

Manuel A. Marin, #343371

Lieber Correctional Inst.

P.O. Box 205

Ridgeville, S.C. 29472

Feb 03, 2020

The Honorable Daniel E. Shearouse

Clerk of Court

Supreme Court of South Carolina

P.O. Box 11330

Columbia, South Carolina 29211

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S.C. SUPREME COURT

Re: Manuel A. Marin, #343371 v. State of South Carolina

Appellate Case No.: 2018-001157

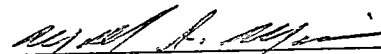
Dear Mr. Shearouse:

Enclosed you will find the following for filing with your office:

1. The original copy of an answer to a JOHNSON Petition For Writ of Certiorari.
2. A self-addressed manila envelope for the return of the clocked in/Filed copies to me, to be returned through inter-agency mail or U.S.P.S.

Thank you very much for your assistance

Yours very truly,



Manuel A. Marin, #343371

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

The Honorable Grace Gilchrist Knie, Circuit Court Judge

2016-CP-42-02795

Manuel Antonio Marin, #343371,

PETITIONER

V.

State of South Carolina,

RESPONDENT.

Appellate Case No.: 2018-001157

PRO SE RESPONSE TO JOHNSON

PETITION FOR WRIT OF CERTIORARI



MANUEL A. MARIN

Lieber Corr. Inst.

P.O. Box 205

Ridgeville, SC 29472

PRO SE PETITIONER

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QUESTIONS PRESENTED

- [I] Did the PCR court err in finding the Prosecution did not suppress exculpatory evidence?
- [II] Did the PCR court err in finding trial counsel was effective when counsel failed to object to prosecutor's highly prejudicial closing argument that Petitioner's firing of two shots was evidence of malice?
- [III] Did the PCR court err in finding trial counsel was effective when counsel failed to object to prosecutor's highly prejudicial closing argument that Petitioner would not stop the vehicle while being attacked by the decedent. Negating his "No Duty to Retreat"?
- [IV] Did the PCR court err in finding appellate counsel was effective when counsel failed to raise the directed verdict on self-defense issue?
- [V] Did the PCR court err in finding Spartanburg County Prosecutor acting the role of an Asst. Attorney General did not commit prosecutorial misconduct by misstating facts and evidence in this case to the Court of Appeals and the Supreme Court?

STATEMENT OF THE CASE

The Spartanburg County Grand Jury indicted Petitioner on Aug. 25, 2008, for murder and possession of a weapon during the commission of a violent crime. (2008-GS-42-05308). (App. p. 1035-1036). Assistant Public Defender Tanya R. Jones represented Petitioner. Assistant Solicitors Susan S. Reese and Jennifer A.J. Jordan represented the State.

On Oct. 27, 2010, the Petitioner proceeded to trial before the Honorable J. Derham Cole. (App. p. 1-447). Petitioner was found guilty on both counts and sentenced to life in prison for murder while the sentence for the weapon charge was not imposed due to the life sentence for murder. (App. p. 448).

Petitioner timely filed a Notice of Appeal from his convictions and sentence and an appeal was perfected. Chief Appellate Defender Robert M. Duder, and Assistant Appellate Defender David Alexander who joined the Appeal at the Oral Argument to the Court of Appeals, represented the Petitioner on appeal. Petitioner's conviction and sentence was affirmed by published opinion by the SC Court of Appeals on July 3, 2013. (State v. Marin, 404 SC 615, 745 S.E.2d 148 (Ct. App. 2013).) (App. p. 479-487). Petitioner filed a Petition for Rehearing on July 18, 2013, which was denied on Aug. 21, 2013. (App. p. 488-492).

Petitioner timely filed a Petition for a Writ of Certiorary with the SC Supreme Court on Nov. 21, 2013. (App. p. 495-510). The Petition was granted on Oct. 23, 2014. (App. p. 540-541). The Supreme Court affirmed the Court of Appeals as modified on March 23, 2016. (State v. Marin, 415 SC 475, 783 S.E.2d 808 (2016) (App. p. 586-598)

The Remittitur was sent on April 8, 2016. (App. p. 599).

Petitioner filed his application for post-conviction relief (PCR) on July 28, 2016. (2016-CP-42-02795). (App. p. 600-631). Petitioner amended his application on Oct. 4, 2017 (App. p. 632-649) and again on Dec. 4, 2017 (App. p. 650-656). The State filed its Return and Partial Motion to Dismiss on or about March 28, 2017, (App. p. 657-665) requesting Petitioner's allegations regarding judicial error be dismissed.

The PCR hearing was held on February 1, 2018, before the Honorable Grace Gilchrist Knie at the Spartanburg County Courthouse. (App. p. 674-895). Petitioner was present and represented by James H. Price. Assistant Attorney General Valerie Garcia Giovanoli represented the Respondent. On June 5, 2018, Judge Knie denied the Petitioner's PCR application by written order.

(App. p. 1006-1034). Then petitioner's counsel Ashley A. McMahan filed a Johnson Petition for Writ of Certiorari on Jan. 3, 2020, pursuant to said petition this Response to Johnson Petition for Writ of Certiorary follows.

STATEMENT OF THE FACTS

The victim and the Petitioner had been at Bongos Nightclub in Greenville earlier in the evening to celebrate Colombian independence. (App. p. 74 Ln. 3 - p. 75 Ln 5). At the end of the night while closing up the bar, the Bongos staff was trying to find a ride home for the victim because he was heavily intoxicated. (App. p. 83, lines 11-23). One of the staff members testified that he had to "cut off the victim from buying more alcohol" (App. p. 81, Ln. 15-18). It's not in dispute that the Petitioner drove while his friend Alfredo Jimenez rode in the front seat and the victim was in the back seat. (App. p. 292, Ln. 13-14; p. 298, Ln. 22-24).

Officer Powell from the Spartanburg Police testified that he arrived at the scene and saw both the Petitioner and Jimenez there at the intersection of Daniel Morgan Avenue and West Main Street. (App. p. 112 Ln. 15-21). Powell noted that one was very upset and the other one very calm (shocked). (App. p. 113 Ln 1-13). He also noted that he saw a gun lying on the sidewalk and he picked it up and put it in the trunk of his police car. (App. p. 114 Ln 15 - p. 115 Ln. 7). Powell also asked where the incident occurred and he (the eyewitness, Jimenez) would just say Wal-Mart and that the victim was grabbing hold of the steering wheel trying to wreck the car. (App. p. 119 Ln. 9-18).

Powell further testified that Jimenez told him that they had been in Greenville earlier and were taking the victim home. When they passed what the victim thought was his road, the victim got very upset and came over the seat fighting with the driver. (App. p. 129 Ln. 12-14).

The Petitioner later testified in his own defense. He stated he went to Bongos that evening and was asked to give the victim a ride home. (App. p. 292 Ln. 1-2).

Petitioner further testified that the victim jumped up from the backseat and put Petitioner in a headlock after passing the victim's home because Jimenez failed to tell Petitioner where to turn since Jimenez was manning the G.P.S. on Petitioner's laptop. It was at that point that Petitioner hit the brakes and the car went onto the oncoming lane and headed towards a telephone pole, but he got the car back onto the road. (App. p. 295 Ln. 11-296 Ln. 12). Petitioner noted that at this point he was scared and decided he wasn't going to take the victim home. He tried to find a public place where he could pull over, to get out of the car, and get some help. (App. p. 297 Ln. 8-14). Petitioner stated that all of a sudden the victim jumped from the back seat, grabbed the steering wheel, and tried to run the car off the road. Petitioner said he tried to push him back several times but the victim continued to come after him, and that was when the Petitioner opened the glove box, got the pouch out with the gun, pulled out the gun and shot the victim. (App. p. 297 Ln 5 - p. 299 Ln. 11).

Crime scene forensics corroborated the Petitioner's testimony. The victim's body was found between the front seats on the console with his upper body in the front area of the car. (App. p. 190 Ln 8-21).

