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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Lexington County
Court of Common Pleas
Honorable Courtney Clyburn Pope, Circuit Court Judge

Appellate Case No. 2021-001217

RAPHAEL L. PONTOO,

Petitioner,

vs.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER’S STATEMENT OF ISSUE ON CERTIORARI

Did the PCR court err finding trial counsel was not ineffective for failure to request the trial court include the element “in the absence of mitigating circumstances” in its charge for failure to stop for a blue light resulting in death where there was mitigating evidence presented to the jury and where the Court of Appeals found the issue was not preserved for appellate review?

RESPONDENT’S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief judge correctly determine trial counsel was not constitutionally ineffective for failing to request the trial judge include the statutory language, “in the absence of mitigating circumstances,” in his jury charge on failure to stop for a blue light resulting in death where that particular statutory language is not an element of the offense and where the trial judge’s instructions as a whole demonstrate the jury was properly instructed on the affirmative defense of duress presented by Pontoo as it related to the offense of failure to stop for a blue light resulting in death such that he could not have suffered any resulting prejudice?

STATEMENT OF THE CASE

On January 30, 2014, Raphael L. Pontoo (Petitioner) was arrested following an investigation into an armed robbery and subsequent high-speed vehicle chase that ended in a fatal crash in the Swansea area of Lexington County. Pontoo was indicted for failure to stop for a blue light resulting in death (FTSFBL) (2014-GS-32-1408) and armed robbery (2014-GS-32-1409) by the Lexington County Grand Jury on June 19, 2014. (App’x 637–42).

On January 26, 2015, Pontoo proceeded to a jury trial before the Honorable Thomas A. Russo. (App’x 1–473). Assistant Appellate Defender David M. Mauldin (Counsel Mauldin) represented Pontoo. Deputy Solicitor D. Shawn Graham and Assistant Solicitor Robert E. McNair, III, of the Eleventh Circuit Solicitor’s Office prosecuted the case.

A. Summary of Evidence Adduced at Trial

In the early morning hours of January 24, 2014, Jonathan Ruple was hanging out with a friend at the Mile High Club, a bar located in West Columbia, South Carolina, when he decided to show his friend his new Hi-Point nine-millimeter pistol. (App’x 71, 73, 253–54). The two then headed out to the bar’s parking lot, and Ruple retrieved the pistol from a book bag stowed in the trunk of his car. (App’x 73, 254–55). At that point, two men, including one who had dreadlocks and was wearing a black t-shirt, light-colored jeans, and a green puffy jacket, approached Ruple and his friend, and the man with dreadlocks introduced himself as “Los” before striking up a conversation with the pair. (App’x 72, 75–76, 255–56, 259). During the conversation, Ruple and the others discussed a wide variety of topics, and Ruple showed the men his gun. (App’x 74, 256). In return, “Los” showed Ruple a .22-caliber revolver he indicated he had obtained earlier that day, and his companion showed Ruple a chrome-plated .25-caliber pistol. (App’x 74, 256–57, 263). The men then continued to converse with one another for roughly ten to fifteen minutes

before Ruple put his pistol back into his book bag, secured the bag on the front passenger's seat of his vehicle, and re-entered the bar with his friend. (App'x 75, 257–58, 260–61).

Over the course of the next hour or two, Ruple socialized and drank with his friend inside the bar while “Los” and four of his companions hung out by themselves nearby. (App'x 78, 260–61, 273). As the night wound down, Ruple decided to head home, and, as he walked towards the exit, “Los” stopped him and asked him where he was going. (App'x 80, 262). In response, Ruple told “Los” he was going home and then exited the bar, chatted outside with his friend for a few minutes, and got into his car to leave. (App'x 80, 262). At that moment, “Los” approached Ruple's car from the passenger's side, knocked on the window, and chatted with Ruple for a few moments about a set of vehicle rims. (App'x 81, 262–63). Then, “Los” suddenly stuck his hand into Ruple's vehicle, grabbed the book bag that contained Ruple's gun, and took off running. (App'x 81, 263; 228).

In response, Ruple speedily chased after “Los” and caught him as he tried to get into a vehicle parked nearby. (App'x 81–82, 263). The two then fought over the book bag for a few moments before “Los” pulled out his revolver and pointed it at Ruple's face. (App'x 82, 263). At that point, Ruple immediately threw up his hands in surrender, and “Los” got into the nearby vehicle and sped away from the area with Ruple's bag. (App'x 83, 264–65). However, as “Los” fled, Ruple took down the license tag number of the getaway vehicle, and he quickly reported the robbery to the authorities along with a description of the getaway vehicle. (App'x 83, 125–26, 142, 163, 264).

