STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

J. Mark Hayes, II, Circuit Court Judge

SANTIAGO RIOS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213256

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Violating Petitioner's rights pursuant to South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution, the PCR court erred in denying Petitioner relief from his murder conviction where the PCR court held trial counsel's deficient performance in failing to request a jury instruction on self-defense, which would have been reversed on direct appeal, was not prejudicial to Petitioner.

STATEMENT

On January 7, 2008, the Spartanburg County grand jury indicted Petitioner for murder. App. 954 – 955. The State represented by Trey Gowdy and Cindy Crick called the case for trial before the Honorable Roger Couch and a jury on April 28, 2008. David Collins and Doug Brannon represented Petitioner. App. 1. The jury found Petitioner guilty of murder. App. 674, lines 13 – 18. Judge Couch sentenced Petitioner to thirty years' imprisonment. App. 682, lines 23 – 25. Petitioner filed a timely notice of appeal, which was perfected by Ricky Harris. App. 685 – 698. On July 14, 2010, the Court of Appeals affirmed Petitioner's conviction and sentence. App. 753 – 759. On July 30, 2010, the Court of Appeals issued remittitur. App. 760 – 761.

On October 13, 2010, Petitioner filed an application for post-conviction relief (PCR). App. 762 – 775. The matter proceeded to an evidentiary hearing on September 19, 2011 before the Honorable J. Mark Hayes, II. Susannah Ross represented Petitioner, and Suzanne White represented the state. App. 781. On January 18, 2012, Judge Hayes issued an order denying Petitioner relief. App. 913 – 922. On February 1, 2012, Petitioner filed a motion to alter or amend the judgment. App. 923 – 924. Judge Hayes requested oral argument concerning the motion by order filed February 23, 2012. App. 929-930. On June 14, 2012, the parties reconvened for oral argument. App. 931. By order filed on July 3 2012, Judge Hayes denied the motion to alter or amend, and directed the Attorney General to prepare an order. App. 950 – 951. On October 2, 2012, Judge Hayes signed the order prepared by the Attorney General. App. 952 – 953.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

Violating Petitioner's rights pursuant to South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution, the PCR court erred in denying Petitioner relief from his murder conviction where the PCR court held trial counsel's deficient performance in failing to request a jury instruction on self-defense, which would have been reversed on direct appeal, was not prejudicial to Petitioner.

Petitioner was charged and convicted of murdering his wife, Eliza Hernandez. During the trial, Petitioner presented evidence that the shooting was accidental or in self-defense. Despite clear evidence in the record of Petitioner acting in self-defense, the trial judge refused to charge the jury concerning self-defense, and trial counsel abandoned his previously-made request for such a charge. The PCR judge found trial counsel's abandonment of the request was deficient performance and had trial counsel preserved the error for appeal, Petitioner's conviction would have been reversed by an appellate court and a new trial granted. However, the PCR judge erred by concluding that Petitioner had failed to prove prejudice, despite his express finding that an appellate court would have reversed.

Relevant facts from the trial.

In his opening statement, the prosecutor claimed Petitioner's statement to police, what the prosecutor called the "third version," asserted that Petitioner's and Hernandez's fingers were on the trigger: "She goes and gets a gun, her fingers are on the trigger, this is his third version, his, his fingers were on the trigger, her fingers are on the trigger, the gun is pointed at him, but somehow or another she wounds up getting shot." App. 153, lines 18-22.

Opening statement by petitioner's trial counsel explained that Hernandez became more aggressive and she eventually attacked Petitioner, including pulling his hair, scratching his neck,

and yanking off his medallion. App. 163, lines 12-23. Counsel further told the jury that the fight became "more and more aggressive" and that Hernandez attacked Petitioner in the living room as well. In the bedroom, Hernandez pushed Petitioner down on the bed and tried to hit him with a dumbbell. Eventually, Hernandez retrieved a handgun. Petitioner, in fear of his life, struggled with Hernandez for control of the gun. During the struggle, Hernandez is shot. App. 164, line 3 – App. 165, line 3.