Petitioner also noted in his testimony that he and Jimenez were talking after the shooting wondering why the victim was

trying to kill them and run them off the road. (App. p. 301 Ln. 6-9).

On cross-exam. Petitioner explained that it was very dark that night and "nothing seemed to be opened" because it was Sunday night, to Monday morning, and "everything is closed on Sundays." And that he was trying to keep the victim from killing them by wrecking the SUV. (App. p. 311 Ln. 1 - p. 314 Ln. 4).

Petitioner was the marketing director for a newspaper. Petitioner was also a manager for a rent to own store. (App. p. 288 Ln. 5-7). Petitioner stated that one of his duties as a store manager was to close the store at night, oftentimes alone. And also, one of his duties as store manager was to make the nightly deposits of the store's daily cash intake. And that for that reason, he kept the loaded weapon in his vehicle. He also stated that he lived in a dangerous neighborhood. (App. p. 316 Ln. 23 - p. 317 Ln. 16).

ARGUMENT

[I] The PCR court erred in finding the Prosecution did not suppress exculpatory evidence.

Petitioner in this matter raised as an issue of his PCR that the prosecution suppressed exculpatory evidence.

During the PCR hearing, Petitioner's counsel presented to the court, chain of custody forms sending a steering wheel cover to SLED, the forms requested DNA analysis of the cover to be compared with the decedent and Petitioner. (App. p. 918; 919).

At the request of Petitioner's counsel, the PCR court issued an order of Discovery requiring SLED to provide written confirmation as to whether any DNA analysis of the steering wheel cover (SLED Lab No.: L08-11693) was ever performed. (App. p. 671-672).

Pursuant to the Order, SLED provided a letter to the effect that the matter was sent back to Spartanburg County Sheriff Office's Investigator Demetric Glen (App. p. 917).

In the aforementioned letter SLED informed Inv. Demetric Glen that their protocol was not followed, and requested that a blood sample, or bucal swab be submitted for comparison purposes.⁹⁶ Please submit a bucal swab (prefered) or liquid blood 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 analysis⁹⁹. (App. p. 917).

Which is exactly what occurred. No further action was performed. The State neglected to, or failed to submit the requested samples for DNA analysis on SLED Lab No: L08-11693 (Steering wheel cover).

On Aug. 18, 2008 counsel for Petitioner John Delgado Filed a Motion with the Spartanburg County Clerk's Office clock stamped and filed on Aug. 18, 2008 Am 11:38 (App. p. 1079-1095). Requesting for the Disclosure of Evidence in compliance with Rule 5 and Brady v. Maryland pertaining to Warrant No.: M023052, State v. Manuel A. Marin.

⁶⁶ In compliance with Rule 5 of the South Carolina Rules of Criminal Procedure (1989), as amended, and pursuant to the provisions of Brady v. Maryland, 373 U.S. 83 (1963), and succeeding Federal and State decisions, including United States v. Bagley, 473 U.S. 667 (1985), the Defendant hereby requests that the prosecution shall, within thirty (30) days or sooner, disclose evidence, data, information, material and items as set forth below as sought by the Defendant, as well as evidence, information, data and material not specifically requested, which may be material and/or exculpatory to the Defendant, or the Defendant's case, presently possessed by the Prosecution or any of its agents (emphasis added) as defined by United States v. Santiago, 46 F.3d 885 (9th Cir. 1995) or acquired in the future by any agent of the State of South Carolina until such time as this matter,

and any post trial matters, are finally, and for ever concluded..."

On Oct. 8, 2010, another Motion for Disclosure and Production of Evidence was filed with Spartanburg County Clerk's Office by Petitioner's new counsel Tanya R. Jones. (App. p. 1122-1125) Item No. 16:⁶⁵ All SLED lab formal reports (from any department), (emphasis added) especially but not limited to Firearms and Ballistics formal reports, Trace evidence formal reports, Toxicology reports, all instrument generated data on which above formal reports were based, all accompanying worksheets on which the above formal reports were based, all notes of examiners and technicians on which the above formal reports were based. In other words, "the whole case jacket" on the Firearms and Ballistic reports, Trace evidence, and Toxicology reports." (App. p. 1123)

In this very Motion counsel for Petitioner complains to the court about the Prosecution not complying with previous discovery requests:⁶⁶ "This information was requested on Sep. 17, 2010, and to date, counsel has not recieved it and no effort has been made by the solicitor to provide it." (App. p. 1123 ln. 15)

At the PCB hearing, trial counsel Tanya R. Jones testified as follows:

Q.⁶⁶ "...did you review everything that the State had given you prior to trial with the defendant?"

A.⁶⁵ "Yes."

Q.⁶⁶ "Okay. Do you recall anything about the

steering wheel cover being sent to SLED
for DNA analysis?"

A. ⁶⁵ "I do not recall that". (App. p. 848 Ln. 7-12)

At the PCR hearing Petitioner's PCR counsel James H. Price presented Petitioner with the letter from SLED to Inv. Demetric Glen which was for the first time disclosed to Petitioner at the PCR hearing.

A. ⁶⁶ "I have never heard of that letter, that, that cover letter, that was on the evidence sheet. I've never seen that before."

Q. ⁶⁶ "I agree with you. That was not in the discovery."

A. ⁶⁵ "That was not in the discovery. (App. p. 787 Ln. 20-24)"

Petitioner and his trial counsel were provided with the chain of custody forms sending the steering wheel cover to SLED and requesting DNA examination of same. Petitioner was not provided with the letter from SLED informing the Prosecution's Inv. Demetric Glen that its protocol was not followed, nor was Petitioner provided with any documentation that no DNA analysis was performed.

Petitioner in his testimony and Second Amended PCR Application, and this Brief, argues that this omission is tantamount to prosecutorial misconduct due to a number of reasons, primarily the fact that Petitioner nor his attorney were given the opportunity to specifi-

cally request DNA examination of the cover for exculpatory evidence, i.e., evidence confirming the deceased did grab the steering wheel cover with his hands thereby placing Petitioner in danger, and in fear for his life and justifying Petitioner's self-defense shooting of the deceased.

Petitioner urges the Court to consider the following argument:

A prosecutor that withholds evidence which if made available would tend to exculpate an accused by creating reasonable doubt as to his guilt violates due process of law. Const. Art. 3§14.

In order to find that 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.

SCRC Rule 3.4 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 to do any such act.

Rule 3.4(d) A lawyer shall not: fail to make a reasonable

diligent effort to comply with a legal proper discovery request by an opposing party.

[1] The procedure of the adversary system contemplates that 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 of 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. (emphasis added).

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.

United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988), The Brady disclosure rule requires the prosecution to provide the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment.

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 violated due process where evidence is material to either guilt or punishment, irrespective of good faith or bad faith of prosecution.

State v. Kennerly, 331 S.G. 442, 452, 503 S.E.2d 214, 220 (Ct.App. 1998), Brady disclosure rule extends to evidence that is not in the actual possession of the prosecution but known by others acting on the government's behalf in the particular case, including the police. (emphasis added) U.S.C.A. Const. Amends. 5, 14.

Kyles v. Whitley, -U.S.- 115 S.Ct. 1555, 131 L. Ed. 2d 490 (1995),⁶⁵ The court emphasized the prosecutor's 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.⁹⁹ (emphasis added)
Id. at 115 S.Ct. at 1567.

⁶⁶ The prosecutor must employ whatever means are necessary to discharge her obligation... 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 nonattorney police investigator to review his own and other officer's rough notes whether they contain Brady, Bagley, and Giglio information is clearly problematic...

Regardless of whether it was the investigator's decision or negligence or the prosecutor's, whether intentional or unintentional, in good faith or in bad faith, not to provide the requested blood, or buccal swab samples to SLED for comparison purposes in Lab No.: L08-11693 (steering wheel cover), the fact remains that it was the prosecutor's responsibility.