Shortly thereafter, Trooper Brandon Lee of the South Carolina Highway Patrol spotted a vehicle matching the description and license tag number of the vehicle involved in the armed robbery, and he pulled the vehicle over to the side of the road after it abruptly slowed down upon

encountering him. (App'x 125–28; 130–31). He then drew his weapon, requested back-up from his fellow officers, and began ordering the occupants out of the vehicle one at a time starting with the driver. (App'x 128, 132). While he while doing so, an individual seated in the rear of the vehicle on the driver's side repeatedly opened his door and had to be commanded to remain in the vehicle. (App'x 133–34). That individual then remained in the vehicle while the driver, Carlisle Jones (“Carlisle”), and two of the other passengers, Iquawn Jones (“Iquawn”) and Patrick Johnson, exited the vehicle and were secured.¹ (App'x 132–34, 282–83, 289, 313, 316–18, 347–48, 371). At that point, one of the individuals remaining in the vehicle suddenly jumped into the driver's seat and sped off in the vehicle, and several officers at the scene quickly pursued. (App'x 134–35, 142–43, 283).

Over the course of the next few minutes, the driver of the vehicle led officers on a high-speed chase that reached speeds in excess of one-hundred miles per hour. (App'x 143–44, 160). The chase continued until the driver, who had dreadlocks that were visible to the pursuing officers, lost control of the vehicle as he approached the intersection of two separate highways, and the vehicle went off the road before crashing into a nearby wooded area. (App'x 136, 145–46, 152–53, 163–64). The pursuing officers then quickly exited their vehicles and ran to the crashed vehicle. (Tr. 137, 166). When they reached it, they found Applicant Raphael Lamarr Pontoo pinned into the driver's seat by a tree branch that went through the vehicle's windshield along with another individual, Alexander Clemmons, unconscious and severely injured in a rear seat.² (App'x 137–39, 147–49, 171, 176–77). Additionally, the officers observed a black Hi-Point

¹ Neither Carlisle, Iquawn, nor Johnson had dreadlocks at that time. (App'x 283, 304, 374–77).

² At that time, Pontoo had dreadlocks and Clemmons had short, frizzy hair. (App'x 139, 145, 166, 191, 194–95, 200–01, 233).

nine-millimeter pistol resting on the front passenger's seat in close proximity to Pontoo's outstretched hand, and that weapon was quickly secured.³ (App'x 149, 167, 169).

In the ensuing minutes, emergency medical personnel responded to the scene of the crash, and they rapidly transported Clemmons, who was unconscious and unresponsive, to a landing zone so he could be taken to a hospital by helicopter. (App'x 175–78, 190–92, 194–95). As they waited for the helicopter, Clemmons's condition began to deteriorate, and paramedic Amanda Sucher from Lexington County Emergency Medical Services removed his clothing, which included an orange jacket and dark jeans, to aid in the provision of medical treatment. (App'x 173, 179–181). Upon doing so, she discovered a handgun hidden behind Clemmons's left knee. (App'x 181–82, 192). Clemmons was then transported to the hospital by helicopter. (App'x 232).

Meanwhile, firefighters cut into the crashed vehicle to enable Pontoo's removal, and Pontoo was rapidly transported to the hospital once he was extricated from it. (App'x 193, 197). While Pontoo received treatment at the hospital, a .22-caliber pistol fell out of his clothing. (App'x 222–23, 229). That gun was then secured and subsequently turned over to the Lexington County Sheriff's Office. (App'x 223). Likewise, officers also obtained Pontoo's clothing from the hospital, which included a black t-shirt and light-colored jeans. (App'x 239–40).

Thereafter, on January 27, 2014, Clemmons succumbed to the traumatic head injuries he sustained in the crash and died. (App'x 232, 234–35). A few days later, Pontoo was released from the hospital, and he was placed under arrest as he left the hospital for his involvement in the armed robbery and Clemmons's death. (App'x 249). Subsequently, Pontoo was indicted for armed robbery and failure to stop for a blue light resulting in a death, and he elected to proceed to trial. (App'x 11).

³ Later on, a book bag, a phone, and several winter coats were located at the scene of the crash, and each of the items was collected as evidence. (App'x 204–05, 215, 220).

