

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

**RECEIVED**

**Aug 08 2022**

**S.C. SUPREME COURT**

Certiorari to Spartanburg County

Honorable H. Steven DeBerry IV, Circuit Court Judge

---

SHDRICK A. SAVAGE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001556

---

PETITION FOR WRIT OF CERTIORARI

---

LARA M. CAUDY  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**INDEX**

INDEX ..... i

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT

1.

The post-conviction relief (PCR) judge correctly granted Petitioner a belated direct appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974)..... 9

2.

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when counsel failed to assert during his closing argument that Petitioner was only guilty of the lesser included offense of voluntary manslaughter as opposed to murder where there was no evidence of malice, rather the evidence showed Petitioner shot the decedent in the sudden heat of passion upon sufficient legal provocation, and when Petitioner was prejudiced by counsel’s deficient performance because there is a reasonable probability Petitioner would have been acquitted of murder if counsel had made effective arguments during closing.....11

CONCLUSION.....14

## **ISSUES PRESENTED**

1.

Did the post-conviction relief (PCR) judge correctly grant Petitioner a belated direct appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974)?

2.

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when counsel failed to assert during his closing argument that Petitioner was only guilty of the lesser included offense of voluntary manslaughter as opposed to murder where there was no evidence of malice, rather the evidence showed Petitioner shot the decedent in the sudden heat of passion upon sufficient legal provocation, and when Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability Petitioner would have been acquitted of murder if counsel had made effective arguments during closing?

## STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Petitioner on March 12, 2015 for the offense of murder. App. 488-489. His case was called to trial on November 28, 2016 before the Honorable Roger L. Couch, and a jury. App. 1. Deputy Solicitor Derrick Balsa represented the state. App. 1. Theo Mitchell represented Petitioner. App. 1.

Petitioner's charge stemmed from a shooting that occurred during the early morning hours of November 23, 2014 at Universal Events, an afterhours nightclub in Spartanburg. App. 56, l. 10 – 57, l. 3; App. 75, ll. 15-20; App. 76, ll. 19-22. On any given Saturday, there would be anywhere from five hundred to twelve hundred people at the club. App. 56, ll. 21-25; App. 75, ll. 20-21; App. 97, ll. 18-20.

Shortly before the shooting, a fight broke out inside the club. The decedent, Marty Jackson, was one of the patrons involved in the fight. App. 81, l. 14 – 82, l. 1. Security removed Jackson, and the other patrons who were fighting, from the club. App. 82, ll. 1-3. When Jackson came outside, he was still fighting with several men. App. 82, ll. 4-5. Security grabbed Jackson and told him to leave. App. 82, ll. 4-8. They held the other patrons inside for a few minutes to give Jackson time to leave the premises. App. 82, ll. 7-8. Jackson started walking up the long sloped driveway. App. 82, l. 9.

After security thought Jackson had left, they allowed the other patrons, who were being held inside, to leave. App. 82, ll. 9-13. Petitioner was one of these patrons. He was “extremely mad” when he came outside and allegedly threatened to kill an unspecified person. App. 82, ll. 13-16. John Mitchell, the owner of the club who was outside at the time, watched Petitioner and at least one other person get into a blue truck. App. 82, ll. 16-18; App. 105, ll. 10-21. Mitchell said he thought there was a third person who got into the truck with Petitioner but he was not

certain. App. 82, ll. 16-19; App. 85, ll. 12-16. Petitioner supposedly got into the driver's seat. App. 82, ll. 17-18; App. 98, ll. 22-23. Errol Graham, a doorman at the club, claimed that before Petitioner began driving away, he pointed toward the hill where the decedent was later found. App. 98, l. 22 – 99, l. 1.

The truck began slowly moving up the driveway. App. 82, ll. 19-20. Mitchell “got on the radio” and warned security at the gate of Petitioner’s alleged threat and told them to “keep an eye out for the blue truck.” App. 82, ll. 24-25. Mitchell remained out front talking to Brad James, a patrol deputy with Spartanburg County Sheriff’s Office who was responsible for patrolling the parking lot at the club. App. 55, l. 21 – 56, l. 10; App. 83, ll. 1-3. Mitchell watched the blue truck travel up the driveway. He looked away “for split second, and saw, out of the corner of [his] eye, a flash from the truck’s window.” App. 83, ll. 3-6. At the same time he saw the flash, Mitchell heard a gunshot. App. 83, ll. 7-9. He claimed the flash came from the front seat of the truck. App. 86, ll. 5-16. After the gunshot, the truck “gunned it up the driveway.” App. 89, ll.4-10.