It is clear that Petitioner and his attorney were not provided with knowledge that no DNA testing of the steering wheel cover

was performed:⁶⁶ "I agree with you. That was not in the discovery."⁹⁹
(App. p. 787 Ln. 23).

Because Petitioner 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 confirmation that the deceased grabbed the steering wheel with his hands, and tried to kill everyone in the vehicle by running the conveyance off the road:⁶⁶ "why was he trying to kill us, why was he trying to kill me, why, why was he trying to run us off the road."⁹⁹ (App. p. 301 Ln. 7-9).

This evidence would have been exculpatory in nature, and its suppression was highly prejudicial, and a violation of the Petitioner's Due Process of Law on account of the prosecutor's immensely inflammatory closing argument, in which the prosecutor repetitiously repudiated Petitioner's testimony:

⁶⁶ "he admits he has to get a gun from somewhere.

I submit to you it's not in the glove compartment.

But it's somewhere" (App. p. 362 Ln. 10-12).

This statement to the jury on closing argument by the prosecutor, (and without objection by trial counsel) was made even though Petitioner had already testified that the gun was in the glove-box:

⁶⁶ "At that point I pushed him off, and I grabbed the glove box, and opened the glove-box and got the pouch out which had the gun in it" (App. p. 299 Ln. 7-9)

And again:

⁶⁶ "Would a reasonable person shoot someone twice in the back of the head? Everything he said is true?" (App. p. 364 Ln. 2-3)

And again:

⁶⁶ "So when you shoot somebody in the head and they stop struggling with you, if that's what they're doing" (App. p. 356 Ln. 18-20)

And again:

⁶⁶ "Ask, ladies and gentlemen, if that's reasonable with the defendant's story. The defendant says, oh, my gosh, we were struggling, he had me, I was trying to shove him off, back and forth, back and forth." (App. p. 355 Ln. 5-8)

See: United States v. Peyro, 786 F. 2d (8th Cir. 1986), statements by the prosecutor such as ⁶⁶ "The man is an obvious liar" have no place in a criminal trial. Judgement must rest with the jury, not the state. ⁶⁶ "The prosecutor has no authority to sit as a 'thirteenth juror'" and cast a ballot on the issue. ⁹⁹

See also: Chambers v. Mississippi, 93 S.Ct. 1038, 410 U.S. 284, 35 L.Ed. 2d 297, The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. U.S.C.A. Const. Amend. 14.

The steering wheel cover was monumental to accredit
Petitioner's testimony.

Without the cover the prosecutor was able to transcend her
closing argument and depict Petitioner's testimony as
fictitious. (And without any objections by trial counsel).

Had not the prosecution suppressed this exculpatory
evidence the outcome of the trial would have been different.

[II] The PCR court erred in finding trial counsel was effective when counsel failed to object to the prosecutor's highly prejudicial closing argument that Petitioner's firing of two shots was evidence of malice murder.

During the State's closing argument, the State's only, sole, and singular argument that Petitioner was guilty of malice murder was the fact that Petitioner fired two shots instead of one.

The State had no other evidence of malice except for the firing of two shots.

The prosecutor enumerated:

"So the question is, is this malice." (App. p. 362 Ln. 25)

"Ladies and gentlemen, I submit this is malice.

Two shots, not one, two shots to the back of the head." (App. p. 361 Ln. 22-23)

Absent an objection by trial counsel; and absent an ex-mero metu curative instruction by the trial judge, the jury took this submission of wrongful law by the prosecutor into deliberations with the assertion that Petitioner was guilty of malice murder because "two shots were fired instead of one."

Thereby negating Petitioner's entitlement to self-defense in a case in which there was no malice except for the firing of "two shots, not one", equaling malice.

What this entails is that if a police officer is being assailed, or is involved in a shooting, and the officer shoots a suspect more than once, he is guilty of malice murder for firing⁶⁶ two shots, not one."

What this equates is that if the officer is being shot at, or assaulted he can only shoot once and wait to see if the assailant is disabled before he can shoot again.

For, the self-defense rule does not differ from civilian to official.

In this case, the evidence showed that the Petitioner shot twice in rapid succession,⁶⁶ (they came close together because they were closely approximated⁹⁹) (Testimony of Dr. David Wren, Pathologist with Spartanburg County) (App. p. 227 Ln. 8-9)

And that the decedent, then, fell on Petitioner's knee.

This is proven by the fact that one of the two bullets exited high up on the windshield, and the other bullet impacted the GPS unit, which was attached to the rear view mirror, and shattered upon impact. (this because the decedent was in front of Petitioner, grabbing a hold of the steering wheel, and trying to wreck the vehicle) Had not this been the case, slugs, or bullet holes would have been found elsewhere inside the vehicle. Since the wounds were through and through. (App. p. 227-230) (testimony of Dr. Wren)

This case mirrors State v. Hendrix, in which Mr. Hendrix also shot in rapid succession, and as in Hendrix the decedent did not hit the ground (or Petitioner's knee) until after the last shot was fired. (Only, Hendrix fired four times with a shotgun, not

twice with a pistol, and this court found it was not excessive force) See: State v. Hendrix, 244 S.E.2d 503 (S.C. 1978), "The State has argued that appellant used excessive force in his case by firing more than once because, under the testimony, in the light most favorable to the state, the first shot disabled the deceased. The rule is that ordinarily one is not justified in shooting or employing a deadly weapon after the adversary has been disarmed or disabled. 40 C.J.S. Homicide §131 at 1020 (1944), and see State v. Jackson, Supra. However, the rule is also 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". 40 C.J.S. Homicide §131 b at 1020 (1944). In the light most favorable to the state, appellate fired four times in rapid succession and the deceased did not hit the ground until after the last shot was fired. Under this circumstances the force used was not excessive." (emphasis added)

Just like Hendrix Petitioner fired in rapid succession, just as in Hendrix, the deceased did not fall on ~~the~~ Petitioner's knee until after the second shot was fired (App. p. 299-300)

In many ways, the prosecutor's extremely prejudicial closing argument that the jury could infer malice because "two shots were fired instead of one" mirrors the error 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 danger inherent in allowing a jury to

infer malice. Id. at 609-10, 685 S.E.2d at 808-09. Belcher recognized that 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 ⁶⁶two shots, not one⁹⁹.

Absent any malice in this case, the prosecutor then resorted to submitting erroneous law to the jury, and to appeal to their passion and prejudice, and to create bias against Petitioner:

⁶⁶So 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 time⁹⁹. (App. p. 356 Ln. 18-21)

And again:

⁶⁶And he tells you, I got the gun and I shot him. where did you shoot him? In the back of the head. Once? I shot him twice. Was he still struggling after the first shot? Well, it was bam, bam⁹⁹.

(App. p. 361 Ln. 6-9)

This immensely inflammatory closing argument after Petitioner and Dr. Wren had testified that the shots were in rapid succession.