B. Pre-Trial Matters

At the outset of trial, Judge Russo conducted an *in camera* hearing at Counsel Mauldin's request in regard to the admissibility of statements attributed to Pontoo subsequent to the fatal crash. (App'x 46). During the hearing, Detective Garrick testified he and another officer met with Pontoo at the hospital on the date of the incident, informed Pontoo of his rights, and spoke with Pontoo about what had occurred. (App'x 51–53, 56–57). As they spoke, the detective stated Pontoo became “very argumentative” and repeatedly insisted he did not know anything and did not remember anything before terminating the conversation with the officers. (App'x 53, 57–59). Detective Garrick further indicated Pontoo was not under arrest and was free to leave at that time, but he acknowledged he asked hospital staff to notify him before Pontoo was released from the hospital. (App'x 51–53, 56). Additionally, Detective Garrick stated he later drove Pontoo to the detention center when he was discharged from the hospital, he believed he informed Pontoo of his rights at that time but was not certain, he did not ask Pontoo any questions, and Pontoo stated no one would believe him if the officers hit him. (App'x 54–55). Following the presentation of that testimony, Pontoo took the witness stand, denied saying anything to Detective Garrick other than stating he did not want to talk to him, and insisted the detective did not inform his of his rights, did not tell him he had a right to remain silent, and did not tell him anything he said could be used against him. (App'x 60–63). Pontoo further stated he was informed he could not leave, but he admitted hospital personnel told him that as opposed to the officers based on his medical condition. (App'x 65).

At the conclusion of the hearing, Counsel Mauldin challenged the admission of Pontoo's alleged statements at the hospital on the grounds Pontoo was in custody at the time of the questioning but was not informed of his rights. (App'x 66). Similarly, Counsel Mauldin argued

Pontoo's alleged statements on the way to the detention center were irrelevant, overly prejudicial, were made while Pontoo was in custody, and were made without him being informed of his rights. (App'x 65–66). In rebuttal, Assistant Solicitor McNair asserted Pontoo's statements from the hospital were admissible because Pontoo was not in custody at that time and was informed of his rights prior to any questioning. (App'x 67–68). Assistant Solicitor McNair further asserted the admissibility of Pontoo's statements on the way to the detention center was dependent on the defense presented during trial. (App'x 67). After considering the arguments of counsel, Judge Russo found Pontoo was not in custody at the time he made the statements in the hospital and, based on that ruling, made no ruling in regard to whether Pontoo had been informed of his rights at that time. (App'x 69). Likewise, Judge Russo ruled Pontoo's statements on the way to the detention center were potentially admissible as they were not made in response to any interrogation, but he declined to fully rule on those statements at that time due to the potential issues related to relevancy. (App'x 69).

Thereafter, Judge Russo conducted another *in camera* hearing at Counsel Mauldin's request regarding the admissibility of identification evidence related to the armed robbery. (App'x 45, 70). During the hearing, Ruple testified about the armed robbery, indicated he had a good opportunity to view the robber's face prior to the robbery, and noted he was only two feet away from the robber when they conversed for ten to fifteen minutes before the crime occurred. (App'x 74–75, 81). Ruple further noted the area where he spoke with the robbery was lit by a street light located only a few feet away. (App'x 75). Regarding the appearance of the robber, Ruple indicated "Los" had dreadlocks, was roughly 5'9" to 5'10" tall, weighed approximately 180 pounds, and was wearing a green puffy jacket, a black t-shirt, and "silver grayish" jeans. (App'x 75–77). Ruple further indicated he got a good look at the robber inside the bar over the

next few hours and saw him again when “Los” pointed a gun at him during the course of the armed robbery. (App’x 78–79, 82). After that, Ruple indicated he was shown two identical black-and-white photographic lineups subsequent to the robbery by Detective Garrick, was provided with no hints or suggestions, and was able to narrow down the robber to the second and fourth individuals depicted in the lineups with complete certainty.⁴ (App’x 83–85). However, Ruple indicated he was not able to choose between the two with certainty because of the absence of color photographs and ultimately selected the second individual while writing he was only fifty percent certain on the lineup sheets. (App’x 84–86). Furthermore, Ruple indicated he was completely certain Pontoo was the armed robber, was experiencing recurring nightmares of Pontoo’s face, and would select the fourth individual depicted in the photographic lineups if he could repeat the process again. (App’x 86–87).