Petitioner's mother, Isabel Rios, testified that Petitioner asked Hernandez for food, and she refused to give him any food. App. 287, lines 3-5. When Petitioner asked for Thanksgiving dinner, Hernandez told him to eat the lunch she had packed for him earlier. App. 287, lines 21-25. She further testified that Hernandez pushed Petitioner, not that Petitioner pushed Hernandez. App. 288, lines 6-13. Hernandez and Petitioner then went into the room and locked the door. App. 288, lines 15-17; App. 289, lines 12-14. Rios heard Hernandez hitting Petitioner and calling him a bastard. App. 290, line 12 – App. 291, line 2. Rios further testified that Petitioner told her that Hernandez shot herself. App. 291, lines 24-25.[1]

Reid Lindsay with the Spartanburg County Sheriff's Office testified that he observed wads of hair at the crime scene. He agreed that finding "wads of hair" was indicative of a struggle. App. 245, lines 19-25. He agreed that there were signs of a struggle in the living room based on finding hair there. He further explained the hair belonged to Petitioner. App. 252, line 20 – App. 253, line

[1] Through George Baldarama, a Spanish-speaking officer with the Spartanburg County Sheriff's Office, the prosecution admitted Rios' statement to police regarding the events of Thanksgiving evening. Rios told police that she saw Petitioner and Hernandez arguing, saw them grab each other's hair, and saw Hernandez grab a medallion from Petitioner's neck scratching his chest. She heard the two arguing in their room, and then heard a shot. Petitioner ran from the room saying either Hernandez had been shot or he had shot Hernandez. App. 382, lines 1-25.

6.[2] Lindsay also admitted that according to Petitioner's statement, the shooting was accidental. App. 249, lines 7-9. Matt Fitts, an expert in forensic DNA and serology, testified the hair recovered from the floor of the living room belonged to Petitioner. App. 529, lines 6-11.[3] Concerning hair recovered from the bedroom floor, Fitts developed a partial DNA profile. He excluded Hernandez as the owner of the hair, but could not exclude Petitioner as the hair's owner. App. 530, line 18 – App. 531, line 5.

Investigator William Gary testified that Petitioner stated that Hernandez had the gun and the two fought over the gun, and that Petitioner "had his hands on [the gun]." He elaborated that Petitioner stated the gun turned towards Hernandez and fired. App. 354, lines 11-20. Gary also testified that Petitioner's t-shirt was torn, indicating he had been involved in a domestic struggle. App. 361, lines 10-17.

Angel Diaz, an employee of the Sheriff's Department, testified that he assisted Gary with interrogating Petitioner by acting as an interpreter. App. 410, lines 7-16. Diaz read Petitioner's statement to the jury. Hernandez was angry with Petitioner and would not give him food. She was angry with him for staying out late drinking at his sister's house and because he did not eat the lunch she had packed for him earlier that day. Petitioner admitted the two shoved each other. He stated that Hernandez pulled his hair and pulled his medallion. The two then went to a bedroom. Petitioner explained:

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[2] Crime scene investigator Tim Davis testified hair was found in the living room of the residence where the shooting occurred. App. 455, lines 4-13. He further testified that hair was found near where Hernandez's body was found. App. 456, lines 5-10.

[3] Fitts also testified that swabs from the bedroom floor revealed the presence of blood. The DNA profiles developed from the swabs were mixtures of at least two individuals. The major contributor was Hernandez, and Petitioner could not be excluded as a possible minor contributor. App. 529, line 25 – App. 530, line 6.

> She had me by the neck. She grabbed a two to three pound weight and hit me in the mouth with it. She told me that her mom was on the way to pick her up. I asked why. She said she did not want to be with me no more. She pushed me on the bed. She went after the gun. I was afraid. I wanted to get to, I wanted to get it from her, but she was pointing, pointing it at me.
>
> She turned. I wanted to open the door, but I could not. She turned her face and I grabbed the gun. We struggled. I told her to let go. She had her finger on the trigger, and I had the barrel.
>
> I told her you're going to kill me. She said yes, so you won't belong to no one else. We struggled. I was defending myself. I thought that a bullet might come out and hit me or her or my mom. During the struggle, a shot was fired. She fell.

App. 416, line 21 – App. 418, line 17.

John Wren, the forensic pathologist, testified that Hernandez died as a result of a gunshot wound. He explained she had "a through-and-through gunshot wound to the head. The entrance was just to the side of the nose on the left side... and it went through her head and came out just to the right of midline at the vertex of her head." App. 561, line 23 – App. 562, line 3. He further found this was an "[e]xtremely close range gunshot wound." App. 564, line 5. Concerning the path taken by the bullet, Dr. Wren testified the bullet moved "upward at about 75 to 80 degrees ... going from left to right." App. 568, line 23 – App. 569, line 1.