And again:

⁶⁶ "And what is a forethought. We said malice...
And this guy made his decision in more than an
instance, because he admits he has to get a
gun from somewhere. I submit to you it's not in
the glove compartment. But it's somewhere. He
has to unhook the pouch, he has to pull the
slide back and he has to fire twice". (App. p. 362
Ln. 9-13)

And again:

⁶⁵ Would a reasonable person shoot some-
one twice in the back of the head?
Everything he said is true?" ⁹⁹ (App. 364 Ln. 2-3)

And again:

⁶⁶ that's when I submit to you, ladies and
gentlemen, he was shot twice in the back
of the head, because that makes no
sence. This is malice." (emphasis added)
(App. 366 Ln. 12-15)

And again:

⁶⁶ So the question is, is this malice? ⁹⁹
⁶⁶ Ladies and gentlemen, I submit this
is malice. Two shots, not one, two shots
to back of the head." ⁹⁹ (App. p. 361 Ln. 22-23)
(emphasis added)

See State v. Day, 535 S.E.2d 431 (S.C. 2000), A prosecutor's comments deprive the accused of due process of law where the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Homicide § 146

Under South Carolina law, malice may be presumed in the absence of circumstances of excuse or justification, and if presumption is permissible, e.g.; absence of circumstances of excuse, the presumption satisfies state's burden to prove malice aforethought beyond a reasonable doubt; however, when all circumstances of the case are fully developed, and defendant produces evidence to show justification for killing any presumption as to malice will vanish S.C. Code 1976 § 16-3-10

The Petitioner in this case did not shoot the decedent again once the decedent fell on defendant's knee and it was then apparent that the danger had dissipated:

Q. "Okay, and you stopped shooting when he dropped?"

A. "Yes." (App. p. 820 Ln. 18-19)

Which is what the prosecutor continually drilled to the jury:

"So when you shoot somebody in the head and they stop struggling with you, if that's what they're doing, you don't shoot them a second time."

(App. p. 356 Ln. 18-20)

see: United States V. Mageno, 762 F.3d 933 (9th Cir. 2015),
"In addition, the trial judge did not admonish the jury to disregard these misstatements of law. Although the judge gave the standard instructions that statements from lawyers are not evidence, and that the jury is to rely on its recollection of the evidence at trial, these instructions were never expressly tied to the misstatements. See, United States V. Combs, 379 F.3d 564, 575 (9th Cir. 2004); United States V. Kerr, 981 F.2d 1050, 1054 (9th Cir. 1992).⁶⁶ The standard judicial caution that the jury's recollection controls⁹⁹ is not a⁶⁶ "cure all."⁹⁹ Gaither, 413 F.2d at 1079, especially where, as here repeated misstatements of fact went uncorrected. Because Mageno's attorney did not catch the government's error, the jury likely accepted the government's characterization of the evidence given. And if the jury's own recollection of burgo's testimony differed from the prosecutor's recitation, the jury would have speculated that the prosecutor's misstatements had at least some factual basis - that is, that the prosecutor knew the statement was so, even if there was no such testimony.⁹⁹

Moreover, the erroneous comments featured prominently in both government closing arguments, including the last plea the members of the jury heard in the primary closing argument. An error that is⁶⁶ "emphasized... during the trial"⁹⁹ is more likely to influence a jury. See Roger J. Traynor, The Riddle of Harmless Error 75 (1970).

(Petitioner submits the above argument to carry on to the next issue: "Would not stop"⁹⁹ or "Refused to stop."⁹⁹)

On Direct examination by the State at the PCR hearing trial counsel Tanya R. Jones admitted to being ineffective in failing to object to the prosecutor's closing argument that "two shots instead of one" was malice murder?

Q. "Okay. After the prosecutor made the argument that, that two shots was a demonstration of malice, you requested the continuing to shoot charge, is that correct?"

A. "That's correct."

Q. "Was that in response to her argument?"

A. "Yes."

Q. "Did you find her argument objectionable?"

A. "I--well, I, I do-- I think it's-- you can object. Certainly." (App. p. 839 Ln. 20-840 Ln. 4)

Again on Cross-examination by Petitioner's counsel at the PCR hearing, trial counsel Tanya R. Jones admitted to being ineffective in failing to object to the prosecutor's closing argument that "two shots instead of one" equaled malice murder?

Q. "Did you see the need of objecting to the solicitor's statements arguing about two shots as malice? Did you think that was inflammatory?"

A. "At the time, I think I was caught off guard. In retrospect, sure, I probably should have objected to that." (App. p. 861 Ln. 10-14)

see: Moore v. Illinois, 408 U.S. 786, 809-810, 92 S. Ct. 2562 (1972),

⁵⁶ "It is the State that tries a man, and it is the State that must insure that the trial is fair."

It is clear that without an objection by trial counsel, and without an ex-mero motu curative instruction by the trial judge, any reasonable juror would have viewed such a statement as:

⁵⁶ so the question is, is this malice. Ladies and gentlemen, I submit this is malice. Two shots, not one, two shots to the back of the head.⁵⁷
as mandatory.

This court stated in their opinion in State v. Marin, that:

⁵⁶ "Mr. 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." (App. p. 588 Ln. 14-16).

Trial counsel was ineffective in failing to object to the prosecutor's highly prejudicial and inflammatory closing argument that Petitioner was guilty of malice murder because "two shots were fired, not one."

This issue went to the heart of the case, and was the singular argument for malice by the prosecution.

This misstatement of the law removed from the jury any, and all considerations as to any mitigating circumstances and self-defense.

[II] The PCR court erred in finding trial counsel was effective when counsel failed to object to prosecutor's highly prejudicial closing argument that Petitioner would not stop the vehicle while being attacked by the decedent.

During Petitioner's trial the prosecutor's sole argument that Petitioner was not entitled to self-defense, is the fact that Petitioner would not stop the vehicle while being attacked by the decedent.

During the jury charge portion of the trial, the judge charged the jury as follows:

"Now in this case the defendant has raised what is known as the castle doctrine. That law recognizes the right of every person to protect himself or herself or a friend or relative or some other from intruders and attackers and from death or sustaining great bodily harm while in his home, business, or vehicle.

And to do this a person may use such force as is reasonably necessary to prevent death or great bodily injury to himself or to another person...

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 has the right to stand his ground and to meet force

with force, including deadly force, if he reasonably believes it necessary to prevent death or great bodily injury to himself or another person.⁹⁹

(App. p. 381 Ln. 23-382 Ln. 19)

The trial judge also charged the following:

⁶⁶ "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."⁹⁹ (App. p. 386 Ln. 7-10)

Although the trial judge charged the jury on these issues, these jury charges were made moot by the prosecutor's extremely prejudicial and inflammatory closing argument that Petitioner would not stop the vehicle while being attacked by the decedent.

What makes the closing argument prejudicial and inflammatory is that it was not an isolated comment by the prosecutor.

In fact the prosecutor used the reference ⁶⁶ "would not stop" ⁹⁹ ⁶⁶ or refused to stop," (26) twenty six times! and insistently drilled this to the jury. (without any objections by trial counsel)

These comments by the prosecutor were made even though the Petitioner had previously testified that he was in fact looking for a place to stop, but Petitioner was attacked for the second time before he could do so. And that the reason for Petitioner not stopping before being attacked for the second time is that he was first attacked in a dark and deserted road.

⁶⁶ Everything was dark and everything was closed.

I mean, I was looking for a public place with people somewhere to stop, (sic) but everything,

I mean, it was dark. Nothing seemed to be open.³³

(It was Sunday night to Monday morning - Approx. 3:00 am)

(App. p. 297 Ln. 23 - 298 Ln 1)

Petitioner submits that he has established a clear pattern by the prosecutor to negate every aspect of petitioner's testimony, even when the evidence corroborates Petitioner's testimony:

Q. ⁶⁶ All right. But the question is, based on your examination of the car, the pictures, the reports and the like, and Marin's testimony, Mr. Marin's testimony was consistent with what you saw in the crime scene?³³

A. ⁶⁶ Yes.³³ (App. p. 712 Ln. 9-13)

(Testimony of Donald Girault, an expert in crime scene reconstruction).

In the Opinion by The Court of Appeals, the court stated in their opinion in State v. Marin:

⁶⁶ Jimenez, the passenger and only other eyewitness in this case, did not testify at trial. Multiple witnesses testified that Jimenez's statements to law enforcement immediately after the incident and while assisting investigators with recreating

the events leading up to Tabares's death corroborated Marin's trial testimony⁹⁹.

(App. p. 481 Ln. 28-31)

Although Petitioner did intend to stop before being attacked the second time, the law states that he was under no obligation to do so. See the above mentioned jury charges. Also see the fourth element of self-defense:

State v. Davis, 317 S.E.2d 453 (S.C. App. 1984), "Fourth, the defendant had no other probable 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.

