THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Jocelyn Newman, Circuit Court Judge

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App. Case No. 2020-000205

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H. Dewain Herring, Petitioner,

vs.

State of South Carolina Respondent.

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# PETITION FOR WRIT OF CERTIORARI

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## ISSUES PRESENTED

I. Whether the lower court erred by failing to find that trial counsel rendered ineffective assistance by failing to properly address Petitioner's mental health, which resulted in prejudice to Petitioner that requires a new trial.

I. Whether the lower court erred by failing to find that trial counsel rendered ineffective assistance of counsel by failing to properly prepare and fully utilize a crime scene investigation expert prior to and during trial, which resulted in prejudice to Petitioner that requires a new trial.

## STANDARD OF REVIEW

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

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to Orders of commitment from the Richland County Clerk of Court. During the February 2006 term of the Richland County Grand Jury, Petitioner was indicted for Murder (2006-GS-40-00881) and Pointing and Presenting a Firearm (2006-GS-40-00914). App. p. 2355. On May 7, 2007, Petitioner proceeded to trial in front of the Honorable G. Thomas Cooper, Jr. and a jury at the Richland County Courthouse. App. p. 1. Petitioner was represented by Richard A. Harpootlian, Esquire. On May 21, 2007, Petitioner was found guilty as indicted. The Honorable G. Thomas Cooper, Jr., sentenced Petitioner to a term of thirty (30) years on the murder conviction and five (5) years concurrent on the pointing and presenting a firearm conviction. App. pp. 2359, 2364.

A direct appeal was filed and perfected by Richard A. Harpootlian, Esquire. App. p. 2365. On December 21, 2009, the South Carolina Supreme Court affirmed Petitioner's conviction and sentence. State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). App. p. 2489. A timely Petition for Rehearing was filed and denied on May 14, 2010. App. pp. 2504, 2526. The Remittitur was handed down on May 14, 2010. App. p. 2528.

On January 20, 2011, Petitioner, through James M. Griffin, Esquire, filed a Petition for Habeas Corpus. App. p. 2530. A First Amended Petition and First Amended Memorandum were filed on April 20, 2011. App. pp. 2359, 2548. A Return and Memorandum in Support of Motion for Summary Judgment was filed on April 29, 2011. App. p. 2592. A Memorandum in Response to Respondent's Motion for Summary Judgment and Reply to Respondent's Return was filed on June 14, 2011. App. p. 2670. The Report and Recommendation of the Honorable Paige J. Gossett, United States

Magistrate Judge, was issued and filed on January 25, 2012. App. p. 2687. Petitioner's Objections to the Magistrate Judge's Report and Recommendations was filed on February 13, 2012. App. p. 2712. The Honorable Margaret B. Seymour, Chief United States District Judge, issued an Opinion and Order on March 19, 2012, which accepted the Magistrate's Report and Recommendation, dismissed the petition and denied a certificate of appealabilty. App. p. 2724. Petitioner, through counsel, filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit on April 18, 2012, which was dismissed via unpublished Opinion on August 21, 2012. App. p. 2745.

On June 4, 2010, Petitioner filed an Application for Post Conviction Relief. App. p. 2746. The State submitted a Return on July 21, 2010. App. p. 2753. On March 21, 2014, Tricia A. Blanchette, Esquire, was substituted as Petitioner's counsel. App. p. 2764.

On August 6, 2014, Petitioner, through counsel, filed a Motion for Discovery in Post Conviction Relief. On September 5, 2014, a motion hearing was held in front of the Honorable Robert E. Hood at the Richland County Courthouse. Thereafter, the Honorable Robert E. Hood issued an Order Authorizing Discovery. App. p. 2767. A subsequent Order for Discovery was issued by the Honorable Tanya A. Gee on September 1, 2015. App. p. 2779.

On September 12, 2016, Petitioner, through counsel, filed an Amendment to Application for Post Conviction Relief. App. p. 2780. By way of the Amendment, Petitioner abandoned any claim(s) of ineffective assistance of appellate counsel and moved to specifically allege ineffective assistance of trial counsel.

On January 4, 2017, an evidentiary hearing was convened at the Richland County Courthouse in front of the Honorable Jocelyn Newman. App. p. 2784. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Jessica E. Kinard, Assistant Attorney General. At the outset of the hearing, PCR counsel gave an opening argument addressing the issues raised and providing references to the trial transcript. Petitioner was sworn and questioned by the court regarding his desire to proceed on his Application, and he affirmed that he was seeking a new trial. App. pp. 2789-91. Petitioner, through counsel called the following witnesses: Tora Brawley, Ph.D., Donna Schwartz Maddox, M.D., Richard A. Harpootlian, Esquire, R. Robert Tressel, and Peter Skidmore. At the conclusion of the hearing, the court allowed time to obtain the evidentiary hearing transcript and subsequently requested proposed Orders from both parties. App. p. 3009.

On May 9, 2019, the Honorable Jocelyn Newman issued an Order Denying Post-Conviction Relief, which was filed on May 10, 2019. App. p. 3067. Petitioner filed a Motion Pursuant to Rule 59(a) & (e), SCRCP, on May 20, 2019. App. p. 3091. A Form Four Order Denying Petitioner's Motion was signed on January 3, 2020 and filed on January 7, 2020. App. p. 3126. An Amended Form Four Order was issued on February 10, 2020 and filed on February 14, 2020, from which the Notice of Appeal was timely filed and this Petition follows. App. p. 3128.

## ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). Where an application for post conviction relief alleges

ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. 466 U.S. at 686; see Butler v. State, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. Bell v. State, 321 S.C. 238 (1996); see also Cherry v. State, 300 S.C. 238 (1989); Rule 71.1(e), SCRCP.

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

I. The lower court erred by failing to find that trial counsel rendered ineffective assistance by failing to properly address Petitioner's mental health, which resulted in prejudice to Petitioner that requires a new trial.

Petitioner submits that the lower court erred by failing to find that trial counsel rendered ineffective assistance of counsel by failing to properly address Petitioner's mental health, which resulted in prejudice to Petitioner that requires a new trial. As a

result, Petitioner urges this Court to consider the following, in conjunction with the complete record, and reverse the lower court's denial of relief.

At the evidentiary hearing, Petitioner called Dr. Tora Brawley to the stand, and she was qualified as an expert in the area of neuropsychology. App. p. 2820. When asked to explain neuropsychology, Dr. Brawley responded: "Neuropsychology is the study of brain behavior relationships. We conduct specific testing that looks at how different areas of the brain are actually working. Where an MRI gives you a picture of the brain, these tests tell us how the areas are functioning, how they are – at what capacity they are functioning." App. p. 2820, lns. 10-16. She conducted a neuropsychological evaluation of Petitioner, including a clinical interview and battery of neuropsychological tests, on March 15, 2016, and her report generated from that evaluation was admitted. App. pp. 2821-2824. She explained that post evaluation she reviewed a cognitive testing report prepared by William E. Haxton, Ph.D., from a neuropsychological evaluation he conducted on June 17, 2006. App. pp. 2823, 3061. She also explained how she determined that the results of her testing were valid. App. pp. 2824-2825. Dr. Brawley summarized her findings, as follows:

> Mr. Herring had several areas of deficit. He had deficits of verbal learning, verbal memory, verbal fluency, abstract reasoning, motor functioning. He was very low, for instance, at the fourth percentile, for his memory for a story. He was at the second percentile for his ability to copy a figure. So, overall I felt that these results were consistent with mild dementia. He was also reporting some depression, but I didn't feel like that could account for what I was seeing here.
>
> The fact that he had such high level premorbid or what we consider beforehand abilities, and he is conversationally, what I call conversationally intact, he can mask some of those deficits to people if they are just having a general conversation with him. It is not until you get to the actual testing that you find the extent of the organicity that we have got here.

App. p. 2825, ln. 20 – p. 2826, ln. 13. She also explained her finding that Petitioner was "tangential," as follows: "He had a hard time staying on task and on questions. I would ask a question and he would start to answer it, and then would go off and I had to kind of reel him back in. It was hard to keep him on task." App. p. 2826, lns. 17-21.

Dr. Brawley also testified about the dementia interviews she conducted with Petitioner's family. She discovered that Petitioner's family had noticed changes in Petitioner's cognition for years prior to 2006, but they had attributed it to his psychiatric symptoms and alcohol consumption. App. pp. 2828-2830.

Throughout her testimony, Dr. Brawley addressed Dr. Haxton's evaluation and report from 2006. Dr. Brawley explained that the premorbid level of functioning she found was consistent with what Dr. Haxton found in 2006. App. p. 2827. Specifically, she testified:

> And Dr. Haxton also did a battery of testing. A lot of similar tests that I give, some were a little bit different, but they were comparable. I was able to compare scores. He had declined in a couple of areas since that testing. But at that time Dr. Haxton noted that he had mild to moderate loss of cognitive functioning, marked ---
>
> Again, my results are consistent with those of Dr. Haxton. He also noted some perseveration or repeating, some of the same behavioral things that I noted in my report. And he felt that also his deficits impaired his ability to successfully maintain his legal practice at this time, which was the question that Dr. Steude had posed to him. So he did note significant impairments in cognition at that time.

App. p. 2830, lns. 6-20, p. 2832, ln. 5-15. When asked on cross-examination if Dr. Haxton's findings were a precursor to the conditions she found, she responded: "I think that Dr. Haxton's findings show that there was also dementia present at the time that he evaluated him in 2006." App. p. 2834, lns. 4-9. Dr. Brawley indicated that she would

have been willing to work with trial counsel prior to and throughout Petitioner's case, but she was not contacted. App. p. 2833.

When Dr. Donna Maddox took the stand, she was qualified as an expert in the area of forensic psychiatry. App. p. 2841. She addressed the materials she relied upon in reaching her findings, which included the file of Dr. Steude (Petitioner's treating psychiatrist at the time of the crime and trial) and neuropsychological evaluation done by Dr. Haxton dated June 17, 2006. App. pp. 2843-2844. She evaluated Petitioner at Kirkland Correctional Institution in September of 2015 and requested a neuropsychological evaluation and family interviews by Dr. Tora Brawley. She addressed the causes she identified that contributed to Petitioner's dementia. She also explained that Dr. Haxton's report and Dr. Steude's file were helpful to establish that Petitioner was suffering from dementia at the time of his crime. App. pp. 2844-2845.