Mitchell “jumped on the golf cart to ride down through there.” App. 83, l. 11. He “radioed up to . . . security at the top of the hill to either stop the truck or get a description or the tag.” App. 83, ll. 14-16. Security responded that the truck had a “Morgan’s Used Cars” tag. App. 83, ll. 16-18. Meanwhile, Deputy James, who heard the gunshot but did not see where it came from, attempted to pursue the truck in his patrol car. App. 59, l. 2 – 60, l. 8. However, by the time he maneuvered around the foot and vehicle traffic in the roadway, the truck was gone. App. 59, l. 22 – 60, l. 11; App. 61, ll. 5-21.

As Mitchell drove his golf cart up the driveway, he heard people yell, “He’s been shot. He’s been shot.” App. 84, ll. 2-4. That is when Mitchell saw Jackson on the ground. He told

everyone to back up so he could check on Jackson. Mitchell said it was “obvious he [Jackson] was already gone.” App. 83, l. 19 – 84, l. 8. Mitchell called 911, but dispatch had already received other calls and law enforcement quickly began arriving. App. 84, ll. 9-12.

Around six o’clock that morning, law enforcement in Gaffney located the blue truck. App. 138, l. 8 – 139, l. 19. There were two occupants. App. 140, ll. 23-24. Petitioner was identified as the driver and Rashawn Miller was the passenger. App. 140, l. 25 – 141, l. 18. They were both detained and transported to the Spartanburg County Sheriff’s Office for questioning. App. 141, l. 19 – 142, l. 19. Petitioner admitted to being at Universal Events that morning. However, he denied driving the truck that was supposedly involved in the shooting. App. 188, l. 15 – 189, l. 19.

Jackson suffered a single “through and through” gunshot wound to the chest. App. 132, ll. 8-17; App. 181, l. 16 – 183, l. 13. No spent shell casings, fired projectiles, or a firearm connected to the shooting were ever located. App. 128, l. 20 – 130, l. 20.

Six weeks after the shooting, Cedrick Jones, who dated Jackson’s sister, came forward and claimed he saw Petitioner shoot Jackson. App. 107, l. 22 – 108, l. 2; App. 120, l. 16 – 121, l. 18. Jones testified that, while he did not go to the club with Jackson that morning, he saw Jackson get into a fight inside the club. App. 108, ll. 3-24. Jackson was escorted out by security. App. 108, ll. 19-22. Jones followed Jackson outside and greeted him. App. 109, ll. 1-7. There was a lot of commotion out front so Jones walked up the hill, stood off to the side, and “just watched everything.” App. 109, ll. 14-19. As Jones was standing there, he saw Jackson walk by him. App. 109, ll. 20-21. Jones began walking with Jackson toward the car. App. 109, ll. 21-23. He claimed as they were walking, Petitioner pulled up next to them and stopped. App. 109, l. 23 – 110, l. 15. Petitioner was driving a blue truck. App. 110, ll. 6-11. Petitioner told Jackson

to “meet me at the store.” App. 109, l. 23 – 110, l. 3. Jackson said, “Nah, get out now.” App. 110, ll. 19-22. The two continued this exchange for several minutes until Jackson, who was upset, threw a beer bottle at Petitioner’s truck. App. 110, ll. 22-25. Jones claimed Petitioner then shot Jackson. Jones saw the flash. App. 111, ll. 1-6; App. 113, l. 22 – 114, l. 17. Jackson and Jones ran. Jones heard Jackson call his name “like to let me know he shot.” App. 111, ll. 6-8; App. 114, ll. 14-18. Jones turned around and grabbed Jackson who was crawling. He laid Jackson down on the ground near a fence. App. 111, ll. 8-10; App. 114, ll. 18-21.

Jones called 911 to report the shooting. App. 114, ll. 21-22; App. 118, ll. 21-25. He admitted he gave the operator a false name. App. 119, ll. 20-22; App. 120, ll. 10-12. He also told the operator that he did not know who shot Jackson. App. 119, ll. 3-10. After calling 911, Jones left. App. 114, l. 23 – 115, l. 3. He did not talk to the police that night. App. 115, ll. 4-13. He claimed he only came forward weeks later after Jackson’s family said “they needed me to stand up if I was there and testify.” App. 115, ll. 14-18. Jones was later impeached with his prior record, including his convictions for burglary, manufacturing drugs, leaving the scene of an accident, and possession of drugs. App. 116, l. 17 – 117, l. 5.

During his opening statement, the deputy solicitor maintained “this case is about who did it and why it happened.” App. 52, ll. 8-9. He contended that the “real issue will be is it murder or is it manslaughter.” App. 52, ll. 11-13. Later during his closing argument, the solicitor made similar assertions. He claimed the state “got the right guy” but the “issue is is it murder or is it manslaughter.” App. 260, ll. 18-22. The solicitor admitted that Petitioner may have been acting in the sudden heat of passion after he and Jackson fought inside the club and that Jackson later provoked Petitioner by throwing a beer bottle at his car, the noise of which Petitioner may have perceived to be a gunshot. App. 258, ll. 15-20; App. 260, l. 21 – 261, l. 5.

