am. App. for PCR, Memorandum in Support, Section Q, pgs. 145-148.**

20. Did the lower court err in denying Petitioner relief where he met his burden of proof regarding his allegations that Trial Counsel was ineffective for arguing that the knife found in Appellant's car was "*missing*" where the testimony of Investigator Ketcherside clearly indicated that he made a conscious decision not to preserve the knife as evidence and for neglecting to investigate the whereabouts of the knife referenced as having been found in Petitioner's car, and failing to produce the knife at Petitioner's trial so the jury could compare that knife with the knife found in the Victim's hand? **Allegations 55 and 56, Am. App. for PCR, Memorandum in Support, Section R, pg. 149.**

21. Did the lower court err in denying Petitioner relief where he met his burden of proof concerning his allegation that Trial Counsel was ineffective for failing to object to portions of the prosecution's closing argument on the law, and the State's subsequent final argument to the jury, which misstated the law in South Carolina and created a mandatory presumption of malice from certain circumstances present in Petitioner's case? **Allegations 57, 58 and 59, Am. App. for PCR, Memorandum in Support, Section S, pgs. 150-163.**

22. Did the lower court err in denying Petitioner relief where the cumulative prejudice arising from the numerous errors and omissions of Trial Counsel demonstrated by Petitioner in his Post-Conviction Relief action was such that it clearly warranted the reversal of his conviction and sentence on the ground that he received ineffective assistance of counsel in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution? **Allegation 69, Am. App. for PCR, Memorandum in Support, Section T, pgs. 163-167.**

The portions of this petition which have now been stricken are addressed at length in the Memorandum in Support filed in the circuit court. Respondent's Motion to Strike was granted by Order of the Chief Justice Beatty dated December 12, 2019.

STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The standard of review in a Post-Conviction Relief appeal is

whether “any evidence of probative value” exists to support the Post-Conviction Relief court’s findings. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). The burden of proof is on the Petitioner in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000); Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner must show that but for counsel’s errors and omissions, there is a reasonable probability that the result at trial would have been different. *Id.*; *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by this Honorable Court as a probability sufficient to undermine confidence in the outcome of the trial. *Ard v. Catoe*, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Counsel may not explain away errors and omissions which acted to prejudice his client’s ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

ARGUMENT

Question Presented 1, Allegation 1, Am. App. for PCR

In his opening statement, Trial Counsel informed the jury that the deceased, *“brought a knife to a gun, a gunfight.”* He told the jury that there, *“will be evidence, I suspect that [the deceased] pulled a knife”* on Petitioner.

The testimony from this trial establishes that Petitioner’s statements in two 911 calls included claims that the deceased had a knife, and that he had shot him in self-defense. Photographs provided to the defense in the discovery process confirmed that the deceased was found with a knife in his hand. Trial Counsel knew that his client had a concealed weapon permit and carried when he was collecting money from tenants. It was ineffective for Trial Counsel to say he merely *“suspected”* evidence would be introduced that the deceased pulled a knife on Petitioner. This statement could easily have been interpreted to mean that Petitioner’s own lawyer was not certain evidence supporting that claim would be introduced. This statement is simply inexplicable in a trial where self-defense was to be asserted and Trial Counsel had photographs documenting that a knife was found in the hand of the deceased. The statement about the Victim having brought a knife to a gunfight was prejudicial on multiple levels. First, it suggested Petitioner had gone to the scene to *“fight”* the deceased. Perhaps of equal importance, this comment came across as a joke about the tragic events in this case. The combination of these remarks quite simply started Petitioner’s trial off on the wrong foot. They conveyed hesitancy by Trial Counsel to commit to the assertion that Petitioner acted in self-defense. Trial Counsel’s remark about the deceased bringing a knife to a gunfight was virtually guaranteed to be repeated by the prosecution and it was. See, App. p. 541, ll. 8-14, where the prosecutor stated, *“[a]nd I submit that even Mr. Davis in his opening statement and in his closing statement says that his client doesn’t have clean hands. What does he say? He says Mr.*

Kemmerlin brought a knife to a gunfight. What does that mean? Who was there to fight to fight with a gun? His client. How can you be without fault if you're the one doing to fight?

Petitioner demonstrated below that Trial Counsel failed to provide him reasonable professional assistance starting with the opening statement he presented on Petitioner's behalf. For the reasons set forth in this Question, Applicant should be granted a new trial.