In addition to Ruple’s testimony, Detective Garrick testified during the hearing and recounted the circumstances of the photographic lineup procedure. (App’x 90). Specifically, the officer indicated he met with Ruple three days after the armed robbery and obtained a description of the suspect from Ruple, which was consistent with Pontoo’s physical appearance and the clothing Pontoo was wearing on the date of the incident. (App’x 90–92). Detective Garrick testified he then showed two identical black-and-white photographic lineups to Ruple that contained Pontoo’s photograph as the fourth individual depicted.⁵ (App’x 93–95, 97). After that, he stated Ruple narrowed the robber down to the second and fourth individuals depicted in the lineup while ultimately selecting the second individual with only fifty percent certainty. (App’x 94–95). The detective further indicated he never showed Ruple any pictures other than the ones

⁴ Pontoo was the fourth individual depicted in the photographic lineups. (App’x 95, 246).

⁵ Regarding the two identical photographic lineups, Detective Garrick indicated he prepared a second lineup so he would have one to retain in his file. (App’x 94, 97–98).

contained in the photographic lineups and did not advise Ruple he selected the wrong individual. (App'x 95).

At the conclusion of the hearing, Counsel Mauldin generally argued the presentation of two separate photographic lineups was somehow unduly suggestive while also contending the “lineup showing demonstration” was suggestive.⁶ (App'x 99). For those reasons, Counsel Mauldin contended both the out-of-court and in-court identifications of Pontoo should be excluded. (App'x 99). In response, Assistant Solicitor McNair argued the identification procedure used was not suggestive and asserted it did not become so simply because two identical copies of the same photographic lineup were shown to Ruple. (App'x 99–100). After considering the arguments of counsel, Judge Russo ruled the identification evidence was admissible after finding no evidence was presented suggesting the lineups were prepared in a suggestive manner or shown to Ruple in a suggestive fashion. (App'x 100–01; 65–66).

C. State's Case

Subsequently, during trial, the law enforcement officers who responded to the report of the armed robbery testified about the details of the stop of the vehicle involved in that crime, the subsequent high-speed chase that followed the stop, and their discovery of Pontoo in the driver's seat of the robber's vehicle after it crashed into a heavily wooded area. (App'x 125–139, 142–53, 163–69, 281–85, 288–90). Similarly, the medical personnel and other emergency responders involved in the case testified about their responses to the crash and the fatal injuries sustained by

⁶ Specifically, Trial Counsel argued: “It's our position that the showing of the two separate lineups and both as far as the face lineup and the gun lineup that that is a suggestive process and we believe that they should be excluded under [Pontoo]'s due process rights and the Fifth and Fourth Amendments and Article 1, Section 3 of the South Carolina Constitution, his right to a fair trial under the Sixth Amendment of the U.S. and Article 1, Section 14 of the South Carolina Constitution. Your Honor, we believe the lineup showing demonstration was suggestive and it does not meet the standard and therefore they should be excluded any in court identification of [Pontoo] and/or the gun should be excluded. Thank you.” (App'x 99).

Clemmons through that incident. (App'x 173–83, 187–201, 231–35). Furthermore, testimony was presented establishing a book bag and a Hi-Point nine-millimeter pistol were recovered from the scene of the crash while a .22-caliber revolver was recovered from the hospital after it fell out of Pontoo's clothing there.⁷ (App'x 149, 167, 169, 204–05, 222–23, 229).

In addition to the presentation of that testimony, Detective Garrick testified about his investigation into the crash and subsequent arrest of Pontoo for his role in the crimes. (App'x 236, 249). During his testimony, the officer further testified over objection about the photographic lineups he showed to Ruple after the incident, and he noted Ruple selected the second photograph contained in the lineups with an expressed certainty level of fifty percent despite the fact Pontoo's photograph was the fourth one depicted in those lineups. (App'x 243–48). Likewise, Ruple testified about the details of the armed robbery that preceded the fatal crash before also discussing the photographic lineups presented to him after the robbery. (App'x 253–68). In discussing the lineups, Ruple acknowledged he incorrectly identified the second person depicted, explained he was unable to properly distinguish between the pictures due to their lack of color, and stated he believed at the time of trial the fourth person depicted in the lineups was the robber. (App'x 266–68). Moreover, without objection, he identified Pontoo in the courtroom as the robber and expressed absolute certainty in his in-court identification. (App'x 269).