During the charge conference Petitioner's trial counsel requested an instruction on self-defense. App. 605, lines 4-5. The prosecutor responded: "I don't think he's entitled to self-defense." App. 605, line 10. Specifically, the prosecutor argued that self-defense requires the person admit to shooting another person: "The, the whole premise behind self-defense is that I committed a homicide, I shot someone, but I did so in self-defense. At no point has this side of the courtroom ever admitted they shot Eliza Hernandez. Never once. Finger was not on the trigger. That's an accident." App. 605, lines 19-24. He elaborated: "[Petitioner] doesn't even admit he shot her. So, he's not entitled to self-defense." App. 606, lines 1-3. Petitioner responded by continuing

his request for self-defense jury charge and explaining the charge was appropriate because there was evidence to cause the jury to believe Petitioner acted in self-defense. To support his position, he pointed to Petitioner's statement in which he said "it was self-defense." App. 607, lines 9-18; see also, App. 612, lines 1-3.

The trial court determined he was not bound by Petitioner's characterization of his conduct as self-defense. App. 612, lines 4-6; see also, App. 614, lines 9-11. The trial court responded "I don't see self-defense in here." App. 615, line 16. Trial counsel then asked the court to charge voluntary manslaughter and accident in addition to the murder jury instruction. App. 615, lines 21-23. Thereafter, the judge did not instruct the jury as to self-defense, but instructed the jury as to voluntary manslaughter, murder, and accident. App. 661, line 19 – App. 665, line 22.

In closing argument, the state argued Petitioner shot Hernandez "in the face and put a bullet through her head." App. 628, lines 6-7. Additionally, the state noted that Petitioner "says he was just a grieving husband, and it was an accident or it was a struggle or it was a suicide." App. 629, lines 3-4. The prosecutor argued that Petitioner told law enforcement that he and Hernandez argued and she attacked him; she was the aggressor. App. 635, lines 6-8. To counter Petitioner's statements to law enforcement, the prosecutor argued "[t]his was not self-defense." App. 644, line 11.

Defense counsel argued to the jury that the pathologist's testimony concerning the pathway of the bullet supported Petitioner's statement to police. He explained:

> But there was the picture of Mrs. Hernandez with the rod through her, with the rod through her. ... If he is seated on the bed, and she is standing, and she had the gun in her hands, and she's pointing the gun at him like this, and if he does what he says he does in his statement, if he takes his hands and he puts them on the gun, and he does this, ladies and gentlemen, look at the rod. Look at the trajectory. It's exactly the way it would be if the, if what happened in that bedroom is the way [Petitioner] said it happened.

> Look at it. He's sitting down on the bed. She's standing up. The trajectory of the bullet was upward. It's the only story that makes sense. I'm gonna tell you why. The trajectory was upward. ... The only story that makes sense is her standing over him with the gun. Her standing over him with the gun, and in his own defense, taking her hands, taking the gun, and turning it away.

App. 621, line 19 – App. 622, line 25.

Relevant facts from the direct appeal.

Following his trial, Petitioner filed a timely notice of appeal. Ricky Harris represented Petitioner on appeal. One of the issues raised on appeal was that the trial court erred in refusing to instruct the jury on self-defense because there was evidence in the record by which a jury could have found that Petitioner was acting in self-defense. App. 685 – 698 (Final Brief of Petitioner, third issue). Concerning this issue, the state argued Petitioner had abandoned his request for jury instruction on self-defense. App. 728 – 733 (Final Brief of Respondent). Specifically, the state argued this was not a situation where Petitioner received an unfavorable ruling and failed to renew his objection at the conclusion of the trial; rather, Petitioner had acquiesced into the trial judge's analysis and decided to affirmatively abandon the request. App. 733, fn. 6. In his reply brief, Petitioner argued against abandonment of the request for the jury instruction. App. 749 – 752.

On July 14, 2010, the Court of Appeals affirmed Petitioner's conviction. As to the issue of a jury instruction concerning self-defense, the Court of Appeals held Petitioner abandoned his request when he acquiesced and asked the trial court to charge voluntary manslaughter, accident, and murder. Therefore, the court concluded, Petitioner waived appellate review of the issue. As a result, the Court refused to consider the merits of the issue. App. 753 – 759.