IF, however, the defendant was in his own premises he had no duty to retreat before acting in self-defense.⁹⁹

See also: State v. Sales, 328 S.E.2d 619 (S.C. 1985), "The appellant contends that the judge erred in refusing to charge that a person attacked on his own premises has no duty to retreat. We agree."⁹⁹

See also: State v. Douglas, 411 S.C. 307, 768 S.E.2d (2014), "the duty to retreat need not be shown in a murder case in which a defendant seeks immunity from prosecution under the Protection of Persons and Property Act. Code 1976 §16-11-410 et seq.

As did Petitioner: "It's actually 16-11-450. "A person who uses deadly force as provided in this section is immune from criminal prosecution..."⁹⁹ (App. p. 320 Ln. 11-13)

See also: State v. Wington, 375 S.C. 25, 649 S.E.2d 185 (Cl. 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 even to the
extent of taking life if necessary, where, being without fault in bring-
ing on the difficulty, he is assaulted while in his own dwelling"
(his vehicle) see: Art. 6 § 16-11-430(1) "Dwelling means a building or
conveyance of any kind... mobil or imobile... § 16-11-430(4) "vehicle"
means a conveyance of any kind...

(Petitioner was without fault in bringing on the difficulty since
Petitioner passed the road to the decedent's house through no fault
of his own, since Jimenez, who was manning the GPS on Petitioner's
lap top failed to tell Petitioner where to turn:

Q. "Okay. So there was a laptop in the car as well?"

A. "Yes, ma'am."

Q. "Okay. And that was your laptop?"

A. "Yes, ma'am."

Q. "Okay. And that laptop sounds like has a G.P.S."

A. "Yes, ma'am."

Q. "Okay. So you put that address into the computer."

A. "Yes, ma'am."

Q. "Who was in charge of directing y'all where to go?"

A. "Alfredo."

Q. "Okay. And what had Alfredo been doing at the club?"
was he drinking cokes?"

A. "No. He was drinking alcoholic beverages."

Q. "Okay. And what was he acting like? was he

acting drunk or was he pretty sober?"

A. ⁶⁴ "Yea. He was, he was drunk too." (App. p. 293 Ln. 17 - p. 294 Ln. 7)

The prosecutor stating to the jury (26) twenty six times that Petitioner ⁶⁶ "would not stop" or ⁶⁵ "refused to stop" (App. p. 308 Ln. 9); (App. p. 309 Ln. 19); (App. p. 309 Ln. 25); (App. p. 310 Ln. 5); (App. p. 310 Ln. 14); (App. p. 312 Ln. 21); (App. p. 315 Ln. 5); (App. p. 315 Ln. 6); (App. p. 315 Ln. 14); (App. p. 315 Ln. 21); (App. p. 315 Ln. 25); (App. p. 349 Ln. 9); (App. p. 349 Ln. 13); (App. p. 357 Ln. 11); (App. p. 358 Ln. 8); (App. p. 360 Ln. 15); (App. p. 360 Ln. 16); (App. p. 360 Ln. 20); (App. p. 362 Ln. 1); (App. p. 363 Ln. 21 (a)); (App. p. 363 Ln. 21 (b)); (App. p. 363 Ln. 22); (App. p. 364 Ln. 8); (App. p. 364 Ln. 11); (App. p. 366 Ln. 3); (App. p. 366 Ln. 4).) annulled the trial judge's charges. For, you can tell the jury one time that the camel has one hump, and then you tell the same jury (26) twenty six times that the camel has two humps, that jury is going to remember two humps, not one.

See: U.S. v. Carter, 236 F.3d 777 (6th Cir. 2001), ⁶⁶ "As we previously noted in this opinion, jurors are apt to place great confidence in the statements of prosecutors..."

This was not an harmless error, for, this issue went to the heart of the case, and was the sole argument by the prosecutor why the Petitioner was not entitled to self-defense, and it removed from the jury the most important part of Art. 6 (The Castle Doctrine), The No Duty to Retreat.

Trial counsel had (26) twenty six opportunities to object to this highly prejudicial comment by the prosecutor, but did not do so once. In fact trial counsel did not object even once during the State's grossly inflammatory and prejudicial closing argument.

See: Javor V. United States, 724 F.2d 831, 834 (CA. 9 1984),⁶⁵ "Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all"³³.

Trial counsel was ineffective in failing to object to the prosecutor's highly prejudicial argument (26) twenty six times that Petitioner⁶⁶ "would not stop"³³ or "refused to stop"⁶⁵ the vehicle while being attacked by the decedent.

Thereby negating Petitioner's no duty to retreat.

[IV] The PCR court erred in finding appellate counsel was effective when counsel failed to raise the issue of the directed verdict on self-defense on direct appeal.

Chief appellate defender Robert M. Dudek was ineffective when he failed to raise the issue on the directed verdict on self-defense since this directed verdict was asked for by trial counsel:

⁶⁶ "We would make a directed 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." (App. p. 369 Ln. 20-24)

And again:

The Court: ⁶⁶ "All right. Ms. Jones, do you want to renew your motions?"

Ms. Jones: ⁶⁶ "Your Honor, I would."

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." (App. p. 318 Ln. 10-16)

And it was ruled on by the trial judge, therefore it was preserved for Appellate Review:

⁶⁶ "I'm going to deny your motion for a directed verdict." (App. p. 322 Ln. 8)

See: Smith V. Robins, 528 U.S. 259, 288 (2000) (Citing 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."

There is a clear difference between a "dispositive issue," see: State V. Johnson, 362 S.E.2d 480 (S.C. 1987), "We conclude that the evidence presented by the state was insufficient to sustain a conviction of murder and a directed verdict should have been granted."

"The appellant's conviction of murder and robbery are reversed and the matter is remanded to the trial court for a judgement of "acquittal" on the charges."

And a "continuing issue":

"By reason of the foregoing arguments, appellant's conviction should be reversed and remanded to the Spartanburg County Court of General Sessions for a "new trial." (App. p. 435 Ln. 1-2). (Initial Brief of Appellant). (State V. Marin)

The Chief Appellate Defender, Robert M. Duxer should have known the difference.

It is not the job of appellate counsel to assume the role of a 4th Appellate Court Justice, or a 6th Supreme Court Justice, and decide whether Petitioner (Appellee) was entitled to a directed verdict, especially since self-defense was proven as a matter of law.

Self-defense has been proven in this case as a matter of law. See: State v. Davis, 317 S.E.2d 453 (S.C.App. 1984), "There are four elements required by law to establish self-defense in this case. First, the defendant must be without fault in bringing on the difficulty:

Petitioner was without fault in bringing on the difficulty because he was attacked for the first time by being placed in a headlock, and causing his vehicle to go into the oncoming lane, and almost hitting a telephone pole. After passing decedent's road through no fault of his own, since the front passenger (Jimenez), who was manning the G.P.S. on Petitioner's laptop failed to tell Petitioner (the driver), where to turn onto decedent's road:

Q. "Okay, so there was a laptop in the car as well?"

A. "Yes, ma'am."

Q. "Okay, And that was your laptop?"

A. "Yes, ma'am."

Q. "Okay. And that laptop sounds like it has a G.P.S."

A. "Yes, ma'am."

Q. "Okay. So you put that address into the computer."

A. "Yes, ma'am."

Q. "Who was in charge of directing y'all where to go?"

A. "Alfredo". (Jimenez)

Q. "Okay. And what had Alfredo been doing at the club? was he drinking cokes?"

A. "No. He was drinking alcoholic beverages."

Q. "Okay. And what was he acting like? was he acting drunk or was he pretty sober?"

A. ⁶⁶ "Yea, He was, he was drunk too." (App. p. 293 Ln 17-294 Ln 7)

Testimony of Officer Gorge Brown to excited utterance by the eyewitness (Jimenez) at the scene:

⁶⁶ "He said that they had gone past his street and the guy (decedent) got all upset and came over the seat fighting with the driver." (App. p. 129 Ln. 12-14)

At the time of the first attack, Petitioner did not know why he was being assaulted:

A. ⁶⁶ "And he jumps up and he grabs me in a headlock.

Q. ⁶⁶ "Okay. What did you do once he put you in a headlock?"

A. ⁶⁶ "I grabbed [his hands and pushed them up off of me] (sic)

I'm like, hey, man, what the hell are you doing?"