Regarding her interview of Petitioner, she recounted that it was clear that "he was having cognitive difficulty." App. p. 2848, lns. 6- 8. Specifically, she testified:

> What I noticed in the exam, he would often – as Dr. Brawley mentioned, he was very circumstantial. It was very hard to just get – he had a lot of information he wanted to share, but he would get so distracted, and would kind of go from one topic to the other, that it was very difficult to get him to cooperate, even though he was trying. So I had much more luck when I administered -- part of my exam is I do neurological evaluation, and I also do a neuropsychological screening. So I had him do some tests. And those tests showed symptoms of dementia.

App. p. 2848, lns. 9-21. She addressed Petitioner's dementia diagnosis, as follows:

> Persons with dementia, they can have different levels of functioning. Mr. Herring appears a lot more intact than what he is because he has very good vocal skills and he can answer questions. The problem is there is a lot of other things that your brain does that is important to dementia.
> So I did not have Dr. Haxton's results until after the testing as well. So they confirmed. It was very helpful for this case in particular because they

were present -- they would have been available around the time of his offense, and they were certainly very similar with Dr. Brawley's findings.

App. p. 2850, lns. 20 – p. 2851, ln. 7.[1]

Dr. Maddox addressed each diagnoses listed in her report. Specifically, she opined that within a reasonable degree of medical certainty Petitioner was suffering from a neurocognitive disorder at the time of his offense, which was verified for her by the information contained in Dr. Haxton's report and interviews of Petitioner's family. App. App. pp. 2854-2855.

Dr. Maddox addressed her concerns with the medications administered to Petitioner prior to his police interrogation and written statement. She explained that "intramuscular medications like Ativan, which is what he received, that can cause disinhibitions. It worsens dementia." App. p. 2858, ln. 25 – 2859, ln. 2. She further explained that the medication could account for Petitioner not remembering what he said during the interview or volunteering more information than he normally would have without the medication. App. pp. 2859-2860.

Dr. Maddox acknowledged that she had previously worked with trial counsel and would have been willing to assist him with Petitioner's case. App. pp. 2861-2862. She indicated that she would have followed the same methodology and felt confident, based upon Dr. Haxton's test results, she would have reached the same diagnosis. App. pp. 2862-2863. She agreed that she would have been willing to consult and assist in plea negotiations, trial preparation, trial, and mitigation. App. pp. 2863-2864. Specifically, she indicated that she would have been willing to testify at a Jackson v. Denno hearing

[1] Dr. Maddox also addressed her review of an MRI scan from 2011, which was abnormal. App. pp. 2853-2854.

regarding Petitioner's statement and at trial. App. p. 2866. She referenced Petitioner's testimony and his repeated responses that he did not remember, and she explained that she would have advised counsel that Petitioner should not testify at trial. App. p. 2865. She further testified regarding Petitioner's testimony, as follows:

> Question: What would have been your advice regarding putting him on the stand and having him testify at trial? You would have advised him not to do that?
>
> Answer: Absolutely, because, just as you – in looking at this testimony, he would have difficulty remembering. He could easily be confused.
>
> The problem with dementia is when you are conversationally attacked [intact], like Mr. Herring is, you can't tell – there is a condition in dementia called confabulation. And what that means is, your brain, when it can't remember something, it fills in the gaps. And it is not lying, it is not on purpose. Your brain fills in the gaps. And so you can't tell – no one is a human lie detector, so you can't tell when somebody with dementia is confabulating or they are actually relying upon their memory to recall something. So his memory also would not have been reliable in this case.

App. p. 2865, lns. 7-21.

Finally, Dr. Maddox was asked about the reply testimony of Dr. Garvin, who was qualified as expert in the area of clinical and forensic toxicology and drug chemistry, and she responded that the appropriate expert to testify about whether Petitioner's actions were purposeful would be a forensic psychologist or forensic psychiatrist. App. p. 2101, 2867-2868. In explaining her opinion regarding the testimony offered by Dr. Garvin regarding Petitioner on the surveillance video, she concluded: "Judging someone's intent or purposes just based on movements is not a good methodology." App. p. 2867, ln. 20 – p. 2868, ln. 3. She further explained that "persons with dementia... may not be

intoxicated to the point that you are stumbling or that you can't perform certain motor tests or neurological tests, but you still can be significantly cognitively impaired because of the underlying mental condition." App. p. 2868, lns. 15-22. She agreed that she would have been capable of testifying about Petitioner's mental health and medications instead of trial counsel merely asking Dr. Garvin about it.

When trial counsel took the stand, he acknowledged the Order he obtained for Petitioner to receive emergency mental health treatment. App. p. 2887. In response to whether he was aware that Petitioner was suffering from a mental illness at the time of his representation he responded:

> Yes. He had been under the treatment prior to this incident by Dr. Phil Steude, who is a psychiatrist here in town. And Dr. Steude, we contacted Dr. Steude about, you know, trying to figure out if there was some mental defense.
>
> Steude indicated that Dewain had been diagnosed bipolar and was on medication at the time of the incident, or had been prescribed medication. And that alcohol and that medication did not mix very well, that it made the person – affected their conduct, mental thoughts.
>
> And, of course, the testimony was clear that he had been playing golf that day with Chris Isgett and they had been drinking and then he – apparently he had some drinks at the different establishments he had gone to. So it was clear, he was drinking alcohol with that medication, and that could provide some explanation for his conduct, which would be voluntary intoxication, which is not a defense.
>
> So we actually attempted to show that his conduct was more consistent with him being given a, in the vernacular, Mickey, somebody had put something in his drink. We had an expert testifying about that. Apparently that didn't go very far.