Relevant facts from the PCR hearing.

During the PCR hearing, Petitioner testified that he was trying to defend his life when Hernandez was killed. He explained that she had a gun pointed at him and he was defending

himself when she was shot. App. 790, lines 6-16. Petitioner further explained that he and Hernandez were struggling over the gun together. App. 796, lines 16-19. Over objection by the state, Petitioner testified that he did not realize the jury would not consider self-defense if he did not testify. App. 797, lines 1-16.

Petitioner submitted a written summary of his claims for relief, which was admitted as Applicant's Exhibit #1 at the PCR hearing. App. 896-912. In this summary, Petitioner explained his trial counsel abandoned the request for the jury instruction of self-defense by failing to define self-defense and provide the trial court with the evidence presented to support the charge. App. 896.

Doug Brannon, one of Petitioner's trial attorneys, testified that Petitioner told him "there was a struggle between [Petitioner] and his wife, she grabbed a gun, and, unfortunately it went off." App. 825, lines 1-3. Brannon agreed there was evidence of a struggle in the record, including evidence of Hernandez physically attacking him. Principally, he pointed to "balls of his hair" that Hernandez had pulled from his head. App. 826, lines 13-22. Brannon's understanding of the events resulting in Hernandez's death was the two argued and then struggled. App. 827, line 3-12.

Brannon testified that although he asked for an instruction on self-defense, they never built a case for it. The defense theory was "there was a struggle over the gun." App. 833, lines 2-18. However, he explained he based his request for the charge based on the "totality of the circumstances," including the interior of the home showing signs of a struggle and Petitioner declaring he acted in self-defense. App. 834, lines 3-20. On cross-examination, Brannon admitted the record contained evidence that Hernandez pushed Petitioner first, and that he misspoke when he informed the trial judge that no such evidence existed. App. 837, lines 4-25. He also agreed that his co-counsel had informed the jury about self-defense during his opening statement. App. 851, lines

9-13. During the PCR, Brannon maintained that self-defense was an appropriate charge in the case. App. 838, lines 1-9.

David Collins disagreed that he presented a theory of self-defense in his opening statement. He agreed the defense theory was there was an argument and an altercation that spread through the house, which resulted in Hernandez being shot. Collins maintained that Petitioner never acknowledged that "he did the shooting." App. 858, line 13 – App. 859, line 10. Despite his initial testimony on direct examination by the state that his opening statement did not convey a theory of self-defense to the jury, he admitted on cross-examination by Petitioner that although he did not utter the word self-defense, he presented the jury with self-defense. App. 873, line 23 – App. 874, line 18. Nevertheless, he maintained that Petitioner denied "he did the shooting," and his understanding at the time was "there had to be an acknowledged shooting" in order for Petitioner to avail himself of self-defense. App. 875, lines 4-16. He hoped the jury could have interpreted he was making a self-defense argument in his opening statement. App. 875, lines 17-19.

The PCR judge noted that in order for the jury to convict Petitioner of murder, the jury would have to find that Petitioner discharged the weapon, but this was the same fact that the trial judge determined had not been presented in evidence and required exclusion of the charge of self-defense. App. 888, lines 9-14.

Order denying PCR.

By order filed June 18, 2012, Judge Hayes found, as an initial matter, trial counsel had requested the court instruct the jury as to self-defense. Judge Hayes also found that trial counsel acknowledged the trial record contained evidence that he failed to articulate to the trial judge to support his position that Petitioner was entitled to a charge on self-defense. App. 917 – 918. Judge Hayes further found "there is a high probability an appellate court would have found that the trial

judge should have charged self-defense." Nevertheless, Judge Hayes denied relief on this claim based upon the following reasoning:

> [A]lthough there appeared to be evidence in the record that would reach the legal requirement to charge self-defense, it does not appear to this court that sufficient evidence of self-defense was presented for this court to conclude that a different outcome in the trial was likely or probable. Furthermore, it is clear that the lack of credibility of [Petitioner], as a result of [Petitioner]'s various stories as to the events that evening harmed the outcome of the trial.

App. 918.