Q. ⁶⁶ "Okay. What happened to the car at that point?"

A. ⁶⁶ "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, I got the car back on the road." (App. p. 296 Ln. 1-12)

Petitioner's testimony indicated that the decedent's violent behaviour was an unreasonable reaction to Petitioner having passed his road, and that the decedent's blood alcohol level, which was 0.323 would most probably lead to decedent's aggressive behaviour.

If a bus driver passes your stop and you attack the bus driver, you are committing a felony (A.B.I.K.).

Had (Jimenez) told Petitioner where to turn, Petitioner would have done so. No driver purposely misses a turn or an exit on the highway.

So Petitioner was without fault in bringing on the difficulty.

Second, 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:

Being in a head-on collision; Going through a windshield of an automobile head first at 45 or 50 M.P.H., and hitting one's head against a telephone pole, a tree, a concrete wall, or any unmovable object at said speed would certainly constitute imminent danger:

⁶⁶ "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."³³ (App. 296 Ln. 10-12) (first attack)

⁶⁶ "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."³³ (App. p. 298 Ln. 10-12) (second attack)

Third, if his defense is based upon his belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief.

If the defendant actually was in imminent danger, 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:

Any reasonable prudent man of ordinary firmness and courage would certainly believe going through the windshield of a vehicle, and hitting one's head on a telephone pole at 45 or 50 M.P.H., or a tree, or a concrete wall, or a head on collision, was in imminent danger of losing his life or sustaining serious bodily injury.

Fourth, defendant had no other probable means of avoiding the danger of losing his life or sustaining serious bodily injury than to act as he did in this particular instance. If however, the defendant was in his own premises he had no duty to retreat before acting in self-defense:

Although the law states that Petitioner was under no obligation to retreat, Petitioner did in fact try to retreat multiple times:

1. "And at that point, you know, I was really scared.

I was wondering, you know, what had just happened, you know, what he had just [done] (sic) or why...

I mean, he had just jumped on me, I mean, for what I-- for an unknown reason. I didn't know why he did that... at that point, you know, I decided not to take him home. I was just trying to find a public place, you know, people where I could stop.⁹⁷

(App.p.296-299) (first attack)

But the decedent attacked Petitioner (driver) again before he could stop:

2. Q. "Okay. And what happened as you're driving trying to find a public place to, to get some help?"

A. "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."

Q. "Okay. What happened then?"

A. "Well, I kept pushing him, pushing him back. You know, I'm like, hey, what, where are you going, you know, what are you doing?"

Q. "So you pushed him back one time. (Petitioner pushed him back several times) Did that work? Did he go back into the back seat?"

A. "No. He kept coming back."

Q. "Yeah. But initially does he fall back or does he keep coming?"

A. "Yes. He goes back, but he kept coming again."
(App. p. 298 Ln. 8-22)

Once the decedent attacked Petitioner (the driver) he became an intruder and Petitioner had no duty to retreat.

Although Petitioner agreed to give the decedent a ride home, he did not agree to being assaulted:

"Well, what if you take a hitchhiker into your vehicle-- that's consensual-- and then they become an attacker?"

(statement by trial judge) (App. p. 283 Ln. 16-18)

Redirect Examination by Petitioner's PCR counsel:

Q. ⁶⁶ Mr. Marin, when you were attacked the second time, did Mr. Tabares give you any notice? ⁹⁹

A. ⁶⁶ No. ⁹⁹

Q. ⁶⁶ Did he tell you I'm getting ready to attack you? ⁹⁹

A. ⁶⁶ No. ⁹⁹

Q. ⁶⁶ Was it real sudden? ⁹⁹

A. ⁶⁶ Yes. ⁹⁹

Q. ⁶⁶ And the next thing you know, you have this guy coming over your back, fighting you, grabbing at the steering wheel? ⁹⁹

A. ⁶⁶ Yes. ⁹⁹

Q. ⁶⁶ And so you were fighting him and trying to keep control of the car? ⁹⁹ Is that correct? ⁹⁹

A. ⁶⁶ That's correct, yes. ⁹⁹

Q. ⁶⁶ And, again, is this going slowly or is this happening quickly? ⁹⁹

A. ⁶⁶ No, this happened very quickly. ⁹⁹

Q. ⁶⁶ Okay. And you felt that you were defending yourself? ⁹⁹

A. ⁶⁶ Yes. ⁹⁹

Q. ⁶⁶ And the shots that you fired you felt were in self-defense? ⁹⁹

A. ⁶⁶ Yes. ⁹⁹

Q. "You did not attack the guy behind you?"

A. "I did not."

Q. "He attacked you?"

A. "That's correct."

Q. "And was trying to wreck your car?"

A. "Trying to kill us yes."

Q. "The two shots, were they like bang, (pause), bang or were they instantaneous, boom, boom?"

A. "Well, like boom boom."

Q. "Okay. And that was at-- there was no length of time between the two shots?"

A. "No, not much length of time."

Q. "Okay. And you stopped shooting when he dropped?"

A. "Yes."

Q. "Okay. Were you in shock after this?"

A. "And before. I was in shock the first time he attacked me. We almost hit a telephone pole, [When] (sic) he put me in the headlock, and, as soon as I touched the brakes, the car veered to the left and we almost hit a telephone pole. We almost got killed right there and then."

Q. "What night in the week did this happen?"

A. "This was Sunday to Monday morning."

Q. ⁶⁶ "Sunday night, Monday morning?"

A. ⁶⁶ "Yes."

Q. ⁶⁶ "Not many places open at ---"

A. ⁶⁶ "Everything ---"

Q. ⁶⁶ "---that time?"

A. ⁶⁶ "---is closed on Sundays."

(App. p. 819 Ln. 8 - 821 Ln. 8).

See: State V. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), ⁶⁶ "Applying subsection (C) the judge found Jones established by a preponderance of the evidence that she was entitled to immunity under section 16-11-440 (C) because she: (1) was not engaged in unlawful activity at the time of the attack; (2) was attacked in a place where she had a right to be; (3) did not have the duty to retreat but, rather, had the right to stand her ground and meet force with deadly force; and (4) acted in self-defense.

See also: State V. Scott, 424 S.C. 463, 819 S.E.2d 116 (2018), Immunity statute's subsection permitting one stand his ground and use deadly force if attacked in a place where he had the right to be applied in prosecution for murder with respect to defendant who exchanged gunfire with occupants of a vehicle from the curtilage of his home; defendant was not engaged in an unlawful activity, defendant was attacked, defendant was in a place where he had a right to be, and defendant believed reasonably that use of deadly force was necessary to prevent death or great bodily injury to himself and others S.C. Code Ann. § 16-11-440 (C).

see: State V. Douglas, 411 S.C. 307, 768 S.E.2d 323 (2014),

"The duty to retreat need not be shown in a murder case in which a defendant seeks immunity from prosecution under the Protection of Persons and Property Act. Code 1976, §16-11-410 et seq. (see: App. p. 320 ln. 11-13)

"Sufficient evidence existed that defendant reasonably believed shooting victim was necessary to prevent great bodily harm and that he acted in self-defense as required for immunity from prosecution under the Protection of Persons and Property Act, even though defendant condoned and participated in drinking binge at his home with victim; several photographs of defendant showed severe bruising on his upper arms, a black eye, a scraped knee, and several marks on his legs and chest, defendant's testimony indicated that victim's violent behavior was an unreasonable reaction to defendant's reasonable demand for victim to return defendant's medicine, objective forensic evidence was consistent with defendant's testimony, and victim previously choked defendant and had to be pulled off him."

see also: State V. Wington, 375 S.C. 25, 649 S.E.2d 185 (Cl. 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 even to the extent of taking life if necessary, where, being without

fault in bringing on the difficulty, he is assaulted while in his own dwelling³³.