Petitioner's trial counsel did not mention voluntary manslaughter in either his opening statement or his closing argument to the jury. See App. 53, l. 3 – 55, l. 2 and App. 251, l. 4 – 257, l. 13.

The trial judge charged the jury on murder and the lesser included offense of voluntary manslaughter. App. 277, l. 4 – 280, l. 4. On November 29, 2016, the jury found Petitioner guilty of murder. App. 291, ll. 6-13. He was sentenced to thirty years imprisonment. App. 300, l. 25 – 301, l. 3.

On December 8, 2016, Candice K. Lapham filed a notice of appeal on Petitioner's behalf. App. 303-304. By order filed May 15, 2017, the Court of Appeals dismissed the appeal for failure to update the court on the status of the transcript. App. 305. Lapham later testified at the evidentiary hearing that she was retained to file the notice of appeal after Petitioner was convicted at trial because Petitioner's trial counsel, Theo Mitchell, "was unavailable to file the paperwork within the 10 days." App. 332, ll. 14-22. She explained that she never requested the transcript because Petitioner's "family was having trouble coming up with the money" to pay for it. App. 332, l. 23 – 333, l. 3. The estimated cost of the transcript was twelve hundred dollars. App. 332, l. 25 – 333, l. 1. Petitioner's family eventually came up with a thousand dollars but by that time the Court of Appeals had already dismissed the appeal. App. 333, ll. 4-11. Lapham intended to instead represent Petitioner in his post-conviction relief action and use the payments she received from his family "towards payment of a PCR." App. 333, ll. 10-24. However, she "came down with pneumonia" and by the time she went to file the paperwork, Susannah Ross already represented Petitioner. App. 333, l. 25 – 334, l. 14.

On March 20, 2018, Petitioner filed an application for post-conviction relief (PCR) seeking, *inter alia*, a belated direct appeal. App. 307-313. The state filed a return to this

application on August 3, 2018. App. 315-320. With the assistance of counsel, Petitioner filed an amended application on July 26, 2021. App. 321-324. An evidentiary hearing was held on August 4, 2021 before the Honorable H. Steven DeBerry. App. 325. Assistant Attorney General William Ray represented the state. App. 325. Susannah Ross represented Petitioner. App. 325. Petitioner's trial counsel, Theo Mitchell, was unavailable for whatever reason and did not testify at the hearing. App. 459. Petitioner, Deputy Solicitor Derrick Balsa, who tried the case, and Candice Lapham, as mentioned, testified at the hearing. App. 326.

By order filed December 23, 2021, the PCR judge granted Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). App. 459-484. The judge found Petitioner did not freely, knowingly, and voluntarily waive his right to a direct appeal. App. 467. Rather, the appeal was abandoned because of Petitioner's inability to pay legal fees. App. 467.

Despite granting Petitioner a belated direct appeal, the judge denied Petitioner relief on his remaining PCR allegations. App. 459-484. The judge found trial counsel was not ineffective for failing to argue during closing that the killing was done in the heat of passion upon sufficient legal provocation. App. 480-482. He determined "counsel presented a reasonable closing argument in light of the facts of the case." App. 482. In support of this conclusion, the judge found arguing Petitioner was only guilty of the lesser included offense of voluntary manslaughter would have been "in stark contrast with [trial counsel's] clear strategy of presenting the shooter to be someone other than [Petitioner]." App. 482. The judge emphasized counsel's argument in closing that there was testimony supporting the fact that three people were inside the truck at the time of the shooting and that Cedric Jones, the only witness who claimed Petitioner was the shooter, was not credible. App. 482.

Moreover, the PCR judge concluded Petitioner failed to prove he was prejudiced by counsel's closing argument. Even if counsel had argued Petitioner was only guilty of voluntary manslaughter, the judge found it "would not have changed the outcome of the case given the fact that this was a drive by shooting that took place after the fight had been broken up and the parties involved were leaving the scene." App. 482.

On January 4, 2022, Petitioner filed a motion to alter or amend the judgment. App. 485-486. The PCR judge denied the motion by order filed January 12, 2022.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated, this petition for writ of certiorari follows.

## ARGUMENT

1.

The post-conviction relief (PCR) judge correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974).

The PCR court correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974). The judge found Petitioner did not freely, knowingly, and voluntarily waive his right to appeal. App. 467. Rather, the appeal was abandoned because of Petitioner's inability to pay legal fees. App. 467.

