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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable G.D. Morgan, Jr., Circuit Court Judge

BRITTANY PEARSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000561

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

I.

Whether the PCR court erred finding defense counsel was not ineffective for failure to properly preserve for appellate review the trial court's denial of immunity under the Protection of Persons and Property Act where counsel failed to request the trial court explain the basis of its denial of immunity by making specific findings of fact which was an abuse of the trial court's discretion?

II.

Whether the PCR court erred finding defense counsel was not ineffective for failure to adequately prepare for petitioner's trial where counsel failed to present any other evidence supporting petitioner's claim of self-defense including: the recording of both 911 calls, decedent's toxicology report, and the testimony of Dustin Lawson all of which corroborated petitioner's trial testimony?

STATEMENT

A Spartanburg County grand jury indicted petitioner on March 12, 2015 for murder and possession of a firearm during the commission of a violent crime. App. 439-40; 442-43. Her case was called to trial on May 23, 2016, before the Honorable J. Derham Cole, and a jury. App. 1. Assistant Solicitors Timi Poulos, Russell Ghent, and Grady Anthony represented the state, and Thomas Quinn represented petitioner. App. 1.

On May 25, 2016, the jury found petitioner guilty of the lesser included offense of voluntary manslaughter and possession of a firearm during the commission of a violent crime. App. 326, l. 13 – 327, l. 3. Judge Cole sentenced petitioner to concurrent terms of twenty-four years' imprisonment for voluntary manslaughter and five years for the weapons offense. App. 330, l. 22 – 331, l. 7.

On direct appeal, appellate counsel raised the following issue: whether the trial court abused its discretion in denying petitioner's immunity from prosecution pursuant to the Protection of Persons and Property Act where decedent attacked petitioner in her car and petitioner shot the decedent in self-defense. Supp. App. 1-16. The Court of Appeals affirmed petitioner's convictions and sentences in July 2018. Supp. App. 39-40.

Thereafter, petitioner filed an application for PCR. App. 333-340. On April 20, 2022, an evidentiary hearing was held before the Honorable G.D. Morgan, Jr. App. 353. Petitioner was represented by Susannah Ross and Chelsey Marto represented the state. App. 353.

On March 16, 2023, Judge Morgan signed an order denying PCR.[1] The PCR court found defense counsel acted reasonably when he failed to object to the trial court's failure to make any findings of fact or conclusions of law regarding its denial of petitioner's claim of immunity

1 Petitioner raised multiple allegations of ineffective assistance of trial counsel. The PCR court denied each allegation. However, only the allegations raised on appeal are addressed here.

pursuant to the Protection of Persons and Property Act (the Act). App. 433. The court also found there was no showing that the trial court's failure to make specific findings impacted appellate court proceedings because the Court of Appeal's opinion affirming did not find the issue was not preserved. App. 433.

Additionally, without citing to any law in support, the PCR court held trial counsel's failure to enter photographs of petitioner's injuries was not deficient finding the "photographs were duplicative" of her testimony and the absence of this evidence was not prejudicial.[2] App. 435. Similarly, the court found counsel was not deficient for failure to enter the decedent's toxicology report during trial. App. 435-36. The court found trial counsel credibly testified he failed to subpoena the toxicologist because they were on the state's witness list. The PCR court found this was reasonable and because there was "ample" testimony at trial that decedent was drinking the failure to enter the report was not prejudicial. App. 436.

Again, without citing to any supporting authority, the court held counsel was not ineffective for failure to enter either recording of the 911 calls at trial where the court found recordings of both calls would not have affected the outcome at trial "because the trial ultimately boiled down to a matter of [petitioner's] credibility to the jury." The court stated that the recordings of the 911 calls would not have impacted that credibility determination.[3] App. 436. The court also found defense counsel was not ineffective for failing to call Dustin Lawson, an earwitness, or admit his written statement in evidence at trial because petitioner did not call Lawson at her evidentiary hearing. App. 436

This petition follows.