Thereafter, Petitioner filed a motion to alter or amend the judgment. Regarding this claim, Petitioner objected to the PCR court's analysis. Specifically, Petitioner objected to the court finding a high probability that an appellate court would have found that the judge should have charged self-defense, and yet, finding trial counsel effective despite his failure to request the charge of self-defense and its companion that the state must disprove self-defense beyond a reasonable doubt. App. 923 – 924.

Order denying Petitioner's Motion to Alter or Amend.

On February 22, 2012, Judge Hayes requested oral argument from the parties on the following issue: "In a post-conviction relief case, can the finder of fact, engage in a weighing of evidence to determine whether an error made at trial (an error which on direct appeal of the underlying criminal case would be deemed reversible) was insufficient to grant the PCR application due to the existence of other evidence supporting the applicant's guilt[?]" App. 929 – 930. On June 4, 2012, the parties appeared before Judge Hayes concerning the matter presented. App. 931. Petitioner argued the trial court erred by applying a harmless error analysis in addition to the prejudice analysis for reviewing claims of ineffective assistance of counsel. App. 934, lines 10 – 24. Additionally, Petitioner noted the abundance of evidence to support self-defense presented at the trial. App. 935, lines 11 – 24. During the arguments, Judge Hayes explained that he was

struggling with whether a PCR court could find such a clear error that was not preserved by the attorney and then engage in a weighing of the evidence to determine whether that error was harmless. App. 946, lines 6 – 24. Petitioner responded that the appropriate standard is a reasonable probability, not harmless error. App. 947, lines 6 – 22.

On July 2, 2012, Judge Hayes issued a form order expressing his findings of fact and legal conclusions. Specifically, Judge Hayes concluded "that, but for trial counsel abandoning the issue of self-defense, the issue would have been addressed by the appellate court." According to Judge Hayes, there was "a very reasonable probability that the appellate court would have reversed the trial court and granted a new trial. Thus, but for the professionally deficient representation by trial counsel, the [Petitioner]'s conviction would have been reversed and a new trial granted." App. 950. Nevertheless, Judge Hayes held that Petitioner had not proven "that to a reasonable probability the outcome would have been different." App. 951. Thus, Judge Hayes denied the motion to alter or amend. Additionally, he requested the Attorney General prepare an order consistent with his form order. App. 951. On October 2, 2012, Judge Hayes signed an order denying the petition to alter or amend. Regarding this allegation, Judge Hayes found counsel was ineffective for failing to properly preserve the request for a self-defense charge; however, he could not find the requisite prejudice required. Ultimately, he determined the court could not "rule to a reasonable degree of probability that the outcome of the [Petitioner]'s trial would have been different had counsel not abandoned the self-defense charge or had the self-defense charge been provided to the jury." App. 953.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. In order to obtain relief based upon a claim of ineffective assistance of counsel, a Petitioner must show that counsel's performance was

deficient and such deficiency prejudiced the Petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. When an attorney's performance is unreasonable under professional norms, then the attorney rendered deficient performance. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Prejudice occurs where the attorney's deficient performance so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The test is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, supra; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Appellate courts give great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). When reviewing a PCR court's decision, a reviewing court "is concerned only with whether any evidence of probative value exists to support the decision." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006).

In a case remarkably similar to Petitioner's, this Court found a PCR applicant was entitled to relief from his convictions where trial counsel failed to request a jury instruction on self-defense at his trial for assault and battery of a high and aggravated nature and assaulting a police officer. Stone v. State, 294 S.C. 286, 363 S.E.2d 903 (1988). A defendant is entitled to a jury instruction on self-defense if the record contains evidence tending to show the four elements of self-defense. Id. at 287, 363 S.E.2d at 904. Stone presented sufficient evidence to entitle him to a jury instruction on self-defense, as found by this Court, and his attorney testified that he did not request the instruction because "it did not cross his mind." Trial counsel did not think the defense was applicable because

it occurred outdoors and both parties had the opportunity to flee. Id. at 287-288, 363 S.E.2d at 904. Having found Stone presented evidence to entitle him to a jury instruction on self-defense and that trial counsel had no strategic reason for failing to make the request, this Court determined trial counsel provided deficient performance. Turning to the prejudice prong, this Court found Stone suffered prejudice as a result of trial counsel's failure because the prosecution's case rested primarily on the testimony of the victim and police officers. Therefore, this Court reversed the decision of the lower court and ordered a new trial for Stone. Id. at 288, 363 S.E.2d at 904.