“The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge's findings.” *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). When a client is convicted and sentenced, trial counsel has a duty to make certain the client is fully aware of the right to appeal. *In re Anonymous Member of the Bar*, 303 S.C. 306, 400 S.E.2d 483 (1991); *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). “In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738 (1967).” *Smith v. State*, 309 S.C. 413, 424 S.E.2d 480 (1992). “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” *Simuel v. State*, 390 S.C. 267, 271, 701 S.E.2d 738, 740 (2010) (citing *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

Candice Lapham testified at the evidentiary hearing that she was retained to file the notice of appeal after Petitioner was convicted at trial because Petitioner's trial counsel, Theo Mitchell, “was unavailable to file the paperwork within the 10 days.” App. 332, ll. 14-22. She explained that she never requested the transcript because Petitioner's “family was having trouble coming up with the money” to pay for it. App. 332, l. 23 – 333, l. 3. The estimated cost of the

transcript was twelve hundred dollars. App. 332, l. 25 – 333, l. 1. Petitioner’s family eventually came up with a thousand dollars but by that time the Court of Appeals had already dismissed the appeal. App. 333, ll. 4-11; See App. 305.

This evidence supports the PCR judge’s conclusion that Petitioner did not freely, knowingly, and voluntarily waive his right to appeal. App. 467. Rather, the appeal was abandoned because of Petitioner’s inability to pay for the transcript. App. 467. Because there is evidence of probative value to support the judge’s finding, respectfully, this Court should grant certiorari and consider Petitioner’s belated direct appeal.

2.

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when counsel failed to assert during his closing argument that Petitioner was only guilty of the lesser included offense of voluntary manslaughter as opposed to murder where there was no evidence of malice, rather the evidence showed Petitioner shot the decedent in the sudden heat of passion upon sufficient legal provocation, and when Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability Petitioner would have been acquitted of murder if counsel had made effective arguments during closing.

Trial counsel was ineffective for failing to assert during his closing argument that Petitioner was only guilty of the lesser included offense of voluntary manslaughter as opposed to murder where there was no evidence Petitioner acted with malice, an essential element of murder. Rather, the evidence showed Petitioner shot the decedent in the sudden heat of passion upon sufficient legal provocation. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the jury would have acquitted Petitioner of murder if counsel had made effective arguments in closing. Because there is no probative evidence to support the PCR judge's findings, this Court should grant certiorari, hold counsel's performance was deficient and Petitioner was prejudiced, and remand for a new trial.

“The Sixth Amendment guarantees criminal defendants the effective assistance of counsel.” Yarborough v. Gentry, 540 U.S. 1, 5 (2003). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided

representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

“The right to effective assistance extends to closing arguments.” Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Bell v. Cone, 535 U.S. 685, 701-702 (2002) and Herring v. New York, 422 U.S. 853, 865 (1975)). “Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel’s tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage.” Id. at 5-6. “Closing arguments should sharpen and clarify the issues for resolution by the trier of fact, but which issues to sharpen and how best to clarify them are questions with many reasonable answers.” Id. at 6 (internal citation and quotation marks omitted).

Trial counsel wholly failed to mention voluntary manslaughter during both his opening statement to the jury and his closing argument at the conclusion of the trial despite evidence to support this lesser included offense. Significantly, the trial judge found there was evidence to support a jury instruction on voluntary manslaughter and charged the jury accordingly. The deputy solicitor also conceded during his opening statement and his closing argument that there was evidence Petitioner acted in the sudden heat of passion upon sufficient legal provocation and

thus the jury had to decide whether Petitioner was guilty of murder or voluntary manslaughter. Given these circumstances, if trial counsel had persuasively argued that Petitioner was acting under the sudden heat of passion after the physical altercation in the nightclub, and had insufficient time to cool off before the decedent provoked Petitioner in the driveway as Petitioner was attempting to leave the premises, there is a reasonable probability the jury would have found Petitioner guilty of only the lesser offense.

There was evidence Petitioner was “very mad” and “irate” when he was removed from the club for fighting and that he and the decedent argued immediately before the shooting. Consequently, it is clear he was acting under the sudden heat of passion. Moreover, the decedent threw a beer bottle at Petitioner’s truck directly before Petitioner shot. The solicitor admitted Petitioner may have perceived the noise caused by the beer bottle striking his truck to be a gunshot. Therefore, there was sufficient evidence to support the conclusion that the decedent legally provoked Petitioner.

Respectfully, this Court should grant certiorari and hold trial counsel was ineffective for failing to assert during his closing argument that Petitioner was only guilty of voluntary manslaughter, and that Petitioner was prejudiced by counsel’s deficient performance.

**CONCLUSION**

As to Issue 1, Petitioner respectfully requests this Court grant the petition for writ of certiorari and consider Petitioner's belated direct appeal. As to Issue 2, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing pursuant to Rule 243(j), SCACR, or, in the alternative, dispense with further briefing and reverse his conviction and sentence.

Respectfully submitted,

s/ Lara M. Caudy

Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of August, 2022.