In The
Supreme Court of the United States

William D. Catoe, Commissioner,
South Carolina Department of
Corrections,

Petitioner,

vs.

Joseph Lee Ard,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court of South Carolina

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CAPITAL CASE
QUESTIONS PRESENTED

I.

The Supreme Court of South Carolina misapplied *Strickland v. Washington* when it concluded that trial counsel was ineffective in failing to interview and later cross-examine the State's gunshot residue expert. Counsel performed reasonable investigation into the matter by retaining a defense expert who reviewed the report, and, after the expert found no error in the report, concentrated their effort on showing how the material tested was not properly or sufficiently collected for accurate testing results, and explored other avenues of showing accident. The state court's ruling necessarily ignores the *Strickland* requirement of showing constitutionally deficient representation, and relegates review to arbitrary approval or disapproval of the method and manner of representation.

II.

The Supreme Court of South Carolina misapplied *Strickland v. Washington* when it failed to consider the overwhelming evidence of guilt in the record when determining prejudice of the purported error regarding the gunshot residue evidence. The state court concluded that the purported error in investigation and cross-examination would have prevented the State from attacking the defense theory as effectively as it did in the closing argument. Such a conclusion fails to consider the probable effect of the purported error in light of the totality of the evidence which is the proper standard under *Strickland*.

III.

The Supreme Court of South Carolina misapplied *Strickland v. Washington* when it considered an after trial change in reporting standards and a subsequently retained expert opinion who testified in the collateral litigation simply to a differing opinion on the gunshot residue test.

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INTRODUCTION TO THE PETITION

Petitioner, William D. Catoe, Commissioner of the South Carolina Department of Corrections, through the Attorney General of South Carolina, hereby petitions the Court for a Writ of Certiorari to review the decision of the Supreme Court of South Carolina which affirmed a grant of a new trial through post-conviction relief. The Supreme Court of South Carolina concluded relief was warranted as trial counsel rendered deficient representation in the investigation and challenge of the gunshot residue evidence in the instant case.

Petitioner asserts the state court misapplied *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), in its evaluation of error and prejudice. This opinion, in a capital case, stands in stark contrast to the decisions of this Court which, if left uncorrected, creates an artificial division in the interpretation and application of this Court's precedent.

CITATION TO OPINION BELOW

The March 5, 2007 decision of the Supreme Court of South Carolina affirming the grant of state post-conviction relief entitling respondent, Joseph Lee Ard, ("Ard") to a new trial, is attached to the Petition as **Appendix I**. The opinion has been published as *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). For the convenience of the reader, Petitioner will refer to the attached copy of the opinion when referencing the state court's opinion.

JURISDICTION

The Supreme Court of South Carolina entered its opinion on March 5, 2007. Petitioner filed a Petition for Rehearing on March 20, 2007. The Supreme Court of South Carolina denied the petition on April 4, 2007. A copy of the order denying is

attached to the petition as **Appendix II**. Pursuant to Rule 13, Rules of the Supreme Court of the United States, this petition has been timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

This matter involves the Sixth Amendment to the United States Constitution which provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

A. Post-conviction Relief Procedural History.

On November 22, 2004, after an evidentiary hearing and full briefing, the Honorable J. Ernest Kinard granted a new trial based upon his conclusion that trial counsel was ineffective in failing to adequately investigate the reports concerning gunshot residue testing. The State filed a timely notice of intent to appeal. (App. p. 4678). On March 6, 2005, Petitioner, the State, presented the following issues in a Petition for Writ of Certiorari filed in the Supreme Court of South Carolina:

I.

> Did the state PCR court err as a matter of law in granting post-conviction relief concerning the failure of trial counsel to more fully investigate the reports concerning gun shot residue where counsel was not deficient and reasonably reviewed the SLED test report concerning the Gun Shot Residue testing on the victim's hands, and retained a former SLED agent to review the reports and provide advice and direction?

II.

> Did the state PCR court err as a matter of law in finding 6th Amendment prejudice where the mere fact that some material found interesting by SLED agent Powell did not make it Gun Shot residue nor mean that the victim was ever holding a gun where the suggestion was refuted by other forensic evidence regarding the lack of a burn injury to the hand at the time of the shooting and the likelihood any of the particles could have come from "transferred contact" where the victim was in close proximity to the shooting which resulted in her death?

Ard made a response in opposition to the petition on July 6, 2005. The Supreme Court of South Carolina granted the State's petition for writ of certiorari on January 20, 2006. Additional briefing followed. On March 20, 2007, the Supreme Court of South Carolina entered its opinion affirming the grant of relief. Petitioner, the State, filed a Petition for Rehearing on March 20, 2007, which was denied on April 4, 2007.