On the other hand, this Court found trial counsel was deficient in failing to request a self-defense charge, but such deficiency was not prejudicial to Petitioner in light of the overwhelming evidence of his guilt. Jackson v. State, 355 S.C. 568, 586 S.E.2d 562 (2003). Jackson testified at trial that the victim had strangled and beat him when he informed her that he was changing jobs and wanted to spend more time with their baby. The victim also chased Jackson with a gun, firing at least one shot at him. During a struggle, Jackson managed to get the gun from the victim. He testified that he guessed he fell back and was firing and that the gun just went off. Id. at 571, 586 S.E.2d at 563-564. This evidence entitled Jackson to a jury charge on self-defense and counsel was deficient in failing to request such a charge. Id. at 572, 586 S.E.2d at 564. However, this Court found counsel's deficient performance was not prejudicial to Jackson because his testimony was not supported by the physical evidence and was highly incredible. This Court was persuaded by the fact that the victim was shot six times, including once in the back, at least four of the shots were made from a downward angle, contrary to Jackson's testimony that he fired the gun in an upward angle, and forensic testing revealed no gunshot residue on the victim's hands. Id. at 573, 586 S.E.2d at 564. As a result, this Court held that although he was entitled to a self-defense charge, the

instruction would not have affected the outcome of the trial due to overwhelming evidence of Jackson's guilt. Id. at 573, 586 S.E.2d at 565.

This Court found trial counsel provided deficient performance by not requesting a jury instruction on the defense of alibi where the defendant testified he was at home asleep with his wife the entire night and his wife corroborated the testimony in defense of a charge that he assaulted a neighbor during the night. Trial counsel testified at the PCR that the sole defense theory was alibi and she had no reason to decline the charge. Riddle v. State, 308 S.C. 361, 363, 418 S.E.2d 308, 309 (1992). This Court found the failure to give an alibi charge when the defendant claimed to be another place was reversible error. Id. (citing State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980)). After finding counsel provided "inadequate legal representation," this Court held "[t]he prejudice of this error was compounded" by the solicitor's argument that the jury should not consider any legal defenses except those charged by the judge. Id. at 363-364, 271 S.E.2d at 309-310.

In a PCR action, this Court found trial counsel provided ineffective assistance by failing to request additional, specific instructions concerning a defendant's right to act on appearances and on failure to retreat. The defendant testified that he and the decedent struggled over the gun because the defendant believed the decedent shot at him and he was afraid the decedent would kill him or his son. Trial counsel testified at the PCR hearing that a charge on appearances, in addition to the charge on self-defense given by the trial judge, would have been appropriate. "Based on this testimony, [this Court found] that a charge on appearances would have been appropriate." After finding counsel ineffective, this Court found the defendant "was prejudiced by inadequate instructions to the jury, which was obviously interested in the law of self-defense." Battle v. State, 305 S.C. at 464-465, 409 S.E.2d 400, 402 (1991). Additionally, this Court held counsel was

ineffective for failing to request a charge on retreat where the issue of treat had been raised at trial on direct and cross-examination of the defendant and the self-defense instruction included the requirement that the defendant had no other probable means of avoiding the danger than to act as he did. Id. at 465, 409 S.E.2d at 402-403.

In Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), the defendant was tried and convicted of criminal sexual conduct with a minor. The state offered testimony from a social worker that the minor had made a prior statement that Jolly had abused her. Although trial counsel objected on the basis of hearsay, the trial judge overruled the objection. Thereafter, the minor's uncle testified without objection that the minor previously told him and her mother that Jolly abused her. Id. at 19, 443 S.E.2d at 568. When Jolly appealed his conviction on the basis of the judge erroneously allowing the social worker's testimony, the Court of Appeals affirmed holding that any error in admitting the evidence was harmless because it was cumulative to the uncle's testimony. Id. (citing State v. Jolly, 304 S.C. 34, 402 S.E.2d 895 (Ct. App. 1991)). At the PCR hearing, trial counsel testified that he did not object to uncle's testimony because the judge had admitted the social worker's testimony. The PCR judge denied relief, finding the Court of Appeals had determined the testimony of uncle and social worker were cumulative to the child's testimony. Id.

