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May 22 2023

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to Florence County
Honorable William H. Seals, Circuit Court Judge
Appellate Case No. 2022-001080

Wayne A. Scott,

Petitioner,

vs.

The State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

I.

Trial counsel erred in failing to specifically object to the trial judge's failure to issue a jury re-charge that answered the jury's question as to whether the State was required to disprove all elements (or one element) of self-defense, and in failing to move for a mistrial in the matter.

II.

Trial counsel erred with respect to his advice given to petitioner on the issue of his right to testify at trial.

COUNTER-STATEMENT OF ISSUES ON CERTIORARI

I.

The PCR judge correctly determined Petitioner failed to establish his ineffective assistance of counsel claim because Petitioner's defense counsel did not provide objectively unreasonable representation by arguing and renewing his objections during the colloquy surrounding the jury questions and because Petitioner offered no evidence or testimony to show actual prejudice as a result of his defense counsel's purported deficient representation.

II.

Petitioner did not preserve any alleged defect in the advice of trial counsel to Petitioner regarding his right to testify at trial; however, even if this issue had been raised to the PCR court and ruled on, the record strongly supports a finding that Petitioner knowingly and voluntarily waived his right to testify at trial, and that there was no defect in the advice or representation of trial counsel in pursuing his articulated strategy of pursuing a self-defense claim while protecting his client from cross examination and possibly making inconsistent statements.

STATEMENT OF THE CASE

Procedural History

In March of 2013, Petitioner Wayne Scott was indicted in Florence County for the murder of Steve Springs and for the possession of a weapon during commission of a violent crime. Petitioner sought immunity under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, in a hearing before the Hon. Howard King on September 19, 2013. After hearing the testimony of Petitioner and two other witnesses, and the arguments of counsel, Judge King denied Petitioner's motion for immunity.

Petitioner was tried before the Hon. George C. James beginning on October 21, 2013. Petitioner was represented by Assistant Public Defender William Grove, and Assistant Solicitor Matthew Ozment represented the State. On October 24, 2013, the jury found Petitioner guilty of both charges.

Petitioner appealed his conviction, arguing that he should have been granted immunity under the Protection of Persons and Property Act, and that the Act should have been included in the jury charge. Petitioner was represented in his direct appeal by Appellate Defender LaNelle Cantey Durant. Petitioner convictions were affirmed on appeal. State v. Scott, Op. No. 2015-UP-513 (S.C. Ct. App. filed November 12, 2015); State v. Scott, Op. No. 2017-MO-010 (S.C. Sup. Ct. filed May 31, 2017). (App'x pp. 690-783).

Thereafter, Petitioner filed an application for post-conviction relief, and, in response, the State filed a return and motion for more definite statement, which also requested an evidentiary hearing. With the assistance of PCR counsel, Petitioner then filed an amendment to his PCR application raising additional grounds for relief. On June 25, 2019, an evidentiary hearing was conducted in the Florence County Court of Common Pleas with the Honorable William H. Seals,

Jr., circuit court judge, presiding. At the conclusion of the hearing, the PCR judge took the matter under advisement. Thereafter, through an order filed on July 28, 2022, the PCR judge denied and dismissed Petitioner's PCR application. Petitioner then timely filed a notice of this appeal.

Factual History

Petitioner Wayne Scott shot and killed Steve Springs on September 24, 2012. (App'x p. 695). Prior to this murder, Mr. Springs had been having an affair with Petitioner's stepdaughter, who was married to someone else. (App'x p. 695). Following a series of phone calls between the two men, Mr. Springs drove to Petitioner's property on the evening of September 24th. Petitioner's version of events was that Mr. Springs got out of his car and stood there while the men exchanged words. (App'x p. 697-98). Mr. Springs then started moving toward Petitioner, perhaps with something in his hand, and then Petitioner shot Mr. Springs once with his hunting rifle before he closed the distance. (App'x p. 698).

Petitioner never contested that he shot Mr. Springs but asserted he did so in self-defense. The State's theory was that Petitioner deliberately lured Mr. Springs to his property to kill him. Petitioner testified at a pre-trial immunity hearing pursuant to the Protection of Persons and Property Act, which included cross-examination by the State that Petitioner's prior felony conviction prohibited him from possessing his (multiple) firearms under federal law. (App'x p. 80 line 18 - p. 82 line 14). Petitioner chose not to testify at trial after two colloquies with the trial judge over two days. (App'x p. 534 line 23 - p. 535 line 23; p. 543 line 9 - p. 545 line 14).