B. Trial Procedural History.

On April 23, 1993, Joseph Lee "Jody" Ard shot his girlfriend, Madalyn Coffey, seventeen (17) years old, in the head. She was eight (8) months pregnant at the time of the shooting. Madalyn died as a result of the shooting. The fetus suffocated in the womb as a result. On September 7, 1993, Ard was indicted for the murder of Madalyn Coffey (count one) and the "murder of unborn child" (count two)(93-GS-32-2353).(App. pp. 3319-22).

Ard was represented by court-appointed counsel Elizabeth Fullwood and John E. "Jack" Duncan. A jury trial began April 15, 1996. The Honorable Marc H. Westbrook presided. On April

21, 1996, the jury found Ard guilty of both counts of murder. (App. p. 2539-40). On April 23, 1996, the sentencing proceeding began. On April 25, 1996, the jury unanimously found the existence of two statutory aggravating circumstances and recommended a sentence of death. (App. pp. 3309-13).

C. Direct Appeal Procedural History.

Ard filed a timely notice of appeal. Joseph L. Savitz, III, Deputy Chief Attorney of the South Carolina Office of Appellate Defense, represented Ard on appeal. Appellate counsel filed his final brief on March 25, 1998. On September 14, 1998, the Supreme Court of South Carolina entered an opinion affirming the conviction and sentence. *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998). A petition for rehearing was filed on September 24, 1998, and denied on October 7, 1998. (App. pp. 3438-45). Ard did not seek certiorari in the United States Supreme Court.

D. Factual History as Included in the Direct Appeal.

The South Carolina Supreme Court summarized the factual history of the case as follows:

> Ms. Coffey died from a single gunshot wound to her forehead. Her unborn but viable child survived in utero for approximately six to eight minutes before dying from a lack of oxygen.
>
> During the guilt phase of trial, witnesses testified they heard appellant threaten to kill Ms. Coffey prior to the shooting. A witness testified she saw appellant assault Ms. Coffey during her pregnancy and heard appellant state he wished Ms. Coffey and the unborn child were dead.

> On the evening of the shooting, a witness testified she heard appellant and Ms. Coffey arguing in a motel bathroom. Appellant had a gun. Shortly thereafter, appellant shot Ms. Coffey. He told a friend, "tell them I did it and they will have to catch me." Appellant then left in his automobile. There were no eyewitnesses to the shooting.
>
> Appellant testified Ms. Coffey's death was an accident. He claimed Ms. Coffey, who was 8 1/2 months pregnant with his child, was upset and threatened to kill herself with the gun she was holding in her hand. During appellant's attempt to take the gun away from his girlfriend, the gun discharged. Appellant testified he thought his girlfriend was dead. He "freaked out" and fled to Atlanta. A friend informed appellant the police were looking for him. Three days later, appellant returned to Columbia and met with an attorney. Appellant testified he planned to surrender to the police but "blacked out" in the attorney's office. When he awoke, he was in the hospital. Ultimately, appellant was arrested for the two murders.

State v. Ard, 332 S.C. 370, 374-75, 505 S.E.2d 328, 330 (1998).

E. Ard's Defense Theory at Trial.

Ard testified as to his version of the shooting:

> A I told her she was acting crazy. I was on my knees. I was trying to lean forward to get it. She twisted like this (indicating). I said, "Give me the goddam gun, Madelyn." She turned real quick like that

(indicating) and I reached up to grab it and it went off.

Q Jody, when you reached for the gun, where did you grab it?

A She had it in her hand like this (indicating) and I grabbed it like that (indicating).

Q Like that (indicating)?

A Yes, ma'am.

Q So your hand was where?

A Around this area right here (indicating).

Q Around this cylinder gap?

A Yes, ma'am, like that.

(App. p. 2227, lines 11-25).

On cross-examination, Ard testified again that he had his hand around the cylinder, but when asked about burns or scarring, he responded "[i]t didn't leave a scar" only that his hand felt "numb" and he had "little marks but it's gone away." (App. p. 2262). The state offered evidence that if one would grab a gun around the cylinder when the gun is fired, there would be injury, including actual tearing of the skin. (App. pp. 2403-05).

F. Other Defense Evidence At Trial.

The defense called **Woodrow Poplin**, an expert in the field of civil and mechanical engineering. (App. p. 2302). He rendered an opinion, after reviewing the crime scene, about the

line of travel of the bullet, from where it struck the mobile home, back to the weapon's probable position. (App. pp. 2303-06). Poplin disagreed with the autopsy report that asserted a 30 degree angle or that the bullet went downward. (App. p. 2310).