Question Presented 2, Allegations 5, 6, 7, and 8 Am. App. for PCR

In its opening remarks to the jury, the prosecution did not even mention that the alleged Victim was found with a knife in his hand at the scene. As noted above, Trial Counsel brought the knife up by commenting that the Victim brought a knife to a gunfight. Trial Counsel followed that statement up with the comment that he *suspected* there would be evidence the Victim pulled a knife on Petitioner. **App. p. 67, ll. 1-8.** As noted above, these statements were a questionable way to lay a foundation for a claim of self-defense. Thereafter, Ketcherside testified about the knife found in the hand of the deceased. **App. p. 177, l. 22-p. 178, l. 13.** During the cross-examination of Ketcherside, Trial Counsel questioned Ketcherside about finding another knife in Petitioner's car. Ketcherside testified that this knife was not collected and taken for evidence because it "***had no bearing on the case.***" When questioned further by Trial Counsel about how he made the decision not to retain possession of that knife, Ketcherside stated, "***... I wanted to verify that it was the same brand and type of knife that was found at the scene.***" **App. p. 221, ll. 17-20.** Although Trial Counsel continued to question Ketcherside about why he had not collected the knife for evidence, he did not question Ketcherside as to whether he had ever actually been able to verify that the knife in Petitioner's car was in fact "***the same brand and type***" as the knife found in the hand of the deceased. Petitioner submits that any ambiguity in Ketcherside's testimony was likely to be resolved in the favor of the State once

Trial Counsel failed to ask follow up questions on this point. As the State's case was presented, it became clear that the prosecution's theory of the case was going to be that Petitioner had planted the knife found in the hand of the deceased. The prosecution had already asked Ketcherside, "*... did you note anything between the right hand and the knife at the time in your reports or in your observations?*" Although the Court sustained an objection by the defense¹, the jury nevertheless heard Ketcherside state,

Yes, sir. The knife didn't appear to have the amount of blood on it that you'd expect if someone was gripping the knife in their hand. And the amount of blood on the knife was not consistent – App. p. 181, ll. 15-18.

Trial Counsel testified that he didn't object to the testimony about the knife because it fit his strategy to show that Petitioner's pocketknife was in his car. His articulated theory was that very few men carried pocketknives anymore, and that testimony that Petitioner owned a pocketknife, but it was in his car, made it less likely the jury would have believed he had another knife to plant on the Victim. His testimony reflects his belief that it did not matter if the jury believed they were "*the same brand and type*" or not. Petitioner respectfully submits that the opposite is true. Petitioner asks this Honorable Court to take judicial notice of the fact that there are countless companies that manufacture knives. That fact is precisely what made Ketcherside's testimony so prejudicial. If any juror(s) interpreted Ketcherside to mean he took the photographs to verify that these two knives *were "the same brand and type"*, the damage to Petitioner would be irreparable. Respondent acknowledged on the record that if these two knives had in fact been the same brand, it would have been a big part of the State's case. The fact that Petitioner had a black handled pocket knife in his car may not have influenced Petitioner's jury to believe he was more likely to have planted the one in the hand of the deceased. If you add the

¹ App. p. 181, ll. 19-24. Trial Counsel did not follow up his objection with a Motion to Strike this testimony or a request for a curative charge.

assertion that Ketcherside took the photographs of the knife in car to verify the two knives were *“the same brand and type”* the probable consequences substantially change. That assertion made it very likely that one or more jurors would question the statistical likelihood that the knife in the Victim’s hand would *“coincidentally”* be *“the same brand and type”* as one found in Petitioner’s own car. The fact that the victim and the Petitioner had similar knives would not be likely to carry much weight with the jury where there was nothing terribly unusual about the basic color, size and type of the knives in question. On the other hand, if the two knives had in fact been the same brand and type, then anyone would be likely to question just how improbable that was statistically.

Earlier testimony on cross-examination of this witness demonstrated that Trial Counsel was aware of the need to clarify such off-handed assertions by Ketcherside. Trial Counsel asked Ketcherside who he took buccal swabs from. He answered that he took swabs from Petitioner. When asked what those swabs were to be compared to, Ketcherside responded, *“To any DNA evidence that may be on scene whether it be blood, DNA swabs with the knife for ownership. His DNA may be on the blood -- on the knife, or maybe his blood was on the knife or maybe his blood was there at the scene.”* . App. p. 218, l. 13- p. 219. l. 1. Trial Counsel immediately responded by asking Ketcherside to clarify, *“[b]ut you haven’t found that to be the case?”* App. p. 219, ll. 2-6. Trial Counsel obviously knew from the discovery process, before this trial, that none of Petitioner’s DNA had been found on the knife in question. Armed with that knowledge, in that situation he took necessary steps to insure that the jury did not think Petitioner’s DNA had been matched to that knife. Subsequent State witnesses would go on to establish that the only DNA found on the knife in the Victim’s hand was his own. No other State witness would testify

that these two knives were not, as implied by Ketcherside, “*the same brand and type.*” Trial counsel did nothing to set the record straight concerning this equally important statement.