This Court found uncle's testimony was inadmissible hearsay. Therefore, this Court found counsel's failure to object to the introduction of the hearsay evidence fell below an objective standard of reasonableness. Id. at 20, 443 S.E.2d at 568. Turning to the second prong, whether there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different, this Court found that had uncle's testimony been properly objected to, the Court of Appeals could not have held the social worker's testimony was harmless and the outcome of

Jolly's direct appeal would have been different.[4] As a result, this Court reversed the decision of the PCR court and granted Jolly relief from his conviction. Id. at 21, 443 S.E.2d at 569.

A defendant is entitled to a self-defense charge if there is evidence establishing: (1) he was without fault in bringing on the difficult; (2) he believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) he had no means of avoiding the danger; and (4) that a reasonably prudent person of ordinary firmness and courage would have entertained the same belief about the danger. State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). Ample evidence in the trial record supported Petitioner's request for a charge on self-defense, as found by the PCR judge. Additionally, the PCR judge's ruling on this point has not been challenged by the state, and is the law of the case.

The opening statement by defense counsel informed the jury that case involved self-defense. Defense counsel explained that Hernandez was the aggressor, who introduced a gun into the fight, and that Petitioner acted to defend himself. Petitioner's mother's testimony and her statement to police supported self-defense: Hernandez shoved and hit Petitioner and called him a bastard. App. 287, lines 3-5; App. 287, lines 21-25; App. 288, lines 6-13; App. 288, lines 15-17; App. 289, lines 12-14; App. 290, line 12 – App. 291, line 2; App. 291, lines 24-25; App. 382, lines 1-25. Petitioner's statement to police, which was introduced through Angel Diaz, also supported self-defense. Petitioner described Hernandez as angry with him and fighting him. He described being afraid of Hernandez shooting him with the gun. He also described being unable to leave the room because the bedroom door was locked. App. 416, line 21 – App. 418, line 17.

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[4] This Court specifically noted that improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless because the cumulative effect enhances the devastating impact of improper corroboration. Jolly, 314 S.C. at 21, 443 S.E.2d at 569.

The physical evidence also supported Petitioner's statement and his claim of self-defense. Apparently avulsed wads of hair found in the living room belonged to Petitioner as proven through DNA testing. App. 245, liens 19-25; App. 252, line 20 – App. 253, line 6; App. 455, lines 4-13; App. 456, lines 5-10; App. 529, lines 6-11; App. 529, line 25 – App. 530, line 6. Additionally, hair found in the bedroom may have belonged to Petitioner as he could not be excluded as the owner through DNA testing. App. 530, line 18 – App. 531, line 5. An officer testified that Petitioner's t-shirt was torn indicating he had been involved in a domestic struggle. App. 361, lines 10-17. Hernandez was shot only once as indicated by the pathologist. According to the pathologist, Hernandez was shot once in the face at an upward angle, which supported Petitioner's statement to police as demonstrated through trial counsel's closing argument. App. 561, line 23 – App. 562, line 3; App. 564, line 5; App. 568, line 23 – App. 569, line 1; App. 621, line 19 – App. 622, line 25.

Finally, recognizing that self-defense was at issue in the case, despite the trial judge's decision not to charge the jury, the prosecution and trial counsel argued regarding self-defense to the jury during closing argument. In other words, the fact that the case involved self-defense was so readily apparent to both the prosecution and the defense that both mentioned self-defense in their closing arguments without regard to the judge's prior ruling that no such charge would be given to the jury.

This Court should affirm the lower court's finding that trial counsel's abandonment of his request for a self-defense charge was deficient performance in light of the clear evidence in the record that Petitioner acted in self-defense on Thanksgiving night in 2006.

Turning to the second prong, this Court should reverse the lower court's finding that Petitioner suffered no prejudice as a result of trial counsel's failure. The lower court based its finding on the fact that Petitioner's inconsistent statements to police led the jury to convict him of

murder, and as a result, there was no reasonable probability that a jury instruction on self-defense would not have affected the outcome of the trial. This was error. The prosecution's case rested upon asking the jury to disbelieve Petitioner's statement to police, which supported his self-defense. The prosecution asked the jury to infer Petitioner killed Hernandez with malice aforethought because two people entered the bedroom, but only one person exited, and that Petitioner initially lied to police. However, the only evidence in the record, testimonial and physical, of what happened that fateful night supported self-defense – the verbal argument that escalated into a physical altercation, Hernandez acting as the aggressor, Hernandez introducing the gun, the angle of the single gunshot wound, wads of Petitioner's hair recovered from the floor in at least one location of the home, and Petitioner's torn t-shirt. The lower court's analysis completely omitted the requirement that the jury would have been instructed that the state had the burden of disproving self-defense beyond a reasonable doubt. See State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002). Consideration of the evidence in the record supporting Petitioner's self-defense assertion and the proper jury instruction that the state bore the burden of disproving self-defense beyond a reasonable doubt necessitated a finding of prejudice.