The defense also called **Donald Girndt**, a private investigator who was formerly with SLED.[1] (App. pp. 2324-26). He was qualified as an expert in fingerprint identification, footwear, blood stain pattern interpretation, crime scene analysis, and crime scene photography. (App. p. 2328). He then opined that the body had been moved. (App. pp. 2339-40). He said that the movement at the scene prior to documentation of the evidence and the testimony caused him not to be able to determine accurate angles at the time of the blood letting and that he could not determine when gunshot residue samples were taken. (App. pp. 2344-45). He also noticed that the victim's hands were not bagged in the photographs to preserve evidence. (App. pp. 2352-53). Girndt conclusions were "inconclusive" based upon the discarding and inadequate documentation of the evidence. (App. p. 2353). He stated that it could have been an accident or it could have been a homicide. (App. pp. 2353-54).

G. Evidence at the PCR Hearing.

The South Carolina Supreme Court summarized the PCR evidence, in part, as follows:

> After filing for PCR, respondent deposed Powell, the SLED gunshot residue expert, in October 2001; Powell testified for the State at the PCR hearing in April 2004. At both the deposition and the hearing, Powell stated that his testimony at trial was based on the SLED protocol **in use at**

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[1] South Carolina Law Enforcement Division.

> **that time.** Based on this protocol, he accurately reported a finding of negative for gunshot residue. Powell explained that SLED's standard at the time was to report a positive conclusion of gunshot residue **only** if perfectly round gunshot residue particles were detected, which specifically meant spherical particles containing barium, antimony and lead. However, he further explained that as time went on, there were concerns that when non-round particles with the three required elements were found, or perfectly round lead particles were found, these findings should not be reported as a negative finding, but rather as "inconclusive."
>
> Regarding the instant case, he stated that if the analysis was conducted under the modern protocol, his conclusion would be that two particles on Coffey's right back hand were inconclusive for gunshot residue. Powell explained that an "inconclusive" finding meant it was not consistent with the person firing the gun, **but could be consistent with the person handling the weapon.**

(Petition Appendix, p. 7).

Also at the PCR hearing, collateral counsel for Ard secured an expert, Robert White, who essentially opined the material, included non-round particles, could be, in his opinion, considered gunshot residue. (See generally App. p. 3646-51). He also acknowledged that gunshot residue could have gotten on the victim's hands in a variety of ways including firing a gun, handling a gun, being close to a gun going off, or touching

something that had residue on it. (App. pp. 3652-52; p. 3685; p. 3837).

The PCR judge rejected Ard's claim of presentation of false evidence in regard to Agent Powell's report and found:

> Agent Powell's statement that the results from the test would now be considered 'inconclusive' is the result of a change in SLED protocol on reporting, *not a change of opinion as to the results of those tests*. Agent Powell's testimony is consistent with SLED reporting protocol in existence at the time of trial.

(App. p. 4661)(emphasis added).

REASONS CERTIORARI SHOULD BE GRANTED

I.

The South Carolina Supreme Court misapplied *Strickland v. Washington* when it concluded that trial counsel was ineffective in failing to interview and later cross-examine the State's gunshot residue expert. Counsel performed reasonable investigation into the matter by retaining a defense expert who reviewed the report, and, after the expert found no error in the report, concentrated their effort on showing how the material tested was not properly or sufficiently collected for accurate testing results, and explored other avenues of showing accident. The state court's ruling necessarily ignores the *Strickland* requirement of showing constitutionally deficient representation, and relegates review to arbitrary approval or disapproval of the method and manner of representation.

"A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066 (1984). He or she must show not merely that counsel could have made different choices in representation, but that specific choices in representation "were outside the wide range of professionally competent assistance" in light of the facts and circumstances of his particular case. *Id. See also Williams v. Taylor*, 529 U.S. 362, 390-91, 120 S.Ct. 1495, 1511 (2000). To be sure, "[t]here are countless ways to provide effective assistance in any given case." 466 U.S. at 689, 104 S.Ct. 2065. Importantly, reviewing counsel's performance is not an exercise to critique or "grade" counsel's performance, but a comprehensive analysis of whether real substantive error occurred in light of the surrounding circumstances. 466 U.S. at 697, 104 S.Ct. at 2069. The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. *Id.* "Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced." *United States v. Gonzalez-Lopez*, ___ U.S. ___, ___, 126 S.Ct. 2557, 2563 (2006).

The South Carolina Supreme Court failed to follow this well established precedent, and granted relief on an arbitrary ground under the guise of a Sixth Amendment violation. Ard is not entitled to relief under federal law, and the grant of relief should not stand.