Trial Counsel stated that he did not need to clarify this point because the jury could see for themselves that the two knives were not alike. It is Petitioner’s position that Trial Counsel should have cross-examined Ketcherside further on this question. Whatever Ketcherside’s response may have been, it would have been beneficial to the defense. If Ketcherside had responded by testifying that he had verified the two knives were “*the same brand and type*”, Trial Counsel could have rigorously crossed this witness concerning what facts backed up that claim. As the lower court acknowledged, there is no evidence that these knives are the same brand. If he had conceded that the two knives had not proven to be “*the same brand and type*”, then Petitioner would have been protected from the jury’s likely conclusion that the odds against these two knives being the same brand were simply too great for it to be a coincidence. The jury would have logically questioned whether Ketcherside would have revealed that information if Trial Counsel had not forced his hand and whether he had intentionally answered the question in a manner which implied he took the pictures because the two knives matched. Petitioner submits, that these questions alone, would have damaged this key witness’s credibility and thereby, the strength of the State’s case.

This testimony built upon Ketcherside’s earlier testimony that there wasn’t as much blood on the knife found in the hand of the deceased as he would have expected to see. Although Petitioner’s objection to that testimony was sustained, Trial Counsel did not request that it be stricken and he did not request a curative charge. The implication that the knife was planted was further strengthened by the subsequent trial testimony of Dr. Ross regarding State’s Ex. No. 53 and 54; two photographs showing a knife in the Victim’s right hand. App. p. 227, ll.

17-23. Dr. Ross testified that, “[a]pparently, there is a knife in the victim’s right hand. When somebody bleeds out and is getting shocky, they go unconscious. And so all their muscles relax. And if they were holding something it would just fall down to the floor or whatever they were on. So it’s not typical to see a weapon remaining in the hand that way”. App. p. 337, l. 24- p. 228, l. 4. (Emphasis added).

This testimony was significantly clarified in the testimony presented by Dr. Ross during this PCR hearing. As outlined in the Memorandum filed below, Dr. Ross acknowledged that if an individual was down on the ground, with his hand against a hard surface like a floor, with his fingers curled around an instrumentality when he became unconscious, the object would have had nowhere to fall. Dr. Ross agreed that under such circumstances, the position in which the victim’s hand had been found with the knife in it would be consistent with what she would expect to find. App. p. 635, l. 18 - p. 636, l. 22; PCR Tr. p. 12, l. 18 – p. 13, l. 22. Petitioner’s jury unfortunately did not have the chance to hear that testimony due to Trial Counsel’s failure to adequately cross-examine her.

In the discussion of these issues at the end of the PCR hearing, the Respondent acknowledged that, “if he had in fact verified that the brands were the same, it would’ve been a big part of the State’s case”. That analysis acknowledges just how prejudicial this testimony would have been to Petitioner’s case if any juror(s) interpreted Ketcherside’s testimony as an assertion that he had taken the photographs of the knife in Petitioner’s car in order to verify that the two knives were “the same brand and type.” The clear danger is that one of more jurors may have interpreted the phrase used to mean he took the picture to document that the two knives were “the same brand and type.” The PCR Court’s remarks during the PCR Hearing include the Court’s view that there had not been any assertion by the prosecution that the deceased had not

had a knife or that the one found in his hand had been planted. **App. p. 856, l.3- p.245, 11.** Petitioner would most respectfully point out that the prosecution did expressly argue that the alleged Victim *did not* have a knife. First, the prosecutor erroneously claimed that the testimony of Dr. Ross ***“proves the victim didn’t have a knife.”*** **App. p. 547, l. 22- p. 548, l. 10.** Later in his closing, the prosecutor made other statements clearly intended to convey the State’s position that the deceased had not had a knife. He stated, ***“Now, let’s assume for the sake of argument that you believe the Victim had a knife.”*** **App. p. 549, ll. 12-13.** And later, ***“if you belief that the Victim had a knife...”*** **App. p. 549, ll. 17-18.** Obviously the prosecution did argue the deceased did not have a knife and therefore, implied that the clear inference to be drawn from the fact that one was in his hand when EMS personnel and law enforcement arrived would be that Petitioner planted it. That theory of the case was built by the prosecution entirely out of improper evidence; Ketcherside’s testimony inviting the inference that the knife found in Petitioner’s car was ***“the same brand and type”*** as the one found in the hand of the deceased; Ketcherside’s improper opinion testimony that the knife found in the hand of the deceased did not have enough blood on it for the Victim to have been holding it during this incident and the erroneous claim that Dr. Ross’s testimony ***proved*** the deceased didn’t have a knife.