App. p. 2887, ln. 18 – 2888, ln. 17.

During his testimony, trial counsel agreed that he assisted Petitioner with obtaining disability coverage due to cognitive impairment and inability to operate his law

practice, probably had Dr. Haxton's report and was on notice of Petitioner's cognitive impairment. App. pp. 2889, 2904, 2954-2955. He explained that he was relying upon Dr. Steude to review the report and give him an opinion, which he recalled as: "Bipolar was all he ever talked about." App. p. 2889, lns. 11-17. On cross-examination, he stated: "I now know that the information I received from Dr. Steude was not complete or accurate." App. p. 2947, lns. 19-22. When asked about Dr. Steude's qualifications, he explained that he did not "know what he is qualified in." App. p. 2952, ln. 20 - 2953, ln. 1.

He confirmed his familiarity with and utilization of Dr. Maddox as an expert. When asked why he did not utilize her services, he again responded that he deferred to Dr. Steude. App. p. 2890. He explained:

> If somebody had – I apologize for interrupting – if somebody had explained to me the relevance of that – you say dementia. I mean, I have talked to him. I know that Mr. Herring has been diagnosed with dementia right now. I talked to him this morning. He was conversant with me. I talked to Donna outside.
>
> I said, What is going on here? Because my concept of dementia is different than apparently what it really is. And she indicated, He is conversant. That doesn't mean he doesn't have dementia.
>
> So if somebody would have explained to me prior to this trial – and Dr. Steude would have been the one to do that – explained to me that dementia affects him in this way, which would have perhaps explained – I mean, that may have been relevant on a GBMI or if you could get that in to a jury it might have allowed them to conclude it was not murder, it was not Mouzon murder, it might have been voluntary or perhaps an involuntary.

App. p. 2891, ln. 17-2892, ln. 12.

Referring to his involvement in the PCR stemming from State v. Santiago, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006), he admitted that even if the testimony of Dr. Maddox regarding dementia was not admissible in the form of a defense, he would have utilized it in plea negotiations. App. pp. 2894. When further asked about Santiago, he

said he would have utilized Dr. Maddox at the Jackson v. Denno hearing and in front of the jury to address the voluntariness of Petitioner's statement, but he did not think of it. App. p. 2897. He further affirmed that he would have proffered her testimony, if deemed inadmissible. App. pp. 2895-2896.

Regarding Petitioner's trial testimony, counsel explained extensive preparation was undertaken for it. App. pp. 2898-2899. He described Petitioner's testimony as, "Horrible. Awful." – "Bizarre." – "Train wreck," and he ranked it as "the worst," testimony he had ever seen. App. p. 2899-2900. In response to whether he would have approached the case differently if he would have been advised by Dr. Maddox that Petitioner should not take the stand, he said he would have "absolutely" approached it differently. App. p. 2901. When asked about a different approach, he referenced that diminished capacity is not a recognized defense, so he would have to get in in "through the back door." App. p. 2902, lns. 8-13. He explained that he would have had to gotten it in via mitigation and to argue against the Mouzon charge. App. pp. 2902, 2904-2905.

Turning to the testimony of Dr. Garvin, counsel agreed that Dr. Garvin was "absolutely" allowed to be called in reply as a result of the defense calling Dr. Holbrook to testify about involuntary intoxication. App. p. 2910. When asked about his prior assertion that he did not want to divert away from the involuntary intoxication defense by going into Petitioner's medications, he acknowledged that he did in fact ask Dr. Garvin about Petitioner's medications being used to treat anxiety and depression. App. pp. 2909-2910. He could not think of a reason he did not object to Dr. Garvin's testimony about interpreting Petitioner's actions, and he admitted that he should have objected and requested a curative instruction. App. p. 2908.

When asked about the Solicitor's description of the defense as the shotgun effect and asked about the defense strategy, trial counsel responded:

> Well, I wouldn't describe it that way. I would describe it as there was a variety of different considerations that the jury should go through. Again, this is a reasonable doubt defense, not that he didn't do it. There are defenses where he didn't do it, he wasn't the guy that pulled the trigger, he wasn't the guy that drove by in the car, he wasn't he guy that broke into the house. That is not this case.
>
> This case is, he is the guy that shot, but he didn't intend to kill anybody. It was reckless, not malice under Mouzon, but simply reckless under involuntary manslaughter. And so there are a number of ways to get to that. And so we tried to develop each of them, whether it was involuntary intoxication, you know, fumbling with the gun, shooting at the building, whatever.

App. p. 2930, lns. 2-19. On cross-examination, he explained the defense, as follows:

> Well, that, you know, the he shot the guy, but that it wasn't malicious. It wasn't Mouzon malice, darkness of heart, absence of social conscious shooting. It was an involuntary manslaughter. A reckless disregard for the lives of others. And that would be involuntary manslaughter, which is a much lesser sentence, parolable, all those sorts of things.

App. p. 2941, lns. 6-13.