Further, the lower court erred in finding the error was reversible on direct appeal, but not prejudicial pursuant to Strickland's analysis. As explained in Jolly, a PCR applicant may demonstrate Strickland prejudice by showing trial counsel's failure to properly preserve a reversible error for appellate review. Jolly, 314 S.C. at 21, 443 S.E.2d at 569. The logic of Jolly is obvious because to obtain a reversal on direct appeal regarding a trial judge's failure to give a requested charge, an appellant must show both error and prejudice. Burkhart, 350 S.C. at 261, 565 S.E.2d at 303 (citing Ellison v. Parts Distributors, Inc., 302 S.C. 299, 395 S.E.2d 740 (Ct. App. 1990)); see also, State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (2006); State v. Taylor, 356 S.C. 227, 589

S.E.2d 1 (2003); State v. Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000); State v. Lee-Grigg, 374 S.C. 388, 649 2d 41 (Ct. App. 2007); State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003); Brown v. Pearson, 326 S.C. 409, 483 S.E.2d 477 (Ct. App. 1997).

Likewise, this Court explained the interaction between review of an error on direct appeal and the prejudice analysis required in post-conviction relief matters in Edmund v. State, 341 S.C. 340, 534 S.E.2d 682 (2000). At Edmund's burglary trial, a police officer testified, without objection, that Edmund invoked his right to counsel and his right to remain silent. The prosecutor, in closing and without objection, described Edmund as acting "smartly enough" when he invoked his right to counsel. The prosecution presented only circumstantial evidence against Edmund. Id. at 343-344, 534 S.E.2d at 684. This Court explained that "[i]n a direct appeal, the admission of comments or evidence of the defendant's exercise of a constitutional right is a 'trial error' subject to harmless error analysis." Id. at 346, 534 S.E.2d at 685. In a PCR proceeding, an application "must show both error and prejudice to win relief." Id. at 346-347, 534 S.E.2d at 685-686. Turning to Edmund's claim that trial counsel was ineffective for failing to object to the officer's testimony and the prosecutor's comments, this Court concluded Edmund had shown error. This ruling was based on decades of case law forbidding comment by the prosecutor or his witnesses on the accused's silence. Id. at 347, 534 S.E.2d at 686.

Next, this Court examined the prejudice prong and explained "[i]n deciding the prejudice prong in this PCR action, we examine the following factors, which are the same ones analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt." Id. at 348, 534 S.E.2d at 686-687. This Court held that Edmund had shown prejudice where the record contained three direct references to the exercise of his right to remain silent or be represented by counsel. After commenting on Edmund's invocation of his right to silence, the prosecutor argued to

the jury that the man Edmund accused of the crime had testified he did not commit the crime. Additionally, evidence of Edmund's guilt was not overwhelming as the state's case was built on circumstantial evidence. Id. at 348-349, 534 S.E.2d at 687.

Therefore, the PCR court erred in concluding that although Petitioner's trial counsel failed to preserve the request for a charge on self-defense in order to permit appellate review and that had the request been preserved for appeal, the appellate court would have reversed, but that such error was not prejudicial due to Petitioner's inconsistent statements to police. The Court's finding that Petitioner was entitled to a new trial had the error been properly preserved implicitly included with it a determination that such error was not harmless.

This Court should affirm the lower court's finding that trial counsel provided deficient performance by abandoning his request for self-defense, and should reverse the court's finding that such error was not prejudicial in light of the lower court's improper legal analysis, the clear evidence in the record supporting Petitioner's claim of self-defense, and the lack of overwhelming evidence of Petitioner's guilt as to the murder charge.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of June, 2013.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

SANTIAGO RIOS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213256

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Santiago Rios, # 328137, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 28th day of June, 2013.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of June, 2013.

(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2022.