To understand the extent of the erroneous application of this Court's precedent, it is necessary to review the salient facts of record and those relied upon by the majority in reaching its opinion. *See generally Strickland*, 466 U.S. 698, 104 S.Ct. 2070

("the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact"). The victim died from a "close range single gunshot wound to the left forehead that exited above the right ear so that the bullet traveled from left to right, s[l]ightly backwards and slight[ly] downwards." (App. p. 2021, lines 8-11). Ard's defense at trial was accident. Ard testified that victim had picked up the gun during a domestic dispute, Ard grabbed the gun and attempted to take it from the victim, and the gun discharged. (Petition Appendix, p. 4). (See also App. p. 2226, line 1 - p. 2228, line 13). The state's gunshot residue expert testified at trial that "several particles" on the victim's hands "were very interesting, but there was not any or enough material for us to be able to call gunshot residue," and, that had the victim "fired the weapon, the material that would have come from this gun would have had to have been removed before the test would have been administered" to avoid a positive result. (Petition Appendix, p. 3). The majority noted that evidence at the PCR hearing established that a *subsequent* (after trial) change in state agency reporting protocol would now require the report to reflect an "inconclusive" result, but the opinion remained the same that the results would still not be consistent with the victim firing the gun. (Petition Appendix, p. 7). As far as counsel's investigation, the record established that counsel hired a former supervisor at the state agency to review the gunshot residue report for the defense. When the former supervisor advised counsel there was "'nothing for [counsel] to question,' in the gunshot residue tests, they tried to develop theories as to why [... the victim...] did not have gunshot residue on her hands, such as the way this evidence was collected and preserved." (Petition Appendix, p. 9). Trial counsel testified that he did not cross-examine the state's expert as he did not wish to highlight the deficiency in the defense. (Petition Appendix, p.

9).[2] The majority concluded that "trial counsel should have further investigated and more throughly challenged the gunshot residue evidence." (Petition Appendix, p. 12). The majority omitted from the recitation of facts, however, that the PCR judge specifically found the "inconclusive" designation "is the result of a change in SLED protocol on reporting, *not a change of opinion as to the results of those tests*." (App. p. 4661)(emphasis added). Further, though the majority noted that counsel investigated the way the material was collected, (Petition Appendix, p. 9), the state court omitted from the recitation of facts (and apparently from consideration), that counsel also presented a crime scene investigator, and an engineer to consider the bullet trajectory, in order to corroborate Ard's version of events and the defense of accident, (App. pp. 2302-2311; pp. 2324-2354), and presented witnesses to establish, contrary to the state's case, that victim and Ard enjoyed a happy relationship, (See App. pp. 2127-2137; p. 2163). The majority did acknowledge that the jury heard from the state expert that he had detected, in his examination, several "interesting" particles on the victim's hands, but the material was not sufficient to be positive for gunshot residue. (Petition Appendix, p. 3).

It is evident from even the most cursory reading of the South Carolina Supreme Court opinion that the facts of this case simply do not meet this Court's definition of *Strickland* error. The Chief Justice of the South Carolina Supreme Court, Chief

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[2] The record shows that defense counsel replied, "No questions," after Agent Powell initially testified. (App. p. 1941, lines 14-15). However, Agent Powell was recalled after the defense case, and questioned about injury if one would grip a gun around the cylinder when the gun was fired. Defense counsel then cross-examined the agent at that time, and included questions that highlighted the fragility of the gunshot residue material and the possible removal of material by moving the body at the scene. (App. p. 2405, line 24 - p. 2407, line 18).

Justice Toal, in the well-reasoned dissent, joined by Justice Burnett,[3] specifically and concisely identified the facts supporting counsel's reasonable representation and the majority's clear error in finding to the contrary:

> In preparation for trial, Ard's counsel did, in fact, hire their own gunshot residue expert to review the gunshot residue test results furnished by the State. Counsel did not ultimately produce this expert as a witness at trial because, upon review of the test results, the expert then indicated to trial counsel that he concurred with the State's expert's conclusion. Instead, at trial, the State called the expert originally obtained by Ard to testify that he had agreed with the State's own expert finding. In my opinion, Ard's trial counsel appropriately countered this testimony with a cross-examination which called into question the accuracy of the gunshot residue test results. Specifically, counsel elicited testimony from the expert suggesting that the process of fingerprinting the victim would have "interfered" with the gunshot residue test results if done prior to trace evidence collection. Simply stated, Ard's trial counsel sufficiently dealt with the adverse evidence. The fact that Ard's counsel could not force their own qualified expert to tailor his opinion to fit their theory of the case, in my view, is an insufficient basis on which to conclude that these counsel were deficient.