In preparation for the jury charge, defense counsel pressed the trial court to read State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002), for the rule that the State must disprove every element of self-defense, as opposed to only one. (App'x pp. 579-83, p. 656 line 17 – p. 663 line

3). The trial court overruled this reading, and charged the jury on self-defense, including that the State had the burden of disproving self-defense. During deliberations, the jury returned several questions to the trial court, including the question of whether all the elements of self-defense "have to apply or does only one or some of the elements need to be met?" (App'x p. 660 lines 15-17). Here, the trial court anticipated the objection of trial counsel:

> THE COURT: Mr. Grove. You want to push forward with your Berkhart [sic] claim that they have to disprove all the elements I assume.
>
> Mr. GROVE: Again, your Honor, I would obviously make note of that. Question five seems to fall right in line with my interpretation to Berkhart. Outside of that, you've charged them on the law. They have to prove self defense beyond a reasonable doubt. Aside from that, it becomes vicarious [sic] position to make comments on the facts of the particular case."

(App'x p. 658 line 7-17). The jury convicted Petitioner of both charges, and he was sentenced to life without parole for the murder charge and five years for the possession of a weapon during the commission of a violent crime. (App'x pp. 670-71, p. 687 lines 18-24).

Summary of the PCR Proceedings

Following an unsuccessful appeal, Petitioner sought PCR on a number of grounds. Petitioner's original PCR application set out four grounds for Ineffective Assistance of Counsel. (App'x pp. 791-92, 879). With the assistance of counsel, this was amended to sixteen grounds, denominated (a) through (p). (App'x pp. 879-880). As relevant here, Allegation 1(l) of the amended grounds alleged that trial counsel was deficient for "Failure to properly respond to issue regarding jury questions." (App'x p. 880). Neither the original nor the amended grounds contain any provision which may fairly be read as an allegation that Mr. Scott's trial counsel failed to adequately advise him regarding testifying in his own defense at trial. (App'x pp. 879-880).

During the ensuing evidentiary hearing, Petitioner and trial counsel each testified about the circumstances of Petitioner's trial. Regarding the jury questions, trial counsel testified in the following exchange on cross-examination by the State:

> And the other question was oddly enough whether or not each element of self-defense had to be disproven or if just one element had to be disproven.
>
> Q And your argument was that the State had disprove [sic] all four elements?
>
> A That's correct.
>
> Q But the judge ruled that the State only had to disprove one element?
>
> A That's correct.
>
> Q Was that the law at the time?
>
> A I believe so, I suppose so. I'll take Justice James' word for it when it comes to he and I having disagreements about the law.

(App'x p. 857 lines 12-24).

Both Petitioner and trial counsel testified regarding the advice trial counsel gave Petitioner about testifying at trial. (App'x p. 824 lines 4-17, p. 852). However, PCR counsel's closing argument to the PCR court did not include any reference to this alleged error. (App'x p. 871 line 21 – p. 875 line 8).

Through an order filed on July 28, 2022, the PCR judge denied and dismissed Petitioner's PCR application. (App'x pp. 877-930). The PCR court ruled on every ground raised in the PCR application and found that Allegation 1(l) ("Failure to properly respond to issue regarding jury questions") was "without merit" and "refuted by the record." (App'x pp. 918-23). The PCR court also noted the testimony elicited around trial counsel's advice. (App'x p. 894). However, the PCR court did not rule on any alleged defect in the advice of trial counsel regarding testimony at trial because it was not one of the grounds raised.

Standard of Review

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Law Relevant to Both Arguments

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly, effective assistance of counsel does *not* mean perfect representation. See Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."); see also Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is considered to be constitutionally ineffective when "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." Id. at 686.

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of

counsel claim must establish: (1) counsel's representation 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). Thus, the applicant has the burden of establishing both deficiency and prejudice in order to be entitled to PCR. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001). 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.

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Id.; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not*

when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to PCR as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[1] Strickland, 466 U.S. at 691. In order to for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S. at 112 (emphasis added).