Furthermore, Carlisle and Johnson, two of the Pontoo's associates who were present on the night of the armed robbery and fatal crash, recounted their experiences on the night of the incident. (App'x 299, 331). Specifically, regarding that night, they both stated they went to a bar with Pontoo, Iquawn, and Clemmons, and each of the men confirmed Pontoo was the only one in

⁷ Later during trial, Ruple identified the gun recovered from the scene of the crash as the one stolen from him on the night of the incident and confirmed the serial numbers of the recovered gun matched the serial numbers of his gun. (App'x 271).

their group with dreadlocks. (App'x 303–06, 333–35). Furthermore, Carlisle stated he observed Pontoo snatch a bag out of another person's car when they were all getting ready to leave the bar for the evening, Pontoo began "tussling" with a man, Pontoo pulled out a gun, and the other man threw up his hands in response. (Trail Tr. 310–12). After that, Carlisle testified Pontoo jumped into their car, he chastised Pontoo for what he had done while receiving no response, they were subsequently stopped by a trooper after they went to get something to eat, and someone took off in his car during the course of the stop after he, Iquawn, and Johnson exited the vehicle. (App'x 313–19).

Similarly, Johnson recounted he was in the car waiting to head home from the bar when he observed Pontoo, who he had seen with a black revolver earlier that evening, "tussling" with another man until that man put up his hands. (App'x 331–32, 342–43). Then, Johnson stated Pontoo got into the car with a bag and appeared to put something into his pants. (App'x 342, 344). After that, Johnson indicated they went to get something to eat, they were subsequently stopped by a trooper, he was ordered out of the car along with Iquawn and Carlisle, and the car then sped off with Pontoo and Clemmons still inside. (App'x 345–49). Thereafter, the State rested its case, and Pontoo elected to testify in his own defense. (App'x 363–64).

D. Pontoo's Case

During his testimony, Pontoo acknowledged he went to the bar with Clemmons and the others on the night of the incident and claimed he observed a man attempt to trade his gun to Clemmons for Johnson's .25-caliber pistol, which he asserted was in Clemmons's possession. (App'x 364–68). Subsequent to that, Pontoo asserted he got into Carlisle's car to go home and began watching a movie in the car. (App'x 368–69). A few minutes later, Pontoo claimed Iquawn, Clemmons, and Johnson returned to the car with Johnson in possession of the nine-

millimeter pistol that belonged to the man he encountered earlier at the bar. (App’x 369–70). After that, Pontoo asserted they all went to get food together, he remained in the car while the others did so, they all left the restaurant, they were subsequently stopped by a trooper, and everyone but him and Clemmons was ordered from the vehicle. (App’x 371). At that point, Pontoo claimed Clemmons stated he was not going to jail, grabbed the stolen nine-millimeter pistol, cocked it, pointed it at him, and forced him to drive away from the stop at gunpoint. (App’x 372). Pontoo insisted he then continued to drive until Clemmons grabbed the wheel, and he asserted he could not remember anything after that. (App’x 372–73).

Subsequently, during cross-examination, Deputy Solicitor Graham questioned Pontoo about the firearm he was alleged to have possessed on the night of the incident, and Pontoo admitted he was in possession of a .22-caliber revolver that night, asserted he carried the gun into the bar for “the protection of society,” claimed he gave it to Clemmons while inside the bar, and insisted he never got his revolver back. (App’x 384–87, 396). As the cross-examination continued, Deputy Solicitor Graham asked Pontoo if he remembered speaking with Detective Garrick at the hospital following the incident, and Pontoo—consistent with his earlier *in camera* testimony—claimed the officer came into the hospital room and he told him he did not want to talk to him. (App’x 60–63, 411). Deputy Solicitor Graham then asked whether he told the detective at the hospital he did not know anything and did not remember anything about the incident, and Pontoo denied that he did while claiming he simply told the officer he did not want to speak with him. (App’x 411). After that, Deputy Solicitor Graham asked Pontoo if he admitted to having had an opportunity to tell the detective the story he testified to during trial, and Counsel Mauldin objected while simply stating “Fifth Amendment.” (App’x 412). Judge Russo then asked for the question to be repeated and, upon hearing the question, ruled Pontoo could

answer it. (App'x 412). At that point, Pontoo responded he could have told the officer his story that day but did not want to talk to him. (App'x 412).

E. State's Reply

Thereafter, the defense rested, and Detective Garrick was called to the witness stand in reply to testify about his meeting with Pontoo at the hospital. (App'x 420, 423; R. 383, 386). During his reply testimony, the detective indicated he informed Pontoo of his rights when he met with him at the hospital on the date of the incident. (App'x 423; R. 386). At that point, Counsel Mauldin renewed his objection from the *in camera* hearing, and Judge Russo overruled the objection. (App'x 424; R. 387). Detective Garrick then recounted he asked Pontoo to tell him what happened and Pontoo responded by repeatedly stating he did not know what happened and did not remember what happened. (App'x 425; R. 388). Following the presentation of that testimony, the State again rested its case, and Judge Russo conducted a charge conference to discuss his intended jury instructions with the parties. (App'x 425–26; R. 388–89).