(Petition Appendix, p. 16).

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[3] Petitioner notes the slim majority. The Supreme Court of South Carolina is comprised of five members.

The dissent is correct. There is no error.

While the state court found counsel was ineffective when counsel failed to cross-examine the agent to elicit the fact that the "interesting" particles were "not inconsistent with [... the victim...] handling a gun," (Petition Appendix p. 13); as the dissent alludes to, such a conclusion is necessarily at odds with the inescapable fact that such evidence would still not corroborate Ard's specific version of the shooting. This creates a tension in the record that simply cannot properly resolve in favor of relief under federal law. To be entitled to relief under federal law:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

Here, there could be no constitution error as there could be no reasonable probability that any error in failing to pose such a question could reasonably be considered to have affected the result of the proceeding such as would undermine confidence in the outcome. *Id. See also Gonzalez-Lopez, supra*. Ard testified at his trial, not just that the victim could have touched the gun, but that she held the gun, put it to her own head, and the gun fired while his hand was around the cylinder gap. (App. p. 2227). It has not been questioned that the victim, under the scenario advanced by Ard, would have had gunshot residue on her hands. (App. p. 1940). This is the version of events counsel had to work with, and, under a proper application of federal law, counsel's actions were completely reasonable in light of their client's expressed version of the shooting:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.

Strickland, 466 U.S. at 691, 104 S.Ct. at 2066 (emphasis added).

Yet, the majority found, contrary to the guidance of *Strickland*, that "counsel's decision to not cross-examine [... the state's expert...] on the gunshot residue evidence was not an objectively reasonable strategy." (Petition Appendix, p. 13). The state court concluded that cross-examination would have supported the defense. Id. The logic falls short of the finish, though, as the ultimate conclusion of "no positive result for gunshot residue" was consistent. No matter how clever the question, the state expert would not, indeed could not, have said the test was positive for gunshot residue. Therefore, counsel had to account for the suggestion, in the absence of a positive gunshot residue test, that victim's hands *were not on the gun at the time the gun fired* which was critical to Ard's version of the events. (App. pp. 3712-13). (See also Petition Appendix, p. 8 (majority noted that counsel admitted the gunshot residue test undermined the accident defense)). The state court failed to account for the fact that counsel would still have to explain the absence of a positive finding, because the evidence would not support the defense version of events if there was not a positive finding. [4]

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[4] Moreover, the majority opinion omits the remainder of the would-be testimony, which would have been the particle evidence could also show merely that the victim was "shot at" *because the levels were low*. (App. p. 3810).

Consequently, the state court's ruling, instead of properly applying the error and prejudice test of *Strickland*, actually reflects an arbitrary grant of relief. Ard is not entitled to relief under a proper application of federal law, and the grant of relief should not stand.

Further, the state court, in reaching its conclusion, relied on two subsidiary findings to support the flawed conclusion that counsel was constitutional ineffective in failing to cross-examine the witness. These findings again show a misapprehension and misapplication of federal law, and do not support the majority's conclusion.

A. The state court erroneously suspended *Strickland's* requirement that respondent must prove prejudice in regard to counsel's choice of expert allowing instead a presumption of error in concluding counsel was deficient for retaining an expert who was the state's expert's former supervisor.

In finding error, the state court found fault with counsel's choice of expert. The expert retained had formerly supervised the state's expert, and had reviewed the agent's work in this matter. (Petition Appendix, p. 12). The majority admittedly found "no evidence" in the record that the expert "rendered a biased opinion." Id. Yet, the majority concluded it was unreasonable to retain the expert given his past connection. Id. However, as more fully discussed above, under either old or new reporting protocol, there is no positive finding for gunshot residue according to the state's expert. In fact, Ard's claim in PCR of false evidence was soundly *rejected* by the PCR judge, who found, in part, the later "inconclusive" label "is the result of a change in SLED protocol on reporting, *not a change of opinion*

as to the results of those tests." (App. p. 4661)(emphasis added). In short, there was, admittedly, no evidence of prejudice.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88, 104 S.Ct. at 2064. *See also Williams v. Taylor*, 529 U.S. 362, 394-95, 120 S.Ct. 1495, 1514 (2000)(noting with approval that "petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice"); *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S.Ct. 2574, 2586 (1986)("defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy"). Further, as part of this burden, a defendant must show not only error, but that the complained of error "actually had an adverse effect on the defense" to be entitled to relief under *Strickland*. 466 U.S. at 693, 104 S.Ct. at 2067. This Court has reserved assumption of prejudice for the rare case of denial or absence of counsel. *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047 (1984). *See also Florida v. Nixon*, 543 U.S. 175, 179, 125 S.Ct. 551, 555 (2004); *Bell v. Cone*, 535 U.S. 685, 697, 122 S.Ct. 1843, 1851 (2002). The state court simply could not, under federal precedent, presume prejudice in connection with the allegation of ordinary counsel error, yet this court did.[5] This is especially troubling where the