In the case at bar, Petitioner failed to meet his burden of establishing his defense counsel's performance during trial fell below the prevailing standard of professional norms. Likewise, Petitioner further failed to establish he suffered any actual prejudice based on his defense counsel's performance that would have entitled him to a grant of PCR. Therefore, just as the PCR judge determined, Petitioner did not—and could not—meet his burden of establishing his defense counsel was constitutionally ineffective, and Petitioner's PCR application was properly denied.

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[1] Notably, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697. In fact, a reviewing court ordinarily should dispose of an ineffective assistance of counsel claim on the grounds of lack of sufficient prejudice "[i]f it is easier" to do so. Id.

I.

The PCR judge correctly determined Petitioner failed to establish his ineffective assistance of counsel claim because Petitioner's defense counsel did not provide objectively unreasonable representation by arguing and renewing his objections during the colloquy surrounding the jury questions and because Petitioner offered no evidence or testimony to show actual prejudice as a result of his defense counsel's purported deficient representation.

Petitioner alleges that "[t]rial counsel erred in failing to specifically object to the trial judge's failure to issue a jury re-charge that answered the jury's question as to whether the state was required to disprove all elements (or one element) of self-defense, and in failing to move for a mistrial in the matter." Petition for Writ of Certiorari p. 3. The crux of Petitioner's argument is that the response to the jury's question was "an erroneous and incorrect statement of the law on self-defense." Petition for Writ of Certiorari p. 6. In fact, the PCR court correctly held that this allegation is without merit. (App'x p. 918).

The record shows that trial counsel diligently pressed the trial court to read State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002), for the rule that the State must disprove every element of self-defense, as opposed to only one. (App'x pp. 579-83, p. 656 line 17 – p. 663 line 3). This was such a high-profile issue that when the jury presented the question referenced in this cert petition, the trial court anticipated trial counsel's objection and it was preserved (and overruled):

> THE COURT: Mr. Grove. You want to push forward with your Berkhart claim that they have to disprove all the elements I assume.
>
> Mr. GROVE: Again, your Honor, I would obviously make note of that. *Question five seems to fall right in line with my interpretation to Berkhart.* Outside of that, you've charged them on the law. They have to prove self defense beyond a reasonable doubt. Aside from that, it becomes vicarious [sic] position to make comments on the facts of the particular case.

(App'x p. 658 line 7-17) (emphasis added). This was not merely a generic objection, but a specific objection that the State should have been required to disprove all elements of self-

defense. Therefore, any error of law in response to the jury question was objected to and preserved. Furthermore, Petitioner's direct appeal did not include this alleged error in the jury charge as a ground for reversal.[2] (App'x 693).

After reviewing the record, the PCR court found was this alleged error was "without merit":

> This Court finds Applicant's allegation that Trial Counsel failed to properly respond to issues in the jury questions is refuted by the record. Trial Counsel argued and renewed his objections during the colloquy surrounding the jury questions. Furthermore, this Court finds Applicant has failed to meet his burden proving Trial Counsel's alleged deficiency prejudiced him. Applicant has presented no evidence or testimony as to how Trial Counsel's failure to respond to the issue regarding jury questions properly prejudiced him or how Trial Counsel was deficient. Therefore, whether Trial Counsel properly responded to the issue regarding jury questions would have changed the trial's outcome is mere speculation. See Clark, 315 S.C. at 388, 434 S.E.2d at 267 (concluding pure conjecture fails to establish prejudice). Accordingly, this allegation must be denied and dismissed with prejudice.

(App'x p. 922-23). This finding is strongly supported by the trial record, and by the testimony of Petitioner and trial counsel at the PCR hearing. (App'x pp. 579-83, p. 656 line 17 – p. 663 line 3, p. 857 line 2 - p. 858 line 12); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings.").

Additionally, Petitioner cannot show any deficiency or prejudice to defendant because the ruling of the trial court was legally sound – as trial counsel conceded at the PCR hearing:

> And the other question was oddly enough whether or not each element of self-defense had to be disproven or if just one element had to be disproven.
>
> Q And your argument was that the State had disprove [sic] all four elements?
>
> A That's correct.
>
> Q But the judge ruled that the State only had to disprove one element?