F. Jury Instructions & Closing Arguments

During the charge conference, Deputy Solicitor Graham noted duress was an affirmative defense that the defendant was required to prove by a preponderance of the evidence, and Judge Russo confirmed his proposed instruction included such language. (App'x 427–28). Judge Russo then asked Counsel Mauldin if he had any issues with the proposed instruction while noting a duress instruction suggested by Counsel Mauldin during an off-the-record discussion was covered by his proposed instruction. (App'x 428). In response, Counsel Mauldin conceded he believed Judge Russo's proposed instruction to be a correct statement of South Carolina law while asserting he objected to that statement as burden shifting based on his belief a defendant

should not “have to prove anything.” (App’x 428). Judge Russo then noted Counsel Mauldin’s objection for the record. (App’x 429).

As the trial proceeded forward, the parties presented their closing arguments to the jury. (App’x 431–46). During his closing argument, Counsel Mauldin focused the jury’s attention on the fact the State allegedly failed to present any evidence about what occurred in the car prior to the crash and called the jurors’ attention to perceived weaknesses and inconsistencies in the evidence presented. (App’x 431–35). Thereafter, Assistant Solicitor McNair used his closing argument to point out the lack of credibility in Pontoo’s testimony and discuss the strength of the evidence of Pontoo’s guilt. (App’x 436–46). However, Assistant Solicitor McNair made no reference whatsoever to Pontoo’s failure to provide his allegedly exculpatory story to Detective Garrick prior to trial. (App’x 436–46).

At the conclusion of the closing arguments, Judge Russo instructed the jury on the relevant and applicable law. (App’x 447–57). During his jury instructions, Judge Russo explained to the jury the burden of proof was on the State, the defendant was presumed to be innocent, and the defendant was not required to prove his innocence to the jury. (App’x 448–49). Additionally, Judge Russo instructed the jury in regard to the elements of the indicted offenses. (App’x 452–55). Specifically, in instructing the jury on the offense of failure to stop for a blue light resulting in a death, Judge Russo stated:

Now, he’s charged in this case with failure to stop for a blue light resulting in death. In order to prove this crime, the State must prove beyond a reasonable doubt that the defendant was driving the motor vehicle on a road, street or highway of this state; that the defendant was signaled to stop by a law enforcement vehicle by means of a siren and/or flashing light, and that the defendant did not stop. An official signal requiring a motorist to stop may be a siren or flashing lights, but both are not required. An attempt to increase speed of a vehicle or in some other manner to avoid the pursuing law enforcement vehicle when signaled by a siren and/or flashing

light may be considered as evidence of failure to stop for a blue light. However, it is merely an evidentiary fact to be taken into consideration by you along with the other evidence in this case and is to be given whatever weight that you think it should receive. If you find that the State has proved beyond a reasonable doubt that the defendant failed to stop for a blue light and his actions resulted in the death of another, that would satisfy the elements of the offense of failing to stop for a blue light resulting in death.

(App'x 452–53). Judge Russo subsequently provided the following charge on the defense of duress:

Now, the defendant has raised the defense of coercion or duress. Coercion or duress is when a person makes another person commit a crime against someone else's person or property by the threat of immediate physical violence. The coercion or the duress must be present, imminent and of the type to create a well grounded fear of death or serious bodily harm if the act is not done. The fear of injury must be reasonable. Coercion or duress is not a defense if there is any reasonable way other than by committing the crime for the defendant to escape the threat of harm. The defendant must prove the defense of duress by a preponderance or greater weight of the evidence. A preponderance of the evidence is evidence which, when taken as a whole, shows that a fact is more likely to be proved than not proved.

(App'x 455).

Following the presentation of those instructions, Judge Russo inquired of the parties if they had any objections to his jury instructions aside from Counsel Mauldin's earlier objection to the duress instruction. (App'x 457–58). In response, both Counsel Mauldin and Deputy Solicitor Graham stated they did not have any additional objections. (App'x 457–58). The jurors then began their deliberations. (App'x 458).

G. Verdict & Subsequent Proceedings

On January 28, 2015, the jury convicted Pontoo as indicted. Judge Russo sentenced Pontoo to consecutive terms of twenty years' imprisonment for failure to stop for a blue light resulting in death and ten years for armed robbery.