By way of the Order of Dismissal, the lower court briefly addressed the issues related to Petitioner's mental health and without citation to the record addressed trial counsel's testimony, in part, and held:

> Trial counsel stated that he relied heavily on the opinions of Dr. Steude, who made no mention of dementia or the June 2006 report of Dr. Haxton – only bipolar disorder. More specifically, he testified that he relied on the treating psychiatrist, Dr. Steude, to interpret any reports for him. He also admitted that his understanding of dementia was not entirely correct at the time, believing that Applicant's demeanor in their meetings was inconsistent with dementia; however, no one – including Dr. Steude – corrected his misapprehension. Trial counsel also testified that he had concerns about whether mental health expert testimony would be admissible at trial, although he believes that it may have been useful during plea negotiations or regarding voluntariness of a statement during a Jackson v. Denno hearing. However, Trial Counsel clarified that he

> neither knew nor had reason to know the full extent of Applicant's mental health issues during his representation.
>
> Ultimately, the Court finds that this allegation must be denied. Trial counsel reasonably relied on the advice and interpretation of Applicant's treating psychiatrist, Dr. Steude, who he believed to be the – ultimate expert – someone with existing experience and knowledge of the Applicant both before and after the incident. See Forsyth v. Ault, 537 F.3d 887, 892 (8th Cir. 2008) (counsel not ineffective for relying on expert opinion in structuring a defense or client). Trial Counsel's testified that he had no reason to doubt the accuracy of Dr. Steude's opinion and evaluation of Applicant, which is both logical and credible. While Applicant likely suffered from dementia at the time of the incident, the Court cannot find Trial Counsel's representation was deficient.

App. pp. 3079-3080.

The lower court's brief findings regarding the issues related to Petitioner's mental health must be reversed since the reasoning is not only flawed but it is also not supported by the record. As a threshold matter, the lower court did not hear testimony from Dr. Steude nor was Dr. Steude part of the trial record, yet the lower court errantly applied precedent from other judicial circuits and held:

> While Applicant presented expert testimony from Drs. Brawley and Maddox, their testimony is not probative to whether counsel was deficient in relying on Dr. Steude's opinion. See e.g. McClain v. Hall, 552 F.3d 1245, 1253 (11th Cir. 2008) finding that a later expert opinion does not show incompetence of counsel for relying on the first expert counsel consulted with). Requiring counsel to further investigate their experts' opinions would defeat the entire purpose of consulting with experts. See Stokley v. Ryan, 659 F.3d 802, 814 (9th Cir. 2011).

App. p. 3080.

It is apparent from trial counsel's testimony that he attempted to shift the blame to Dr. Steude for his failure to properly address Petitioner's mental health prior to and during trial, and this blame shift, which is not supported by the record as reasonable, was accepted by the lower court. Trial counsel's testimony does not establish a reasonable

trial strategy to weigh against his failure to address Applicant's known cognitive impairment. See Reeves v. State, 415 S.C. 366, 782 S.E.2 747 (Ct. App. 2015) (Reversing the denial of post conviction relief reasoning that trial counsel was deficient for failing to discuss with Reeves hiring a medical expert to more thoroughly challenge the State's medical evidence presented at trial and finding that counsel did not present a legitimate trial strategy for failing to consult with an expert before trial or call an expert at trial.). Despite the lower court finding that Dr. Steude was the "ultimate expert," absent from the record is any testimony from Dr. Steude regarding his treatment of Petitioner, consultation with and/or advice rendered to trial counsel. Petitioner submits that the lower court's finding that the experts offered at the evidentiary hearing were not "probative" to whether counsel was deficient in relying on Dr. Steude's opinion is in error and must be reversed since it is not supported by the record. Additionally, counsel's deficiency in addressing Petitioner's mental health exceeds his self-reported reliance on Dr. Steude as an expert.[2]

At the evidentiary hearing, counsel conceded that he utilized the findings of Dr. Haxton from 2006 when he assisted Petitioner in obtaining disability coverage for cognitive impairment prior to trial, yet he failed to establish that he discussed those findings with Petition and admitted he never discussed a dementia diagnosis with Dr. Steude. By way of the Order of Dismissal, the lower court addressed Dr. Haxton's findings, which counsel utilized regarding disability benefits but failed to utilize in Petitioner's murder defense or mitigation, as follows:

> Applicant also offered the report of neuropsychological evaluation performed by Dr. William Haxton, dated June 17, 2006. The report

[2] By way of the Rule 59, SCRCP, Petitioner urged the lower court to more fully address the issues raised regarding Petitioner's mental health. App. p. 3095.

> concludes that Applicant "experiences marked deficiencies in several areas" and that "[b]ecause of his history of good verbal and mathematical skills, Mr. Herring can give the impression that he is continuing to function at his previously optimal level. However, these skills mask his loss of ability to quickly process new information and to integrate disparate pieces of abstract information to formulate comprehensive conceptualization of central theme."

App. p. 3078, fn. 2. Additionally, the lower court noted Dr. Maddox's testimony that "while people with dementia have varying levels of functioning, Petitioner "appears a lot more intact that what he is because he has very good vocal skills and he can answer questions." App. 3078. It appears counsel was deficient in relying upon his own familiarity with Petitioner and Petitioner's treating psychiatrist and failed to identify the mental health issues identified by Dr. Haxton and properly addressed by Dr. Maddox and Dr. Brawley, yet the lower court held that trial counsel "neither knew nor had reason to know of the full extent of the Applicant's mental health issues during his representation." App. p. 3079. Petitioner submits this erroneous conclusion is not supported by the record cited to in the Order of Dismissal and in total.