[2] On appeal, Mr. Scott argued that the jury should have been charged regarding S.C. Code Ann. § 16-11-410 in conjunction with the self-defense charge. (App'x p. 693).

A That's correct.
Q Was that the law at the time?
A I believe so, I suppose so. I'll take Justice James' word for it when it comes to he and I having disagreements about the law.

(App'x p. 857 lines 12-24). The longstanding law in South Carolina is that "there are four elements required by law to establish self-defense," and each must be present in order for the defendant to be entitled to the complete defense of self-defense. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Conversely, if the State disproves one of the four elements, then the defendant is not entitled to the complete defense. See id. Thus the trial court correctly applied South Carolina law over the objection of trial counsel, and Petitioner cannot show any deficiency or prejudice on the part of his trial counsel as a result.

II.

Petitioner did not preserve any alleged defect in the advice of trial counsel to Petitioner regarding his right to testify at trial; however, even if this issue had been raised to the PCR court and ruled on, the record strongly supports a finding that Petitioner knowingly and voluntarily waived his right to testify at trial, and that there was no defect in the advice or representation of trial counsel in pursuing his articulated strategy of pursuing a self-defense claim while protecting his client from cross examination and possibly making inconsistent statements.

Petitioner alleges that his "[t]rial counsel erred with respect to his advice given to [P]etitioner on the issue of his right to testify at trial." Petition for Writ of Certiorari p. 7. The crux of Petitioner's argument is that Petitioner should have taken the stand at trial to testify in support of his self-defense claim, and that "[trial counsel's] error in not fully exploring the question of Petitioner's right to testify at trial in light of the self-defense claim, which was critical to the case, meant that Petitioner did not voluntarily and intelligently waive his right to testify at trial." Petition for Writ of Certiorari p. 10. As more fully explained below, this argument was neither raised in Petitioner's application nor ruled upon by the PCR court, and therefore is not preserved for this Court's review. Even if it were preserved, the record reflects that Petitioner

was counseled on the record no fewer than three times regarding his right to testify before he ultimately chose not to testify at trial. Trial counsel articulated to the PCR court a prudent and well-reasoned strategy for counseling his client not to testify at trial. Finally, both Petitioner and trial counsel testified that they discussed the possibility of Petitioner testifying and how that could impact the strategy of the case. This supports a finding that Petitioner knowingly and voluntarily waived his right to testify at trial, and that there was no defect in the advice or representation of trial counsel.

As an initial matter, Petitioner did not preserve any alleged defect in the advice of trial counsel to Petitioner regarding his right to testify at trial. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Petitioner's original PCR application set out four grounds for Ineffective Assistance of Counsel. (App'x pp. 791-92, 879). With the assistance of counsel, this was amended to sixteen grounds. (App'x pp. 879-880). Neither the original nor the amended grounds contain any provision which may fairly be read as an allegation that Mr. Scott's trial counsel failed to adequately advise him regarding testifying in his own defense at trial. Although PCR counsel elicited testimony from Petitioner, PCR counsel's closing argument to the PCR court did not include any reference to this alleged error. (App'x p. 871 line 21 – p. 875 line 8). The PCR court ruled on every ground raised in the amended PCR application, and noted the testimony elicited around trial counsel's advice. (App'x pp. 877-930). However, the PCR court did not rule on any alleged defect in the advice of trial counsel regarding testimony at trial because it was not one of the grounds raised. (App'x pp. 877-930). Thus, this alleged deficiency was not raised to, argued before, or ruled on by the PCR court. Petitioner cannot properly appeal this alleged error by

raising it for the first time in his Petition for Writ of Certiorari. See Wilke, 330 S.C. at 76, 497 S.E.2d at 733.

Even if this alleged deficiency were preserved, the record reflects that Petitioner knowingly and voluntarily waived his right to testify at trial. In a criminal trial, the defendant has a right to testify in their own defense, and that right is guaranteed by the Fifth, Sixth, and Fourteenth Amendments. Rock v. Arkansas, 483 U.S. 44 (1987). This right may be waived by the defendant if the record reflects a knowing and voluntary waiver. Brown v. State, 317 S.C. 270, 271-72, 453 S.E.2d 251, 252 (1994). "A defendant's knowing and voluntary waiver of a statutory or constitutional right must be established by a complete record; and may be accomplished by colloquy between the court and the defendant, between the court and defendant's counsel, or both." State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993).