When asked if he had personally examined all the physical evidence in this case, Trial Counsel’s answer was not unequivocal. Once Ketcherside made this statement, Trial Counsel should have asked for a break to compare the knife found in the Victim’s hand with the photographs of the knife found in Petitioner’s car. He did not do so. Instead, he quickly changed the direction of his cross-examination and left the implication inherent in Ketcherside’s testimony unchallenged. Neither did Trial Counsel remove the damage from this prejudicial testimony by demonstrating for the jury in closing arguments that there was no basis for anyone

to conclude that the two knives were “*the same brand and type*” and by inviting them to closely compare the two knives, the photograph of the knife from Petitioner's car and the actual knife found in the hand of the deceased, themselves during their deliberations. Even in the face of this improper testimony, and the fact that it went unchallenged by the defense, Petitioner’s jury still required being recharged on the law relating to self-defense, murder and voluntary manslaughter. Petitioner respectfully asserts relief was warranted on these allegations.

Questioned Presented 3
Allegations 18, 19, 20, 36, 48, 49, 50, 51 and 52 Am. App. PCR

Trial Counsel was ineffective for failing to subpoena a witness from SLED in order to be prepared to introduce the toxicology report issued by that agency on the Victim.² He was ineffective for failing to question Dr. Ross concerning whether that report had been adopted by her and made an official part of her autopsy report in this case. The testimony of Dr. Ross during the PCR proceedings confirmed that THC the active ingredient in marijuana and two types of stimulant, an amphetamine and a metabolite of ephedrine, were found in the bloodstream of the deceased. The SLED report, introduced only as a Court’s Exhibit during this proceeding, shows that the level of THC in the blood of the deceased was 3.4 mg/l and the threshold for that substance was 2.00. The report found, using Gas Chromatography/Mass Spectrometry, Amphetamine at a level of 0.09 mg/l and a level of 0.01 for ephedrine, which would give a combined level of 0.1 for amphetamines which would arguably meet the 0.100 threshold for methamphetamine.

Trial Counsel was ineffective for failing to more thoroughly cross-examine Dr. Ross concerning her assertion that one of the wounds displayed stippling from a shot fired within

² Applicant acknowledges that the PCR Judge declined to allow PCR Counsel to introduce the toxicology report as a PCR Exhibit. He asserts that the PCR Court erred in so ruling where Dr. Ross identified the toxicology report which was incorporated by her as part of her autopsy report. Therefore, although she did not prepare the toxicology report, it was made a part of the official autopsy record in this death.

inches of the Victim. Her PCR testimony confirms that she could not determine the distance from which that shot was fired beyond a range of within inches *up to two feet* without information concerning ballistics testing which she did not have in this case. She was not cross-examined concerning her claim that, *“it’s not typical to see a weapon remaining in the hand that way.”* Her PCR testimony confirms that with proper cross-examination, on facts consistent with the position the body was found, this expert witness would have acknowledged the knife being in the hand of the deceased would be consistent with what she would expect to find. As noted *supra*, she acknowledged that if an individual was on the ground, with his hand against a hard surface, with his fingers around an instrumentality when he became unconscious, the object would have had nowhere to fall. She agreed that under such circumstances, the position in which the victim’s hand had been found with the knife in it would be consistent with what she would expect to find. **App. p. 635, l. 18 - p. 636, l. 22.** Because of Trial Counsel's failure to properly cross-examine Dr. Ross, Petitioner’s jury unfortunately did not have the chance to hear that testimony.

Dr. Ross opined that the manner of death was *“homicide”* and the cause of death was exsanguination; meaning that the Victim bleed to death. **App. p. 338, ll. 5-12.** Trial Counsel subsequently cross-examined Dr. Ross concerning the definition of homicide. She responded by testifying, *“according to Black’s legal Dictionary, it’s simply the life taken by another through the action or inaction of that person.”* **App. p. 342, ll. 7-11.** Trial Counsel then asked Dr. Ross, *“you don’t have any idea who that person was?”* Dr. Ross acknowledged that she did not. **App. p. 342, ll. 12-17.** Trial Counsel did not question Dr. Ross as to whether the term *“homicide”* applied to both lawful and unlawful killings. Black’s Law Dictionary, 8th Edition, in fact notes that the term refers to *“the killing of one person by another”* whether lawful or not.