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2 Applicant's exhibits 1-2, photographs are on file with the Court.

3 Applicant's exhibit 4, recording of 911 calls are on file with the Court. This exhibit contains two files, a recording of petitioner's call to 911 and her neighbor Dustin Lawson's 911 call.

ARGUMENT

I. The PCR court erred finding defense counsel was not ineffective for failure to properly preserve for appellate review the trial court's denial of immunity under the Protection of Persons and Property Act where counsel failed to request the trial court explain the basis of its denial of immunity by making specific findings of fact which was an abuse of the trial court's discretion.

Immunity hearing

Petitioner moved to dismiss the indictments pursuant to the Act. App. 8, ll. 9-14. The court held a pretrial hearing to determine whether petitioner was immune from criminal prosecution under the Act. App. 19, ll. 23-25. Counsel called one witness, petitioner, for the immunity hearing. The following evidence was established through petitioner's testimony.

The decedent, Myah Cole, was petitioner's girlfriend. They had been dating for almost a year and had been living together for nine months at the time of the decedent's death. App. 25, l. 16 – 26, l. 4. On November 8, 2014, petitioner and the decedent went to a baby shower that was hosted and attended by the decedent's family and friends. During the shower, the decedent grabbed petitioner's butt in front of everybody. This upset petitioner because the couple had agreed not to engage in public displays of affection. The decedent was angered at the way petitioner reacted and the two had a verbal argument. App. 26, l. 8 – 27, l. 23; 27, l. 24-28, l. 8.

When the couple left the event, the decedent was still angry at petitioner's behavior. The two continued to argue on the way home to their apartment and after they got home. App. 28, l. 14 – 29, l. 4. At this point the argument was just verbal. App. 28, ll. 14-16; 29, ll. 2-4.

Later that day, they met another couple at a pool hall, Red's Bar and Grill. While they were at the bar, the other couple was "kissing in public." The decedent "made a smart comment" to petitioner about public displays of affection. App. 29, ll. 5-21. In response to the decedent's

comment, petitioner walked out and went to her car. As petitioner was trying to leave, the decedent started banging on the car window to get her attention because she did not want petitioner to leave her. App. 30, ll. 7-11. The decedent then stood in front of the car "to where if [petitioner pulled out she] would hit her with [her] car. So [petitioner] unlocked the door" and let the decedent in the car. App. 29, l. 22 – 30, l. 6.

Petitioner then drove them back to their apartment. Her plan was to drop decedent off and leave. After she parked the car, petitioner told the decedent to get out of the car. She gave the decedent her keys to their apartment because the decedent did not bring hers. Petitioner "kept trying to get her to get out of the car." While the decedent refused at first, she eventually got out of the car and stood outside. Nevertheless, she quickly got back into the car and began to attack petitioner, who was still sitting in the driver's seat. App. 30, l. 12 – 31, l. 19. The decedent was kneeling in the front passenger seat leaning over petitioner and was "punching" petitioner in the head and "beating [her] head into the window." App. 32, ll. 4-17. Petitioner said decedent's left hand was holding petitioner's head down and she was punching petitioner with her right fist. App. 32, ll. 22-24.

As the decedent was beating her, petitioner "was trying to fend her off" and had her hands up in a defensive position. App. 32, l. 25 – 33, l. 3. Petitioner's car, a Dodge Dart, was a very small car. Petitioner still had her seatbelt on and was pulled up very close to the steering wheel because of her height. Consequently, she "couldn't move." App. 31, l. 20 – 32, l. 3; 33, l. 6-34, l. 2. Petitioner "had never been put in a position like that before and didn't know what to do." App. 33, ll. 21-25. She ultimately reached under her seat, grabbed her gun, cocked it, and shot the decedent.[4] App. 34, ll. 3-6. She fired "one time." App. 34, ll. 5-6. Petitioner later said

4 Petitioner had a valid concealed weapons permit. App. 50, 14-18.

that she "wasn't aiming" and just put the gun between them "and fired." App. 38, l. 19 – 39, l. 7.