Just as in Douglas, Petitioner was without fault in bringing on the difficulty: see (App. p. 293 Ln. 17 - 294 Ln. 7 Supra)

Just as in Douglas, Petitioner was assaulted in his own dwelling:

Q. ⁶⁶And that registration card was found in the Durango?³³

A. ⁶⁶Yes, in the glove box.³³

Q. ⁶⁶And the registration indicated it belonged to the defendant?³³

A. ⁶⁶That is correct.³³

See: Art. 6 § 16-11-430 (1):

⁶⁶Dwelling³³ means a building or conveyance of any kind... mobil or imobil.³³

Art. 6 § 16-11-430 (4):

⁶⁶Vehicle³³ means a conveyance of any kind...³³

Article 6 § 16-11-420 (a):

⁶⁶It is the intent of the General Assembly to codify the Common Law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle...

Art. 6 §16-11-420(b):

The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders, and attackers without fear of prosecution or civil action for acting in defense of themselves or others:

(Once the decedent attacked Petitioner (the driver), he became an intruder, an attacker): (App. p. 283 Ln. 16-18) Supra.

Art. 6 §16-11-420(d):

The General Assembly finds that persons residing or visiting this state have a right to expect to remain unmolested and safe within their vehicles:

(Petitioner agreed to give the decedent a ride home. Petitioner did not consent to being attacked for passing the decedent's street).

Art. 6 §16-11-420(e):

The General Assembly finds that no victim of a crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack:

(Petitioner has shown by the evidence and testimony that he had no duty to retreat).

Art. 6 §16-11-440(a):

A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily

injury to another person if the person: (2) Who uses deadly force, knows or has reason to believe that an unlawful and forcible act is occurring or has occurred:

(the decedent was forcing the vehicle off the road, and was attacking Petitioner (A.B.I.K.)).

Art. 6 § 16-11-440(c):

A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including but not limited to, his place of business has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in section 16-1-60:

(Petitioner reasonably believed he was in danger of losing his life or great bodily injury to himself and the other passenger by being in a head-on collision, hitting a telephone pole, a tree, a concrete wall, or any other unmovable object at 45 or 50 M.P.H.).

Art 6 § 16-11-450(a):

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 for the use of deadly force:

(Petitioner submits that he has met all the provisions of this article).

On the one issue which Chief Appellate defender Robert M. Duder raised on appeal (the continuing to shoot proposition) which the Court of Appeals denied Petitioner, the Court stated as follows in their opinion:

⁶⁶ "The Supreme Court approved the charge (continuing to shoot) as a proper way to deal with a different issue than the one we face in this case. In State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), the court faced the question of whether the trial court erred in refusing to direct a verdict for the defendant. 270 S.C. at 654, 244 S.E.2d at 504. (Which is the very issue appellate counsel failed to raise on this appeal).

See: Anderson v. State, 354 S.C. 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'" .

Self-defense has been proven in this case as a matter of law. Trial counsel requested a directed verdict on self-defense, and it was ruled on by the trial judge. Therefore it was preserved for appellate review:

See: State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (S.C. 2013),
⁶⁷ 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, 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.⁷⁹

Just as in Curry, Petitioner ~~did~~ also moved for immunity under the Act at the directed verdict stage.

Just as in Curry, Petitioner's trial counsel called it a "slightly unusual" procedure, in different words:

"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 goes to the jury.

It's actually 16-11-450"⁸⁰ (App. p. 320 Ln. 6-11)

Just as in Curry the decision in Duncan was not published until after Petitioner's case was tried.

Just as in Curry, Petitioner did not have the benefit of Duncan.

Just as in Curry, both appeals were filed by the same appellate defender: Robert M. Duder.

Since this was a dispositive issue in this case, Appellate counsel Chief Appellate Defender Robert M. Duder was ineffective in failing to raise this issue on Petitioner's Direct Appeal.

[V] The PCR court erred in finding that Spartanburg County Prosecutor acting the role of an Asst. Attorney General did not commit prosecutorial misconduct by misstating the facts and evidence in this case on his briefs to the Court of Appeals and the South Carolina Supreme Court.

(App. p. 476)

(App. p. 585)

Although Mr. Russell D. Ghent was a prosecutor for Spartanburg County at the time of Petitioner'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 Donald J. Zelenka.

(App. p. 476)

(App. p. 585)

Prosecutor Russell D. Ghent abused his discretion and committed prosecutorial misconduct by misstating or injecting disinformation into his briefs to the Court of Appeals and the Supreme Court in order to create bias and prejudice against Petitioner, and in an attempt to introduce the element of malice in a case in which there was no malice.

This action only having the effect of proving and reinforcing Petitioner's assertion that the State lacked the required element of malice imperative in supporting a murder conviction.

The evidence and testimony presented at trial and PCR clearly contradicts Mr. Ghent's spurious assertions on his briefs:

Q. "There was no testimony in the trial about the so called -- the suppositions that you testified to?" (in the briefs)

A.^{6b} No, sir, but the Supreme Court... had no problem with it.⁹⁹ (App. p. 891 Ln. 4-8)

(testimony by Mr. Russell D. Ghent at the PCR hearing)

At the PCR hearing, Donald Girndt, an expert in crime scene reconstruction testified that after reviewing the evidence i.e. examination of the car, pictures, reports, testimonies etc., the crime scene was consistent with, and corroborated Petitioner's version of events:

Q.^{6b} All right. But the question is, based on your examination of the car, the pictures, the reports, and the like, and Marin's testimony, Mr. Marin's testimony was consistent with what you saw in the crime scene?⁹⁹

A.^{6b} Yes.⁹⁹ (App. p. 712 Ln. 9-13)

In the Opinion by the Court of Appeals, the court stated in their opinion in State v. Marin:

^{06b} Jimenez, the passenger and only other eyewitness in this case, did not testify at trial. Multiple witnesses testified that Jimenez's statements to law enforcement immediately after the incident and while assisting investigators with recreating the events leading up to Tabares' death corroborated Marin's trial testimony.⁹⁹ (App. p. 481 Ln. 28-31)

In the Initial Brief of Respondent to the Court of Appeals filed on Aug. 6, 2012, Mr. Ghant testified in his brief as follows:

"Even assuming for argument the events were as Appellant claimed at trial, the Appellant 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.E.2d 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)..."

"In State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (S.C. 2007), our Supreme Court held that 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." (App. p. 456 Ln 1-22)

This is a perfect example that in any absence of malice in this case, Mr. Ghant and the State must desperately fabricate it in order to negate Petitioner's entitlement to the first element of self-defense and justify Petitioner's wrongful murder conviction.

Petitioner in this case did not take a loaded gun to the site of a prior confrontation. And Petitioner did not approach an altercation that

was already underway with a loaded weapon by his side.