Rather than ask Dr. Ross to clarify the definition she provided for this term, Trial Counsel asked her to admit that she did not, “*have any idea who that person was?*” Petitioner submits that this limited cross-examination on this point did not provide the jury with the necessary explanation that the term homicide, as she had used it in stating the manner of death, did not indicate a finding that the killing was unlawful. Petitioner respectfully asserts that, to a lay person, the term homicide carries with it the connotation of criminality. Left without proper clarification, the testimony of Dr. Ross concerning the manner of death could easily have been interpreted by the jury as her expert opinion that the cause of death involved an unlawful killing.

Dr. Ross identified State’s Ex. No. 2, 3, 4 and 5 as the bullets retrieved from this autopsy. App. p. 335, ll. 16-21. On cross-examination Dr. Ross described observing six (6) wounds and collecting four (4) bullets. She indicated that “*one wound was in and out*” and said she “*felt*” that the shot through the forearm re-entered the chest. App. 339, l. 20- p. 340, l. 8. She testified that she had no idea where the missing bullet(s) went. App. p. 340, ll. 9-11. Dr. Ross was not questioned concerning the inconsistency in her testimony concerning the number of through and through shots, nor was she questioned about whether a bullet was retrieved from GSW No. 2. As noted above, Dr. Ross in fact testified to two of the GSW being through and through shots; GSW No. 4 and 6.

CSI Ketcherside was not cross-examined by Trial Counsel concerning his claim that the blood trail in this case lead exclusively from the front door toward the back of the trailer despite the introduction of photographs as State’s exhibits which clearly showed a blood pattern consistent with Petitioner’s version of events; a looping pattern inconsistent with a single pass. **See, St. Ex. No. 35, App. Ex. No. 6 and St. Ex. No. 20, Pet. PCR Ex. No. 7.** Ketcherside was not challenged on his qualifications to give opinion testimony concerning the fact that the handle

of the knife found at the scene did not provide a good surface for obtaining finger prints or his opinion that the location of the blood patterns at the scene lead him to believe the deceased tried to hide from Petitioner.

SLED Agent Green was not cross-examined concerning the ballistics testing that could have been conducted to determine the average distance Petitioner's gun would eject a spent cartridge casing after each round was fired.

Petitioner respectfully submits that the trial record, as well as the PCR hearing testimony and exhibits, demonstrate that Petitioner's claim of self-defense could have been substantially strengthened if Trial Counsel had more thoroughly cross-examined the State's witnesses concerning the forensic evidence in this case.

Question Presented 4
Allegations 12, 13 and 14
Amended Application for Post-Conviction Relief

Petitioner testified that Trial Counsel had come to him at some point with a potential plea offer to five (5) years. He stated Trial Counsel never said what crime the five year sentence would be for if he agreed to plead. He acknowledged, however, that he knew murder carried "*a mandatory 30 years.*" **App. p. 846, ll. 1-15.** Petitioner acknowledged that, at that point, he rejected entering a plea to anything in connection with this killing. **App. p. 846, ll. 16-24.** He testified that he rejected the potential plea offer because he was innocent and did not want to plead to something he did not do. **App. p.847, ll. 12-14.** Petitioner asserted that after he told Trial Counsel he would not plead guilty to Voluntary Manslaughter; his lawyer never had any discussions with him about whether Petitioner wanted to oppose Voluntary Manslaughter being submitted to the jury as a verdict option. **App. 846, ll. 20 - 24.** He stated that he understood that the trial judge submitted the charge of Voluntary Manslaughter to his jury despite his

objections. He testified that he had *no discussions* with Trial Counsel, once they knew Voluntary Manslaughter would be charged, concerning whether he wanted Trial Counsel to argue *“that if the jury did not find [he] acted in self-defense, they should, at worst, find [him] guilty of the lesser included offense of Voluntary Manslaughter.”* App. p. 847, ll. 4-11. Petitioner very clearly testified that if he had known he could assert self-defense, but still alternatively argue that, if they did not find he acted in self-defense, at worst he was guilty of the lesser offense of Voluntary Manslaughter, he *would have* wanted his lawyer to make that argument to his jury. He reiterated that Trial Counsel never discussed this important decision with him and stated that Trial Counsel made the decision against that approach on his own. App. p. 847, l. 4- p. 848, l. 10. Again, Petitioner did not dispute that he declined to plead guilty to anything, but confirmed that in his mind that was different from taking the position that he did not want the jury to consider voluntary manslaughter a verdict option. App. p. 848, ll. 11-16. Respondent did not cross-examine Petitioner during his PCR hearing. App. 852, ll. 6-8.