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[5] This same state supreme court assumed prejudice in another capital case which was reversed by this Court in *Ozmint v. Nance*, 543 U.S. 1043, 125 S.Ct. 868, 869 (2005), for reconsideration in light of the Court's decision in *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551 (2004). On remand, the state supreme court issued another opinion finding Nance's case:

> ...represents one of the rare cases where counsel

majority actually admits that no evidence of bias is in the record, and the facts show no error or misstatement, under then existing reporting protocol, in the state expert's opinion. [6]

When precedent is correctly applied, the issue is whether counsel acted reasonably. It should not be whether another expert exists, who should have been located, who would have opined differently, as the dispositive issue. "The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness." *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.), *cert. denied* 525 U.S. 1012 (1998). The Fourth Circuit has consistently found there is no such rule. *See, e.g., Fisher v. Angelone*, 163,

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> 'entirely fails to subject the prosecution's case to meaningful adversarial testing."

Nance v. Ozmint, 367 S.C. 547, 553, 626 S.E.2d 878, 881 (2006)(emphasis in original).

The state supreme court then block quoted, and incorporated into the opinion granting relief, its previous findings that, in the court's view, detailed individual counsel deficiencies, even while acknowledging it would continue to presume prejudice under *Cronic* and *Nixon* in that case. *Id.*

[6] This also makes extremely curious the state court's citation to a Florida District Court's case, *Troedel v. Wainwright*, 667 F.Supp. 1456 (S.D.Fla. 1986), when that case is based on a showing that testimony regarding the gunshot residue evidence was either false or misleading, and whether counsel should have discovered same. Comparison of this case to *Troedel* merely highlights the misapplication of federal law in the instant case.

F.3d 835, 853 (4th Cir. 1998), *cert. denied* 526 U.S. 1035 (1999). Other federal courts have also refused to consider such claims, especially noting that the arguments essentially boil down to a battle of experts requiring courts to weigh in on successive, often multiple, opinions: "such battles of psychiatric opinions during successive collateral challenges to a death sentence would place federal courts in a psycho-legal quagmire resulting in the total abuse of the habeas process." *Harris v. Vasquez*, 949 F.2d 1497, 1518 (9th Cir. 1990), *cert. denied* 503 U.S. 910 (1992); *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir.1990), *cert. denied*, 498 U.S. 1110 (1991)(after denying the viability of the claim in habeas, the court noted it wished to avoid "a never-ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis."). Though the referenced cases specifically discuss psychiatric opinions, the concept is the same - - a battle of experts. As the court in *Waye v. Murray*, 884 F.2d 765, 766-67 (4th Cir.), *cert. denied* 492 U.S. 936 (1989), noted, "it will nearly always be possible in cases involving the basic human emotions to find one expert witness who disagrees with another and to procure an affidavit to that effect..." Such procured disagreement, however, does not show counsel error.

Simply, counsel is "not required to shop for a more favorable expert," *Walton v. Angelone*, 321 F.3d 442, 466 (4th Cir.), *cert. denied* 539 U.S. 950 (2003), or one who will testify exactly as counsel prescribes. *See Wilson v. Green*, 155 F.3d 396, 403 (4th Cir.), *cert. denied* 525 U.S. 1012 (1998)(it is not require of counsel to second guess reports contrary to a hoped for position). Stated differently, the "failure to 'shop around' for a favorable expert opinion after an evaluation yields little in mitigating evidence does not constitute ineffective assistance." *Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003), *cert. denied* 541 U.S. 947 (2004). *See also Winfield v. Roper*, 460 F.3d 1026, 1041 (8th Cir. 2006)("Counsel is not required to shop for experts who will testify in a particular way."); *Dowhitt v. Johnson*, 230

F.3d 733, 748 (5th Cir. 2000), *cert. denied* 532 U.S. 915 (2001)("under the circumstances, trial counsel was not deficient by not canvassing the field to find a more favorable defense expert").