The weapon in this case was already in the glove box of Petitioner's vehicle, where it is lawful for Petitioner to keep, since the weapon was legally registered in Petitioner's name:

Q.⁶⁶ Okay. What did you do at that point?³³

A.⁶⁶ At that point I pushed him off, and I grabbed the glove box and opened the glove box and got the pouch out which had the gun in it.³³ (App. p. 299 Ln. 6-9)

Q.⁶⁶ Can you explain to the jury this photograph?³³

A.⁶⁶ That's just sort of a general closer-up picture of the black nylon bag that was on the ground outside the driver's door of the vehicle on the roadway.³³
(App. p. 172 Ln. 10-13)

Q.⁶⁶ And what is that?³³

A.⁶⁶ It's a receipt from where a Ruger P95 9mm handgun was purchased June the 7th of 2000.³³

Q.⁶⁵ By whom?³³

A.⁶⁶ Manuel Marin...³³ (App. p. 178 Ln. 11-15)

Q.⁶⁶ There is nothing illegal about buying a gun, correct?³³

A.⁶⁶ No.³³

Q.⁶⁶ Okay. And, in fact, your trace didn't come up that this gun had been stolen or anything like that correct?³³

A. ⁵⁰ "No. The trace simply just goes from the manufacturer to the original purchaser of the firearm ⁹⁹."

Q. ⁶⁵ "And so far as you could tell it was a legitimate transaction ⁹⁹."

A. ⁶⁶ "Yes. It was ⁹⁹". (App. p. 222 Ln. 3-11)

Therefore Petitioner was without fault in bringing on the difficulty.

Mr. Ghent also accused Petitioner of "kidnapping" the decedent, see: (App. p. 464 Ln. 4-14).

Petitioner in this case was not indicted or charged with "kidnapping". There was no mention of the word "kidnapping" during the trial. Petitioner did not force the decedent into his vehicle:

Q. ⁶⁰ "Okay. And Mr. Tabares wasn't fighting you in terms of getting into the vehicle, was he? ⁹⁹"

A. ⁶¹ "Not, no, no, no way ⁹⁹."

Q. ⁶⁶ "Okay so he went willingly and sat down ⁹⁹."

A. ⁶⁶ "Yeah, yeah, yeah, yeah ⁹⁹". (App. p. 88 Ln. 9-13)

(Testimony of bouncer who placed the decedent in the vehicle).

And after being attacked by the decedent, the decedent became an intruder, an attacker, an aggressor.

If you are a passenger in a bus, and the bus driver passes your stop, especially through no fault of his own, and you attack the bus driver, you cannot charge the bus driver with "kidnapping ⁹⁹."

After being attacked by the decedent the first time, Petitioner was

looking for a place to stop, but was attacked again by the decedent before he could do so.

Regardless. There was nothing in the trial transcript with the word ⁶⁶kidnapping³³, and Petitioner was not charged or indicted for ⁶⁶kidnapping³³.

In the Brief of Respondent for Writ of Certiorary to the Supreme Court, Filed on Jan. 12, 2015, Mr. Ghent testified in his brief that:

⁶⁶The Petitioner claimed he was attacked by the victim from the back seat while trying to drive him home, turning the car into a ⁶⁶missile³³ and justifying that he put a gun to the victim's head as the victim was prone and face down in his lap³³. (App. p. 575 Ln. 21-23)

If this had been the case, Petitioner would have shot himself on his ³³lap³³, since the wounds were through and through, and back to front: see, testimony by Dr. John David Wren (App. p. 223-237).

And again:

⁶⁶but which admittedly did not tell jurors that having once shot an unarmed man who was pinned face down³³. (App. p. 578 Ln. 3-4)

And again:

⁶⁶This was evidence of pulling a gun from the glove compartment (emphasis in glove compartment) while holding the victim face down³³. (App. p. 579 Ln. 6-7)

While the crime scene photographs clearly shows that one of the two bullets exited high up on the windshield and the other impacted the G.P.S. unit which was attached to the rearview mirror and shattered upon impact.

Which proves that the decedent was upright and holding on to the steering wheel at the time of the shooting, and trying to wreck the vehicle by running it off the road. (and this is also why the suppression of the exculpatory evidence (Lab No. L08-11693) steering wheel cover was so critical and prejudicial, without the cover the state is able to conjure all sorts of stories).

Further contradicting prosecutor Ghent's spurious writings on his briefs is the fact that no slugs or bullet holes were found anywhere on the floorboard or anywhere else in the vehicle except high up on the windshield and the shattered G.P.S. unit.

There was nothing in the record to confirm that Petitioner held the decedent's head down as described by Mr. Ghent.

On cross-examination at the PCR hearing, 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 Petitioner holding the decedent's head down was speculation and conjecture.

See: SCRC Rule 210 Record on appeal (c) Content:

The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with

the requirements of Rule 338.⁶⁶ The Record Shall not, however, include mater which was not presented to the lower court or tribunal.⁶⁹

The only possible way for Prosecutor Russell D. Ghent's testimony to be true, that: Petitioner shot the decedent while holding him ⁶⁶ "pinned face down in his lap", is for one of the bullets, or projectiles to have traveled on a downward path through the decedent's head, then, made a (160°) one hundred sixty degree turn and impact the G.P.S. unit and shatter, then the second projectile also travel on a downward path, and that bullet too make a (140°) one hundred forty degree turn and exit through the upper part of the windshield.

See: United States V. Schuler, 813 F.2d 978, 980 (9th Cir. 1987),
⁶⁸ "Accordingly, it has long been the rule in this circuit that 'Prosecutors'
⁶⁶ must refrain from introducing evidence not in the record."

See also: United States V. Artus, 591 F.2d 526, 528 (9th Cir. 1979),
⁶⁸ "Indeed, in light of their status and stature as representatives of the government, prosecutors have an affirmative 'obligation' to avoid making statements of fact... not supported by proper evidence introduced during trial." Gaither, 413 F.2d at 1079. ⁶⁶ "We have thus made plain that when a prosecutor 'makes unsupported factual claims... it is definitely improper.'" United States V. Kojayan 8F.3d 1315, 1321 (9th Cir. 1993).

⁶⁶ "The prosecutor's job isn't to win, but to win fairly." Artus Supra.

What compounds Petitioner's prejudice on this issue is the fact that appellate counsel for Petitioner, Chief Appellate Defender Robert M. Durkin neglected to file the Reply Briefs, SCRC, Rule 208(a)(3) Rule 209, and offer a rebuttal to the State's misstatements of facts thereby acceding to the State's prevarications:

Q.⁶⁶ There was no testimony in the trial about the so called -- the suppositions that you testified to?⁶⁷ (in the briefs)

A.⁶⁸ No, sir, but the Supreme Court had no problem with it.⁶⁹ (App. p. 891 Ln. 4-8)

Without a Reply Brief to contest these inflammatory statements against Petitioner, the Supreme Court had no choice but to accept them.

This was not Petitioner's fault but it was prejudicial to him and it violated Petitioner's Due Process of Law.

Petitioner's counsel should have filed the Reply Briefs contesting these factual conclusions which were unsupported by the record.

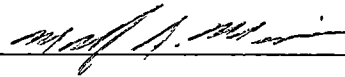
Unless Petitioner's bullets were the only ones known to mankind that could defy Sir Isaac Newton's Laws of gravity and motion, Prosecutor Russell D. Ghent misstated the facts and evidence in this case.

Therefore, Mr. Ghent committed Prosecutorial Misconduct.

CONCLUSION

For the foregoing reasons, Petitioner submits this Court should grant the Petition for Writ of Certiorari and the convictions and sentence reversed and the case remanded for a verdict of acquittal or a new trial.

Respectfully submitted,



Manuel A. Marin, #343371

Lieber Correctional Inst.

P.O. Box 205

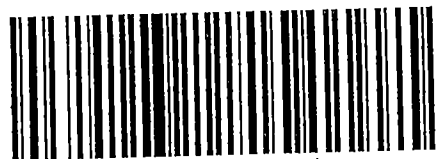
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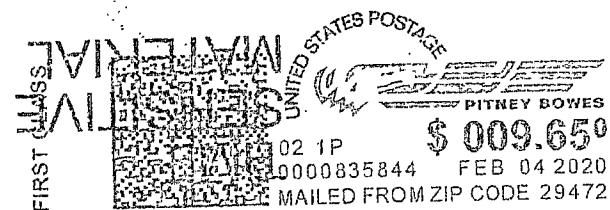
January 31, 2020

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A. Marin, #343371
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The Honorable Daniel E. Shearouse
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