The record reflects that Petitioner was counseled on the record no fewer than three times regarding his right to testify before he ultimately chose not to testify at trial. On September 19, 2013, Petitioner appeared and testified at a hearing in support of his motion under the Protection of Persons and Property Act. (App'x p. 4, p. 50 line 1 - p. 84 line 24). Before giving this testimony at the hearing, Petitioner was advised by the presiding judge on the record regarding his Fifth Amendment rights at trial. (App'x p. 48 line 3 - p. 49 line 21). On October 23, 2014, during Petitioner's trial, the trial judge engaged in a lengthy colloquy on the record with Petitioner which explained Petitioner's right to testify and some of the risks. (App'x p. 529 line 1 - p. 536 line 14). When Petitioner indicated there was some portion of the colloquy he did not understand, the trial court reframed the information in a way that was very accessible to a lay person. (App'x p. 530 lines 1-12). Petitioner affirmed under oath that he understood his right to testify, and the court soon recessed for the day. (App'x p. 534 line 23 - p. 535 line 23; p. 543

lines 9-10). Finally, on October 24, 2014, when court resumed the next day, the trial judge briefly reviewed Petitioner's rights again. (App'x p. 543 line 22 - p. 545 line 14). Petitioner affirmed he understood and chose not to testify. (App'x p. 544 line 19 - p. 545 line 13).

At the PCR hearing, trial counsel articulated a prudent and well-reasoned strategy for counseling his client not to testify:

> If at all possible and this is true in almost every case, I do my best in terms of trying to protect my client from cross-examination. So if we can present our case without subjecting them to the risks that come along with them testifying at trial, I try and do that and present the case as best I can without the need of a client's testimony and the client ultimately has that choice at the very end if we haven't covered everything, that they can testify at that time. We had that conversation and he decided not to testify. His was a little tricker [sic] because he had testified already at the immunity hearing, and he had also provided a statement prior to that. And so he not only has to navigate cross-examination from the prosecutor, but also ensuring that doesn't run into inconsistent statements from two prior testimonies that he's had or two prior statements I suppose you could say.

(App'x p. 852 line 14 - p. 853 line 4). In the circumstances of the case, this was a prudent, well-reasoned strategy to avoid not just the possible inconsistent statements, but also testimony about Petitioner's prior felony conviction which prohibited him from possessing his firearms under federal law. (App'x p. 80 line 18 - p. 82 line 14).

Finally, both Petitioner and trial counsel testified that they discussed the possibility of Petitioner testifying, and that testimony was consistent with trial counsel's articulated strategy. On October 23, 2014, during Petitioner's trial, trial counsel stated on the record at trial that he and his client "talked about [Fifth Amendment rights] at length over the course of the last year," which was not contested by Petitioner during the colloquy with the trial court. (App'x p. 528 lines 24-25). Petitioner testified to the PCR court that he had discussed the possibility of testifying with his trial counsel, who advised him that he had the right to testify and couldn't tell him to testify or not to. (App'x p. 824 lines 4-17). They also discussed the burden on the State to

disprove self-defense. (App'x p. 824 lines 4-12). Petitioner testified to the PCR court that trial counsel advised him that if he testified, "the State could use anything [Petitioner] said against [him]." (App'x p. 813 lines 2-6). Trial counsel testified to the PCR court that "[w]e had that conversation and he decided not to testify." (App'x p. 852 lines 22-23). Petitioner likewise testified to the PCR court that because he "didn't know what to do," he chose to defer to the strategy of his trial counsel: "I was letting [trial counsel] run the show because I knew no better." (App'x p. 824 lines 14-17).

In summary, Petitioner did not preserve any alleged defect in the advice of trial counsel to Petitioner regarding his right to testify at trial. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal."). However, even if this issue had been raised to the PCR court and ruled on, the record strongly supports a finding that Petitioner knowingly and voluntarily waived his right to testify at trial, and that there was no defect in the advice or representation of trial counsel in pursuing his articulated strategy. See Strickland v. Washington, 466 U.S. 668, 689 (1984) (the reviewing court will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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