Further, in this case, the state supreme court essentially holds that counsel cannot simply rely on his expert, but must independently investigate the expert's area of investigation i.e. personally question the state's expert. (Petition Appendix, pp.12-13). This circular logic undermines any confidence in the state court's conclusion. Counsel has the right to rely on the opinion of experts. *Lewis v. Alexander*, 11 F.3d 1349, 1353 (6th Cir. 1993)("An attorney is entitled to rely on a professional of established skill and reputation in formulating judgments necessary to trial preparation."). *See also Vinson v. True*, 2005 436 F.3d 412, 419-20 (4th Cir. 2006)(upholding the lower court's finding that "reliance on the defense expert's advise did not violate the performance prong of Strickland."). Again, the record simply cannot support the grant of relief based on federal law.

B. The state court also erroneously suspended *Strickland's* requirement that respondent must prove constitutional error relying instead on ABA guidelines as a definitive measure of effective representation.

Lastly, to the extent the court relies on the *American Bar Association Guidelines For The Appointment and Performance of Defense Counsel in Death Penalty Cases*, the 2003 revision for evaluation of representation for this 1993 murder and 1995 trial, to find not only is investigation required, but certain steps, such as interviews with potential witnesses, *must* be followed, the state court again misapprehends and misapplies this Court's precedent. The majority quotes the guidelines as support that failure to interview or failure to retest evidence is *per se* ineffective. (Petition Appendix, p. 11). This simply ignores all the Court's

prior holdings that consistently recognized, as the dissent in this case did, (Petition Appendix, p. 24, n.19), that reasonableness of investigation is case specific and does not require adherence to a checklist of required steps:

> Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Strickland, 466 U.S. at 688-89, 104 S.Ct. at 2065

This Court has repeated the "guides" designation in regard to these standards in several of its most recent cases. *See Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456 (2002); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003). Nothing suggests a departure from the *Strickland* rule. There are no specific steps, requirements, or forms to follow by rote as a pre-condition to finding counsel provided effective representation. *Strickland, supra.* Constitutional error may only be found, according to this Court's precedent, where one who is challenging the conviction shows error and prejudice. *Id. Gonzalez-Lopez, supra.* Again, Ard is not entitled to relief under federal precedent. The grant of relief should be reversed.

In sum, the state court misapplied *Strickland* in finding counsel was constitutionally ineffective as the record fails to support error, or if error, fails to support prejudice. However, the state court also made two specific and significant errors in

evaluating and concluding prejudice which are addressed in the following two issues.

II.

> The South Carolina Supreme Court misapplied *Strickland v. Washington* when it failed to consider the overwhelming evidence of guilt in the record when determining prejudice of the purported error regarding the gunshot residue evidence. The state court concluded that the purported error in investigation and cross-examination would have prevented the State from attacking the defense theory as effectively as it did in the closing argument. Such a conclusion fails to consider the probable effect of the purported error in light of the totality of the evidence which is the proper standard under *Strickland*.

As demonstrated above, establishing that the victim could have handled a weapon does not support Ard's testimony that clearly placed the gun in the victim's hand when it was fired, or explain why gunshot residue, which would have been present under such a scenario, was not detected. In short, if counsel's representation was deficient, it could only be inconsequential given the static result in regard to a lack of a positive test. But that is not the only error the state court made in applying this Court's precedent. The state court also failed to consider the purported error in light of the whole record.

"In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069. Instead of considering the record as a whole, the majority emphasized the effect of the alleged error in isolation, most specifically its probable effect on closing argument:

> Respondent clearly showed that counsel could have established that while there was a scientific finding of "no gunshot residue," there nevertheless was evidence consistent with (but not conclusive of) Coffey handling the gun. Had counsel elicited this testimony from Powell, the State would not have been able to attack the defense theory as convincingly as it did.
>
> ...
>
> The State's heavy reliance on defense counsel's failure to challenge this gunshot residue evidence highlights both the deficiency by counsel and the resulting prejudice.

(Petition Appendix I, p. 14).

The "errors" complained of simply do not show the resulting prejudice required under *Strickland* to entitle Ard to relief:

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 866-867, 102 S.Ct. 3440, 3446-3447, 73 L.Ed.2d 1193 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693, 104 S.Ct. at 2067 (1984).

The majority's consideration of prejudice is flawed by its myopic approach. Other, uncontested, evidence rendered Ard's version of events untenable. Specifically, Ard testified he gripped the gun around the cylinder, yet the evidence showed no damage

to the skin that would have had to have occurred to corroborate this important portion of Ard's testimony. If Ard had indeed grabbed the cylinder as described, there would have been injury, including actual tearing of the skin. (App. pp. 2403-05). Ard admits that he had no such injury. (App. p. 2262). Additionally, as the dissent points out: "The State presented twenty witnesses to show that Ard killed the victim with malice. Although the State emphasized the lack of gunshot residue in its closing argument... the State presented other overwhelming evidence from which a jury could find Ard guilty of murder." (Petition Appendix, p. 18). [7]