Trial Counsel's PCR testimony, and the trial record, confirm that he objected to the jury being given Voluntary Manslaughter as a verdict option. Once more his answer was, *“[a]gain, if the transcript says I did, I did.”* App. p. 663, ll. 17-21, App. p. 569, l. 22- p. 570, l.7. Once it became clear that the trial court was going to submit Voluntary Manslaughter to the jury as a verdict option, Trial Counsel strenuously argued against a jury verdict of guilty of Voluntary Manslaughter in his closing argument. App. p. 532, l. 21- p. 533, l. 6. When Trial Counsel was questioned about what legal advice he had given Petitioner concerning the distinctions between Murder and Voluntary Manslaughter in South Carolina, he asserted he had advised Petitioner of the definitions of both offenses and the potential sentences for each offense. His answers to questions concerning these factors were clear and unequivocal; each time responding, *“I did.”*

App. p. 664, ll. 2-15. When asked, however, if he advised Petitioner that a sentence for Voluntary Manslaughter, unlike a sentence for Murder, *would not* have to be served day-for-day, Trial Counsel waived and responded, “[a]s I recall, yes.” When asked if he specifically recalled giving Petitioner advice concerning this crucial decision, Trial Counsel did not answer the question, but rather stated he recalled “*going over the manslaughter charge and the murder charge with Mr. Hughes.*” Petitioner submits that he never understood that he could advance a claim of self-defense and still argue in favor of Voluntary Manslaughter as an alternative verdict to murder. He refused to consider *pleading* to any crime because he was, and is, innocent. His PCR testimony confirms that he felt differently about allowing the jury to consider the question of whether he was guilty of Voluntary Manslaughter versus Murder in the event they rejected his claim of self-defense. Trial Counsel's testimony asserts that he informed his client of the elements of Murder and Voluntary Manslaughter as well as the sentencing exposures for each. What is not clear is whether Trial Counsel ever adequately informed Petitioner of the day for day service requirement for murder, or that a claim of self-defense *did not preclude him from arguing in favor of Voluntary Manslaughter as a verdict option.* Petitioner submits that he would not have wanted Trial Counsel to object to the submission of this lesser-included offense if he had understood that he could argue self-defense *and* the alternate theory of Voluntary Manslaughter. He has clearly asserted that once it became obvious that the trial court was going to submit Voluntary Manslaughter as a verdict option, he absolutely, with no doubt in his mind, would have wanted Trial Counsel to argue in favor of Voluntary Manslaughter versus murder in the event the jury did not find that he acted in self-defense. It is important to note that Trial Counsel appears to have assumed that since Petitioner did not want to plead guilty to Voluntary Manslaughter, he would not want to argue in favor of it at trial.

Question Presented 5
Allegation 10, Am. App. for PCR

As demonstrated in the trial summary contained in Petitioner's Memorandum, there were many factors in support of Petitioner's claim of self-defense which were not reviewed for the jury in Trial Counsel's closing argument. With regard to the law, Trial Counsel neglected to expressly refute the State's claim that under the law use of a deadly weapon *is* malice and shooting someone five times *is* malice. Trial Counsel should have argued that the prosecutor's claims were not only misstatements of the law, but simply put, did not make sense where, 1) a person could obviously use a weapon in self-defense and 2) once justified in using force in self-defense the person depending themselves, "***he is justified in continuing to shoot until it appears that any danger to his life or body has ceased.***" *Douglas v. State*, 332 S.C. at 72-73, 504 S.E.2d at 309-210 (S.Ct. 1998); *State v. Hendrix*, 270 S.C. 653, 662, 244 S.E.2d 502, 507 (S.Ct. 1978).

Trial Counsel neglected to point out to the jury that where the Victim bled after being shot and where his body was ultimately found, did not establish *where* he was shot. Trial Counsel failed to draw the jury's attention to the fact that Dr. Ross's testimony acknowledged that a "***close***" gunshot can be fired from up to ***two feet*** from the muzzle of the gun. App.p. 332, l. 24 – p. 333, l. 7. He failed to point out that this testimony meant that the one GSW, with stippling, found on the Victim at autopsy could have been fired from just under two feet plus the length of Petitioner's arm extended from his body, estimated at 2.5 feet, plus the length of the pistol; approximately five and a half (5.5) feet. The arrest warrant in this case puts Petitioner's height at six (6) feet tall. The SCDC records before this Court reflect the same height for Petitioner. Both the SCDC Records of Petitioner, and the Records of the Clerk of Court, were part of the judicial packet presented to the Court for this evidentiary hearing. Additionally, both the SCDC records and the records of the Clerk of Court are matters of public record. Thus,

Petitioner asserts that an estimate of 2.5 feet is a conservative estimate of the length of one of Petitioner's arms.