Pontoo filed a timely notice of appeal. Donald L. McCune, Jr.,⁸ perfected Pontoo's appeal by filing a brief with the Court of Appeals on the following issues:

- I. The Trial Judge's Jury Instructions Improperly Placed the Burden of Proof for the Duress Defense on the [Pontoo]
- II. The Trial Judge Erroneously Allowed the State to Impeach the [Pontoo] with Post Miranda Silence
- III. The In-Court Identification of Pontoo was Unduly Suggestive

(Supp. App'x 1–25). Following briefing and oral argument, the Court affirmed Pontoo's convictions and sentences in an unpublished per curiam opinion. *State v. Pontoo*, 2017-UP-467 (S.C. Ct. App. filed Dec. 28, 2017) (Supp. App'x 26–78; 79–82). The case was remitted back to the circuit court on January 16, 2018.

Pontoo timely commenced the underlying PCR action on December 11, 2018. (App'x 474–79). The State requested an evidentiary hearing through its return on March 22, 2019. (App'x 480–92). Pontoo filed an amended application on June 7, 2021, and a second amended application on June 16, 2021. (App'x 493–95; 501–03). An evidentiary hearing convened on July 2, 2021, before the Honorable Courtney Clyburn Pope via Cisco WebEx Meetings in accordance with the Chief Justice's administrative memorandum, *Court Operations*, dated September 14, 2020.⁹ (App'x 504–81). Ola A. Johnson represented Pontoo, and Assistant Attorney General Lillian L. Meadows represented the State. Pontoo testified on his own behalf at the hearing. The

⁸ The South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Pontoo on appeal. Pursuant to the terms of the 2015 Appellate Practice Project, Chief Appellate Defender Robert M. Dudek moved to appoint Mr. McCune as co-counsel for the purpose of preparing the briefs and record and arguing the case before the Court of Appeals. The Court granted the motion on October 23, 2015.

⁹ See S.C. Sup. Ct. Memorandum dated September 14, 2020 (“Judges . . . have discretion to determine whether it is appropriate to conduct a hearing using remote communication technology. Consent of the parties or counsel is not required. Please use WebEx, the conferencing platform supported by the Judicial Branch.”).

Sate presented testimony from Pontoo's trial counsel, David M. Mauldin, and appellate counsel, Donald L. McCune, Jr.

By order signed September 22, 2021, and filed October 11, 2021, Judge Clyburn Pope denied post-conviction relief on all grounds and dismissed the action with prejudice. (App'x 582–35). Pontoo then timely initiated an appeal.

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, 422 S.C. at 180–81, 810 S.E.2d at 839–40. However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

The post-conviction relief judge correctly determined trial counsel was not constitutionally ineffective for failing to request the trial judge include the statutory language, “in the absence of mitigating circumstances,” in his jury charge on failure to stop for a blue light resulting in death where that particular statutory language is not an element of the offense and where the trial judge’s instructions as a whole demonstrate the jury was properly instructed on the affirmative defense of duress presented by Pontoo as it related to the offense of failure to stop for a blue light resulting in death such that he could not have suffered any resulting prejudice.

Pontoo contends the post-conviction relief judge erred by failing to find trial counsel provided constitutionally ineffective assistance based on his failure to request the judge include the language, “in the absence of mitigating circumstances,” in his jury charge for failure to stop for a blue light resulting in death. In support of that contention, Pontoo maintains there was no strategic reason for Counsel Mauldin’s failure to request this language be included in light of the mitigating evidence presented through Pontoo’s trial testimony that Andrew Clemmons, the deceased victim, forced Pontoo to drive away from the felony car stop by holding a gun to his head. To the contrary, the post-conviction relief judge properly concluded Pontoo failed to overcome the strong presumption that trial counsel provided adequate representation in this regard and further failed to demonstrate any resulting prejudice from the absence of the language regarding mitigating circumstances because the jury was properly instructed on the affirmative defense of duress as it related to the offense of failure to stop for a blue light resulting in death that was consistent with the relevant and applicable South Carolina law. *See Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 474, 472–73 (2004) (recognizing a jury charge is correct if it correctly defines the relevant and applicable law when read as a whole). As these findings are supported by probative evidence and do not constitute an error of law, this Court should deny certiorari.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In post-conviction relief actions, the reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction. *Id.* at 687. To obtain relief, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel’s deficient performance. *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland*, 466 U.S. 668). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; see also *Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)).