At the evidentiary hearing, trial counsel agreed that he would have and/or should have utilized the findings of Dr. Maddox and Dr. Brawley, which encompass the findings of Dr. Haxton. He acknowledged his involvement in the Santiago case where Dr. Maddox was the expert utilized in the area mental health, and he conceded that he should have utilized her to argue against the voluntariness of Petitioner's statement pre-trial and in front of the jury as was addressed in Santiago, 370 S.C. 153, 634 S.E.2d 23. See also State v. Callahan, 263 S.C. 35, 208 S.E.2d 284 (1974) (Holding the lack of mental capacity is an important factor to be considered, amongst other factors, in determining if a confessions is voluntary, and finding that the trial court erred in not allowing a

psychiatrist to testify before the jury about mental capacity at the time of confession.). As addressed in detail above, he further agreed that both experts and their findings regarding Petitioner's mental health could have been used in plea negotiations, formulation of a defense, determination of whether Petitioner should testify, argument against the Mouzon charge, mitigation and in other ways to back door a diminished capacity defense.[3] Nevertheless, the lower court excused counsel's failure to properly address Petitioner's mental health.

Additionally, Petitioner submits that trial counsel was deficient in opening the door to the reply testimony of Dr. Garvin and failing to object to her testimony that exceeded her areas of expertise as explained by Dr. Maddox and detailed above. See State v. Ellis. 345 S.C. 175, 547 S.E.2d 490 (2001) After Dr. Holbrook was called by the defense at trial, the State argued that his testimony regarding involuntary intoxication encompassed the issues of criminal capacity and sanity. The State made a lengthy argument based primarily upon State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007). App. pp. 1871-1883. At the conclusion of the defense argument, the trial court found that Dr. Holbrook's testimony would not be struck, but the State would be allowed to provide rebuttal testimony. App. pp. 1184-6.

When Dr. Garvin was called in rebuttal, she was qualified in the areas of chemical and forensic toxicology and drug chemistry. App. p. 2101. She opined that within a

[3] Petitioner submits that the instant case is analogous to Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001), where the South Carolina Supreme Court held that the trial court did not err in refusing to charge diminished capacity because it is not recognized in South Carolina and the instructions, taken as a whole, properly presented the elements of malice. See State v. Fuller, 229 S.C. 439, 93 S.E.2d 463 (1956). Yet, in Gill, Dr. Harold Morgan, a forensic psychiatrist, was allowed to testify in front of the jury regarding Gill's intellectual capacity (I.Q.) and personality disorder and opine regarding his inability to handle problems or think of the consequences of his behavior. Id. at 220, 552 S.E.2d at 32. Here, trial counsel could have utilized the testimony of the mental health experts as was done in Gill.

reasonable degree of medical certainty Petitioner was not given a substance involuntarily that caused his intoxication. App. p. 2106. Without objection, she testified that Petitioner's actions were purposeful, provided reasons for his behavior, and distinguished his actions from amnesia. App. pp. 2111-12, 2162. On cross-examination and redirect, she also ironically distinguished Petitioner's behavior from the case studies offered by the defense since the people in the case studies had underlying psychiatric disorders. App. pp. 2162, 2164-5, 2168, 2183. Counsel did ask her about Petitioner's medications from his hospitalization, and she acknowledged that the medications were used to treat anxiety and depression. App. p. 2166.

Yet again, counsel's prejudicial ineffective assistance in the area of Petitioner's mental health is demonstrated by the testimony of Dr. Garvin at trial. As a result of the State's partially winning argument that the defense offered mental health testimony through Dr. Holbrook, Dr. Garvin was called as the lone witness to provide testimony in the area of mental health, which is an area that exceeds her expertise as Dr. Maddox explained and is addressed above. Clearly, trial counsel opened the door to Dr. Garvin's testimony and then admittedly failed to object or ask for a curative instruction.

Even though the lower court found that Petitioner likely suffered from dementia at the time of the offense, she excused counsel's failure to properly address Petitioner's mental health and held:

> Applicant is unable to satisfy the second prong of the Strickland test, as the State presented overwhelming evidence of Applicant's guilt. It is well-settled case law in South Carolina that he prejudice prong of Strickland cannot be satisfied if there is overwhelming evidence of guilt. See Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) citing Strickland, 466 U.S. at 687). Therefore, this allegation must be denied and dismissed.

App. p. 3080. This categorical denial of relief is an error of law and must be reversed

since the court failed to address the prejudice suffered due the specific errors of counsel.

In Smalls, 810 S.E.2d 836, 422 S.C. 174 (2018), this Court addressed the error in applying a categorical bar to prejudice due to "overwhelming evidence of guilt." This Court explained:

> Ordinarily, the existence of "overwhelming evidence" does not automatically preclude a finding of prejudice. In Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998), for example, we found counsel was deficient for not objecting when the State in closing "improperly inject[ed] parole considerations into the jury's sentencing decision" and otherwise misstated the law regarding sentencing. 331 S.C. at 338-39, 503 S.E.2d at 167. Despite finding the evidence of Simmons' guilt was "overwhelming," we balanced the impact of counsel's error against the strength of the State's case on the point in question, and found Simmons had proved prejudice. We explained, [B]ecause the issue is whether the solicitor's improper argument prevented the jury from fairly considering [its sentencing options], the overwhelming evidence of petitioner's guilt does not eliminate the reasonable probability that the result of the trial would have been different had trial counsel objected to portions of the solicitor's closing argument. 331 S.C. at 340, 503 S.E.2d at 167.
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> In Smith v. State , 375 S.C. 507, 523-24, 654 S.E.2d 523, 532 (2007), we first examined counsel's error—failure to object to improper closing argument—to assess its impact on the jury's determination of guilt, stating "the solicitor's comments were confined to facts established during trial" and "were limited and did not recur throughout his argument." 375 S.C. at 523, 654 S.E.2d at 532. We then considered the strength of the State's case and found "there was also overwhelming evidence of Petitioner's guilt." Id. We held, after balancing these and other considerations, "we do not believe there was a reasonable probability that the result of the trial would have been different." 375 S.C. at 524, 654 S.E.2d at 532.
>
> Simmons and Smith illustrate the proper consideration of the strength of the State's case in the PCR court's analysis of prejudice: it is one significant factor the court must consider—along with the specific impact of counsel's error and other relevant considerations—in determining whether the applicant has met his burden of proving prejudice. In this case, however, neither the PCR court nor the court of appeals appears to have considered the specific impact of counsel's error. Rather, both courts used what they considered "overwhelming evidence of guilt" as a categorical bar that precluded a finding of prejudice, without the necessity of separately considering the impact of counsel's error.

Smalls v. State, 810 S.E.2d 836, 422 S.C. 174 (2018).

Here, the lower court committed an error of law when she applied a categorical denial of relief due to overwhelming evidence of guilt without any form of analysis, which is the exact error addressed in Smalls. Therefore, this Court must conduct a *de novo* review to properly address the prejudice prong.

As is addressed above, the deficiency in handling the issue of Petitioner's mental health infected the fundamental fairness of the proceedings against Petitioner from start to finish, yet the lower court failed to consider the specific impact of counsel's errors in her brief prejudice findings. At the evidentiary hearing, Petitioner presented evidence of prejudice through the testimony of the mental health experts, testimony of trial counsel, the exhibits, and the record. In Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015) and McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008), prejudice resulted from failure to refute the State's experts and failure to utilize an expert in the development of a defense, but here the deficiency and prejudice goes beyond that addressed in Reeves and McKnight. As trial counsel conceded, he would have approached the case completely differently if he had utilized and obtained the findings of Dr. Maddox and Dr. Brawley, which encompassed the findings of Dr. Haxton from 2006.

It is true that Petitioner testified at trial, which would have been against Dr. Maddox's advice, and that his testimony, along with other evidence, such as his police interview that Dr. Maddox could have offered testimony on, could be deemed evidence of guilt, but the open question resulting from counsel's deficiencies that tainted the entirety of the proceedings against Petitioner is whether the evidence would have resulted in a murder conviction if counsel had properly addressed Petitioner's mental health.

Petitioner submits that the categorical denial of relief due to overwhelming evidence of guilt is not only an error of law but an error that is not supported by the record. By way of the testimony and evidence offered, Petitioner has established that counsel's deficiency in addressing his mental health affected plea negotiations, trial strategy, trial preparation, pre-trial hearings, trial, charges given to the jury and mitigation. As trial counsel stated, the testimony of Dr. Brawley and Dr. Maddox that the lower court errantly found to be "not probative" would have caused him to approach the entire case differently. As a result, Petitioner is simply asking for the opportunity to be granted a new trial where his mental health can be properly addressed, which is ultimately a matter of fundamental fairness.

II. The lower court erred by failing to find that trial counsel rendered ineffective assistance of counsel by failing to properly prepare and fully utilize a crime scene investigation expert prior to and during trial, which resulted in prejudice to Petitioner that requires a new trial.

Petitioner submits that the lower court erred by failing to find that trial counsel rendered ineffective assistance of counsel by failing to properly prepare and fully utilize a crime scene expert investigation expert prior to and during trial. At trial, the defense called Lawton H. Yates, Jr., and he was qualified in the area of firearms and ballistics. App. p. 1591, ln. 17. As was noted at the evidentiary hearing, he testified that no trajectory was done by law enforcement at the club scene. App. p. 825. He further opined that traffic could have caused the reflection at issue in the video and that there was no evidence of a gunshot from the car or the video. App. pp. 1693-5. He explained that he would expect to see a flash or fireball when a gun is shot. App p. 1636, ln. 14. He further explained with the four pound trigger pull resulting from the gun being cocked, it was

likely that the gun could go off if Petitioner was moving towards the glove compartment. App. p. 1643, ln. 1.

At the evidentiary hearing, Petitioner called R. Robert Tressel, Chief Criminal Investigator for the Cobb County District Attorney's Office in Marietta, Georgia. App. p. 2958. Mr. Tressel was qualified as an expert in the area of crime scene investigation and homicide investigation. App. p. 2963, ln. 3-9. He explained the items he reviewed and that he had visited Richland County Courthouse to review evidence. App. pp. 2963-2967. After providing an overview of the role crime scene investigation plays in a homicide investigation, he went into his specific opinions. App. pp. 2965-2966. He explained that the crime scene investigation conducted was not consistent with "best practices approach." App. p. 2982, ln. 11 – p. 2983, ln. 16.

Specifically, he opined how the trajectory analysis conducted at the club scene was insufficient. App. pp. 2967-2975. He referenced trial court exhibits, including pictures and a diagram, and explained what he could ascertain regarding the shot from the exhibits. App. pp. 187-192. He further referenced the video and still photographs derived from the video. App. pp. 2975-2979. His main take away from the video was it establishes Petitioner could not see if anyone was behind the door based upon the direction the door swings. App. p. 2976, ln. 12 – p. 2, lns. 4-6.