Trial Counsel failed to argue the height of the threshold of the front door of this trailer as compared to the height of the stoop, how narrow that stoop was and how high it was off the porch, the makeshift appearance of the stoop and the clutter on the porch; all of which were visible in photographs introduced by the State introduced at trial.³ Drawing attention to each of these factors would have demonstrated why Petitioner would have been afraid to try to back out of the trailer.

Trial Counsel failed argue to the jury that regardless of whether Petitioner's possession of a weapon on this property was *unlawful*, once circumstances required that he arm himself in self-defense by pulling out that weapon, the law in S.C. supports the principal his unlawful possession of the pistol on private property would not preclude a defense of accident or self-defense.⁴ He did not remind the jury that the judge had ruled that Ketcherside *was not* qualified to give opinion testimony on blood evidence. Trial Counsel did not argue Petitioner's physical limitations as a result of his heart transplant as further support for why he would not have felt confident that he could flee the scene without further endangering himself.

Trial Counsel did not argue that the difference in age; Petitioner's physical disabilities and the fact of the prior bad blood between the two men were all factors which would give him the right to judge the conduct of his adversary more harshly than otherwise. *State v. Hendrix*, 270 S.C. at 661, 244 S.E.2d at 507 (S.Ct. 1978). He did not argue that the testimony of the ballistics expert established that a 380 caliber bullet is a relatively light bullet that is not very

³ State Trial Exhibit No. 34.

⁴ *State v. Slater*, 373 S.C. 66, 71, 644S.E.2d 50, 53 (S.Ct. 2007).

powerful⁵, thereby providing a possible explanation for why it took 5 shots to bring the deceased down. He failed to argue that the Victim's size, 6' 1" foot tall, and an estimated 220 lbs, could also explain why it took five shots to stop him.⁶ He missed the opportunity to argue that the fact that there was one remaining bullet in the clip of Petitioner's gun supported his position that he quit shooting when the deceased quit advancing on him.⁷ Trial Counsel also failed to note that, while Dr. Ross testified that the Victim would not have lived for more than one minute after sustaining the five GSW's described in her testimony, *Petitioner did not* have anyway of knowing that at the time. He did not point out that Petitioner testified he thought the Victim would have dropped his knife after the first shot was fired, and therefore, he had reason to be fearful for his life as long as the Victim was in possession of the knife.

Trial Counsel was ineffective for neglecting to point out testimony which supported the position that Petitioner was not in fault for going to this trailer to collect the debt owed to him. Nothing in the record indicates that anyone had told him not to come to the location and nothing indicated Victim disputed the debt. Trial Counsel did not articulate why Petitioner's fear for his life was reasonable. He did not point out that the State's own witnesses confirmed that Victim was fit enough to be personally repairing that trailer to get it in condition to live in. Trial Counsel neglected to use State's Ex. No. 19 and 20 to refute the testimony of Ketcherside that there was only one blood drip trail and no indication of any back and forth motion in the crucial blood evidence.⁸ He did not urge the jury to scrutinize Dr. Ross's testimony by pointing out that if the Victim lost consciousness in the position he was found in, the knife quite simply could not have "*fallen out*" of his hand because it had nowhere to go. Dr. Ross's PCR testimony confirms this

⁵ App. p. 296, ll. 16 - 20; App. p. 297, l. 13 - p. 298, l. 16.

⁶ App.p. 331, ll. 2 - 7.

⁷ App.p. 192, l.1 - p. 193, 16; App.p. 369, l. 12 - p. 370, l. 2; App.p. 370, l. 21 - p. 379, l. 6. State's Trial Exhibit No. 1.

⁸ A copy of State Trial Exhibit No. 19 was introduced in this PCR action as Applicant Exhibit No. 3.

assertion to be true.⁹ Trial Counsel failed to point out that any awkwardness in the position of the knife in the Victim's hand could readily be explained by the fact that EMS admitted rolling the body to attach an electrode *and* admitted that he may have cut or *ripped* the Victim's shirt.¹⁰ Trial Counsel should have pointed out that the original position of the knife would have been altered when the Victim lost consciousness; i.e. that although the knife would not have been able to *fall out* of the hand given its position against a hard surface, the loosening of the Victim's grip on the knife when his muscles relaxed would logically be expected to 1) alter its position in the hand and 2) made it more likely for the manipulation of the body during treatment by EMS Summers, who admitted that he shifted the position of the knife. Dr. Ross testified that the Victim would probably have lost consciousness in less than *one minute after sustaining GSW No. 2*, however, she also stated that "*death permanently*" *within a few minutes*. **App. p. 333, l. 20 - p. 334, l. 1.** Given the fact that she initially referenced the Victim being unconscious within one minute, it was crucial for Trial Counsel to have pointed these facts out to the jury. The jury heard Petitioner's voice on the 911 recordings saying that the Victim *was breathing* at the time of the second recorded 911 conversation at 10:01:06 am call. The initial 911 call came in about 1.5 minutes earlier at 09:59:38 a.m. **See, Petitioner's Ex. No. 4.** The defense needed to show the jury that the Victim could have been breathing at the time of the 10:01 a.m. call. It was important for Trial Counsel to show that Petitioner's assertion that he called 911 as quickly as he retrieved his cell phone was credible in light of the daughter testifying that he texted her looking for her father between "**9:00 - 9:38 am**" She later testified that her father came back by her house at "**9:20 am**", right after Petitioner had texted her. App.p. 353, ll. 13 - 21. Trial Counsel missed the opportunity to draw the jury's attention to the fact that the State's own evidence established