The applicant bears the heavy burden of establishing both prongs of the *Strickland* standard. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRPC. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of “fell below an objective standard of reasonableness” as measured by “prevailing professional norms.” *Strickland*, 466 U.S. at 688. Reviewing courts should be deferential in this inquiry, and apply “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689.

With respect to prejudice, the applicant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Id.* When evaluating this probability, the reviewing court “should consider the specific impact counsel’s error had on the outcome of the trial” coupled with “the strength of the State’s case in light of . . . the [totality of the] evidence presented to the jury.” *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843. Significantly, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Strickland*, 466 U.S. at 696.

The purpose of a trial judge’s jury instructions is “to enlighten the jury and to aid it in arriving at a correct verdict.” *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge is required to charge only the current and correct law of South Carolina. *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003). In doing so, a trial judge is only required to instruct the jury on the substance of the law and does not have to use any particular verbiage. *State v. Burkhardt*, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). A trial judge’s jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. *State v. Foust*, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); *see State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) (“A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.”).

Pontoo contends Counsel Mauldin deficiently failed to request the judge include the language, “in the absence of mitigating circumstances,” in his jury charge on failure to stop for a blue light resulting in death. S.C. Code Ann. § 56-5-750(A) provides that:

In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light.

(emphasis added).

At the PCR hearing, Counsel Mauldin stated that he certainly could have requested the judge use the language, “in the absence of mitigating circumstances.” (App’x 541–42). However, he explained that the duress charge itself is an affirmative defense that would *obviously constitute mitigating circumstances*. (App’x 542). The PCR court agreed with Counsel Mauldin’s assessment and further correctly noted that Counsel Mauldin’s failure to request the mitigating circumstances language does not constitute deficient performance because “in the absence of mitigating circumstances” is not an element of the failure to stop offense or descriptive of that offense. Rather, it is a proviso creating an exception to the offense defined and described by the words that follow. *See Cain v. S.C. Pub. Serv. Auth.*, 222 S.C. 200, 213, 72 S.E.2d 177, 183 (1952) (“ ‘The natural and appropriate office of a proviso is to modify the operation of that part of the statute immediately preceding the proviso, or to restrain or qualify the generality of the language that it follows.’ ” (citation omitted)); *see also State v. Clarke*, 302 S.C. 423, 425–26, 396 S.E.2d 827, 827–28 (1990) (“The general rule, when dealing with statutory crimes to which there are exceptions, is that the defendant ‘has the burden of excusing or justifying his act; and hence the burden may be on him to bring himself within an exception in the statute . . . [A]n exception to a criminal offense shall be negated in the indictment only if the language of the exception must be regarded as descriptive of the offense. If not, the exception is a matter of defense and need not be negated in the indictment. . . . The statutory exceptions are matters of defense for which a defendant bears the burden of production.” (citations omitted)).

Further, even assuming “in the absence of mitigating circumstances” constitutes an “element,” of the offense of failure to stop for a blue light resulting in death as Applicant alleges, it is immaterial in the context of a duress defense. “Duress excuses the crime but does not negate any element of the offense.” *State v. New*, 371 S.C. 523, 526, 640 S.E.2d 871, 873 (2007); *accord. Dixon v. United States*, 548 U.S. 1, 6 (2006) (holding that the prosecution need not bear the burden disproving duress beyond a reasonable doubt because “the existence of duress normally does not controvert any of the elements of the offense itself); *see, e.g., State v. Rocheville*, 310 S.C. 20, 425 S.E.2d 32 (1993) (duress does not negate element of malice in murder charge); *State v. Robinson*, 294 S.C. 120, 363 S.E.2d 104 (1987) (duress envisions a third person compelling another to commit a crime). Rather, it allows the defendant to “avoid liability . . . because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present.” *Dixon*, 548 U.S. at 7 (quoting *United States v. Bailey*, 444 U.S. 394, 402 (1980)).

Here, the trial judge correctly instructed the jury on the affirmative defense of duress as it related to the offense of failure to stop for a blue light resulting in a death, and his instructions were fully consistent with the relevant and applicable South Carolina law. Accordingly, the PCR court correctly found Pontoo failed to demonstrate a reasonable probability that, but for trial counsel’s failure to request the “in the absence of mitigating circumstances” language, “the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. This Court should deny certiorari.

CONCLUSION

Based on the foregoing argument, this Court should deny Pontoo's petition for a writ of certiorari.

Respectfully submitted,

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