Regarding the still photos, he explained how he utilized the photos to ascertain that the "flash" referenced at trial was merely rectangular reflections coming off the sides of the vehicle.[4] App. pp. 2978-2979. In addressing the autopsy report, he opined that the

[4] At the evidentiary hearing, Mr. Tressel addressed his concern regarding the testimony and admission of the NASA disc portraying the "flash." App. pp. 2986-2987. He explained when evidence is sent to an outside agency or expert, he would typically expect to see a chain of custody for transmittal of the evidence and reports from any reviewing agencies or experts, which he did not see in this case. App. pp. 2984-2986.

bullet stayed intact until it struck the victim. App. pp. 2979-2980. When asked about the trial expert's theory about a ricochet, he explained that he totally disagreed with it. App. pp. 2980-2981. He explained that he agreed with the State's argument that the defense ricochet theory was implausible. App. p. 2981, lns. 15-22.

Further addressing the discharge of the weapon, he acknowledged that the defense expert briefly touched on the possibility of an accidental discharge. App. pp. 2987-2988. He explained that both cocking and uncocking the weapon could have caused an accidental discharge. App. p. 2989.

At the conclusion of his testimony, Mr. Tressell recapped the major contentions he held with the defense expert's trial testimony and evidence. App. pp. 2990-2991. He testified that he would have been willing to assist defense counsel and testify at trial if he had been contacted by the defense. App. p. 2990.

After briefly addressing the testimony of Mr. Tressell, the lower court determined that trial counsel "performed within expected norms." App. pp. 3081-3082. The court further held that even if counsel was deficient, no prejudice was demonstrated due to the "overwhelming evidence of Applicant's guilt." App. p. 3082. Then, without addressing the specific impact of counsel's error in light of the record, the court errantly held: "The

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While on the stand, trial counsel explained that he did not object to the testimony or the introduction of the NASA video "because I thought that actually the video was helpful based upon Ron Yates' testimony." App. p. 2913, lns. 8-14. Trial counsel further explained how the video aided the defense. App. pp. 2917-2918. This testimony is difficult to reconcile against counsel's extensive arguments and ultimate request for a mistrial due to the testimony stemming from the playing of the video at trial.

During closing argument, the State explained: "We sent it to Cape Canaveral. We tried to get it more clear. You can't. But you will see it back there. Thank goodness we have the video." App. p. 2219, lns. 20-23. Referencing the video, the State opined: "That's good evidence. That showed the shot." App. p. 2220, lns. 24-25. The State further argued: "That tape – those 39 seconds are why we are here today." App. p. 2288, ln. 4.

law is well-settled that the prejudice prong of Strickland cannot be satisfied if there is overwhelming evidence of guilt." App. p. 3082. As is argued in detail above, Petitioner submits this finding amount to an error of law under Smalls.

The lower court failed to consider that at trial much time and effort were put forth by both sides arguing and addressing the issue of the "flash." App. pp. 452, 457, 461-3, 469, 576-78, 581-3, 851, 943, 944-45, 949, 950, 2220, 2222, 2288, 2283. The appellate records also demonstrate that it became an accepted fact that the video evidenced a "flash." Obviously, the flash supported the State's theory that Petitioner was aiming at the club when the gun was fired, and the gunshot was not the result of an accidental discharge. Yet, Mr. Tressel's testimony establishes that the contentious flash may have simply been a recurring reflection, which would have supported the defense theory of an accidental discharge. Additionally, he offered testimony regarding the potential accidental discharge while uncocking the gun, which supports the defense of accident.

In opening, the defense told the jury about the lesser included offense of involuntary manslaughter and then stated: "And then there's another, it's not a crime, but accident, accident; that is, the unintentional. The dropping of a gun, it goes off and hits somebody, mishandling of a weapon." App. p. 391, lns. 17-14. Unfortunately for Petitioner, the trial court declined the defense request for an accident charge, and the State argued in closing: "His Honor is not going to tell you, he will not tell you that you can use accident as a defense. Accident is not a defense in this case. You cannot find the defendant not guilty because of accident." App. pp. 2073-74, 2297, ln. 25 – 2298, ln. 3.

Based upon the record and arguments contained herein, Petition urges this Court to find that counsel was ineffective for failing to properly prepare and fully utilize a

crime scene investigation expert prior to and during trial. Here, Mr. Tressell offered extensive testimony regarding the quality of the investigation, addressed the "flash," and offered alternative theories that were not advanced by the defense at trial. Additionally, Mr. Tressell offered testimony in support of an accident charge and finding.

In order to obtain an intentional murder conviction, the State hung their hat on the video and the theory that the shot was evidenced from the video; thus, putting the trajectory in a location where Petitioner intentionally shot at the door causing the death of the victim. By way of the Order of Dismissal, the lower court categorically denied relief due to "overwhelming evidence of guilt" and failed to properly consider the prejudice suffered by the deficient performance of counsel. As a result, Petitioner urges this Court to find that a new trial should be granted whereby a defense within "expected norms" could be presented to counter the evidence that was not properly evaluated by the lower court before errantly deeming it "overwhelming."

## CONCLUSION

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

Respectfully submitted,

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