⁹ PCR Tr. p. 12, l.18 – p. 13, l. 22.

¹⁰ App.p. 144, ll. 2 -25.

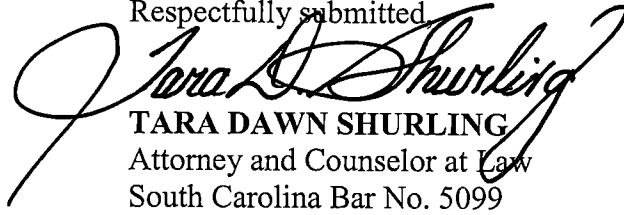
that the deceased was shot sometime shortly after 9:20 and before 09.59.38 a.m. when the initial 911 call came in. Trial Counsel failed to argue that a minute was adequate time for the Victim to have stumbled from where the shots were found to the kitchen area in this mobile home. Trial Counsel also failed to argue that Petitioner's position that he never got closer than eight feet from the Victim when he went back in the trailer, was reasonable where Petitioner had no way of knowing whether he was unconscious or whether he was waiting for Petitioner to get close enough for him to cut him. Trial Counsel should have pointed out that Petitioner had no way to judge the extent of the Victim's blood loss where there was a large volume of blood under and on the body that was not visible until the Victim was turned over because he bled out under his torso laying face down. **App. p. 261, l. 3-9 and App.p. 268, ll. 3-5.** Trial Counsel was also ineffective for failing to argue in closing all the reasons the testimony of Corp. Edwards and Trainee Rivas, during which they claimed Petitioner told them he never went in the trailer, did not make sense. He neglected to argue the reasons why Petitioner logically would not have made those statements. *See, Question 13.* Petitioner respectfully submits that Trial Counsel provided him less than reasonable professional assistance of counsel by failing to argue all the evidence that supported Petitioner's claim that the deceased was killed by him while he was acting in self-defense and the reasons why the State had failed to disprove that he acted in self-defense. Relief should have been granted on these allegations.

CONCLUSION

For the reasons stated herein, the Petitioner asks this Honorable Court to grant the writ, dispense with further briefing, reverse his conviction and sentence and remand his case for a new trial. Petitioner asserts that this remedy is particularly appropriate where Petitioner's health is such that he may not survive an extended appellate process. Alternatively, he would ask that the

writ be issued and that he be granted the opportunity to more fully brief the issues summarized herein.

Respectfully submitted,



TARA DAWN SHURLING
Attorney and Counselor at Law
South Carolina Bar No. 5099

ATTORNEY FOR PETITIONER

This 9th of January, 2020.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2018-000553

GEORGE W. HUGHES,

PETITIONER,

v.

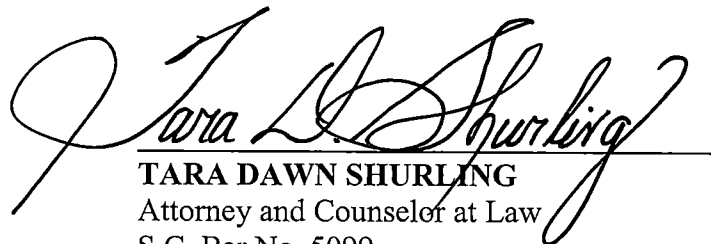
STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Second Revised Petition for Writ of Certiorari and Appendix in the above-entitled case has been served upon opposing counsel this the 9th day of January, 2020, by mailing one (1) copy in a stamped envelope properly addressed to:

Benjamin H. Limbaugh
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211


TARA DAWN SHURLING
Attorney and Counselor at Law
S.C. Bar No. 5099

ATTORNEY FOR PETITIONER.

RECEIVED

JAN 14 2020

S.C. SUPREME COURT