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6 Petitioner refers to facts as reflected in the prior opinion of the state supreme court, when that court affirmed the conviction on direct appeal:

> During the guilt phase of trial, witnesses testified they heard appellant threaten to kill Ms. Coffey prior to the shooting. A witness testified she saw appellant assault Ms. Coffey during her pregnancy and heard appellant state he wished Ms. Coffey and the unborn child were dead.
>
> On the evening of the shooting, a witness testified she heard appellant and Ms. Coffey arguing in a motel bathroom. Appellant had a gun. Shortly thereafter, appellant shot Ms. Coffey. He told a friend, "tell them I did it and they will have to catch me." Appellant then left in his automobile. There were no eyewitnesses to the shooting.
>
> Appellant testified Ms. Coffey's death was an accident. He claimed Ms. Coffey, who was 8 1/2 months pregnant with his child, was upset and threatened to kill herself with the gun she was holding in her hand. During appellant's attempt to take the gun away from his girlfriend, the gun discharged.

When viewed in light of the whole record, there is no basis for finding prejudicial error. Again, the state court misapplied this Court's precedent.

III.

The state supreme court misapplied *Strickland* when it considered an after trial change in reporting standards and a subsequently retained expert opinion who testified in the collateral litigation simply to a differing opinion on the gunshot residue test.

This Court has long held that "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 446 U.S. at 690, 104 S.Ct. at 2066.

State v. Ard, 332 S.C. 370, 374-75, 505 S.E.2d 328, 330 (1998).

The state court also acknowledged that "[d]uring the sentencing phase, Lance Black, an inmate at McCormick Correctional Institute, testified as a hostile witness for the State. Black testified while appellant was incarcerated at McCormick before trial, appellant told him he had 'planned' the accident defense. According to Black, appellant told him he had killed Ms. Coffey because she was going to turn him into the police, presumably for drug offenses." 332 S.C. at 379, 505 S.E.2d at 332 .

Here, though there is reference to reliance on the evidence available at the time of trial, there is no doubt the state court considered the testimony of a subsequently retained expert who would opine consist with the defense, in simple disagreement with the state expert. [8] Petitioner notes the majority writes, "[t]he PCR court's findings are based *almost exclusively* on Powell's [i.e. the state gunshot residue expert] testimony as to what information he would have provided to counsel if only they had asked - either prior to trial or on cross-examination." (Petition Appendix, p. 15). To base even part of the decision on the subsequent change in protocol, or finding of a favorable expert years after trial, is simply plainly contrary to this Court's precedent. *Id. See also Bell v. Cone,* 535 U.S. at 698, 122 S.Ct. at 1852; *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667 (1986)(repeating *Strickland*'s direction to view counsel's actions "from counsel's perspective at the time"). Moreover, as the dissent noted:

> ...the fact that eight years later, PCR counsel were finally able to retain an expert who reached a conclusion favorable to Ard's case (i.e. that the victim's hands contained traces of gunshot residue) does not imply that trial counsel were deficient for failing to find such an expert at the time of his trial. To hold otherwise declares open season on the criminal justice system by giving a "second chance" to any convicted criminal who is patient enough to seek out an "expert" who will

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[8] Petitioner again notes the wealth of authority that supports that counsel is not ineffective for failing to obtain an expert to testify as he would so direct. *See, e.g., Winfield v. Roper*, 460 F.3d 1026, 1041 (8th Cir. 2006)("Counsel is not required to shop for experts who will testify in a particular way.")

> one day provide him with the opinion testimony he desires.

(Petition Appendix, p. 17).

Not only is reliance on subsequent changes in protocol, or the eventual finding of another expert who agrees with the defense, plainly contrary to the parameters of the *Strickland* test, the obvious danger is the very real inevitability of unending litigation based on the creativity of collateral counsel and the mere passage of time with its inevitable change. To dispense with the time restriction is to invite ceaseless litigation. Again, the state court has misapprehended and misapplied federal law to grant relief in the instant case. The grant of relief should be reversed.

CONCLUSION

In sum, the state court misapprehended and misapplied *Strickland v. Washington* in the instant case. Particularly troubling is the state court's presumption of prejudice in regarding to the expert, which is a clear misapplication of federal law. Further, the conclusion that relief is warranted is based on arbitrary review of the method and manner of representation as opposed to the required showing of error and prejudice. These are significant legal errors in a capital case which is likely to be cited repeatedly for the erroneous application of this Court's precedent. Petitioner respectfully urges the Court to grant certiorari to review the judgment of the Supreme Court of South Carolina.

Respectfully submitted,

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