After petitioner shot decedent, she opened the car door, threw the gun out, and got out of the car. When she got out of the car, decedent fell over into the driver's seat. App. 34, ll. 17-21. Petitioner immediately called 911 and told the operator that she "had just shot [her] girlfriend." App. 34, l. 21 – 35, l. 1; 43, ll. 18-23. Petitioner was hysterical when law enforcement arrived and felt "numb." App. 35, ll. 2-9. She cooperated with law enforcement and gave both a written and a recorded statement that night. App. 48, l. 16 – 50, l. 4.

Petitioner maintained she had no "other option" but to shoot decedent, and that if she had not shot the decedent, it would have been the decedent on trial instead of petitioner. App. 36, ll. 1-6. She also said she feared she would be seriously injured or killed if she did not shoot decedent. App. 34, ll. 7-9.

Petitioner was five feet, three inches tall and 145 pounds. The decedent was the same height, but approximately ten to fifteen pounds heavier. App. 33, ll. 4-10; 46, ll. 7-17. Petitioner purchased the Dodge Dart about a month before the incident. It was exclusively her car. She and decedent had different schedules and did not share transportation during the week. However, if they did something together on the weekends, they would ride together in the same car. Petitioner said she "probably" let decedent drive her car at some point, but she could not recall. App. 45, l. 12 – 46, l. 6.

At the conclusion of the hearing, the trial court broke for a lunch recess without permitting argument. App. 54, ll. 3-9. After the break, the court without any explanation ruled petitioner was not entitled to immunity under the Act. The court simply said, "I . . . find that the motion to dismiss or to grant immunity to the defendant based upon 16-11-450 should be, and therefore is, denied." App. 63, ll. 8-10.

PCR hearing

At the evidentiary hearing defense counsel acknowledged that the trial court did not make any factual findings or explain the basis of the denial of immunity under the act. Counsel did not object or ask for any "further deliberation" of the court's decision to deny petitioner immunity under the Act. App. 385, ll. 4-16. He testified that he believed his chances of success on a motion for immunity before this judge "were slim" because this judge had never granted immunity. App. 393, ll. 8-19.

PCR counsel argued trial counsel was ineffective for failure to object or request the court make specific findings of fact on the record which ultimately prejudiced petitioner in their direct appeal. PCR counsel asserted the appellate court was unable to review a decision that did not explain the basis for its ruling. App. 407-08.

Discussion

Trial counsel's failure to preserve the record by requesting the court explain the basis for denying petitioner's motion for immunity under the act was deficient. Petitioner was prejudiced where due to counsel's failure there was no basis for the appellate court to review the trial court's decision.

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). As to allegations of ineffective assistance of counsel, the applicant must show counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the

result at trial would have been different. *Strickland v. Washington*, *supra*; *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Johnson v. State*, supra.

It was not reasonable for defense counsel to fail to make a record and properly preserve this issue for appellate review. The PCR court points out that *State v. Glenn*[5], a case that clarified that the trial court should make specific findings of the elements on the record, came out after petitioner's 2016 trial. However, the rules of preservation were well established at the time of petitioner's trial and counsel was deficient for failure to make a record that offered appellate the opportunity for meaningful appellate review. *See Jackson v. Speed*, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997) (stating "it is the responsibility of trial counsel to preserve issues for appellate review.").

Petitioner was prejudiced by counsel' deficiency where but for counsel's error there was a reasonable probability the appellate court would have reversed the trial court's denial of immunity or at the very least remanded to the lower court to make specific findings of fact.

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its intent was to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). "The General Assembly [found] that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." S.C. Code Ann. § 16-11-420(B). The General Assembly recognized "that persons residing in or

5 429 S.C. 108, 123, 838 S.E.2d 491, 911 (2019).

visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

To effectuate its intent, the General Assembly created a statute providing for immunity from prosecution to "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A).

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C).

The Court explained that it had interpreted "another applicable provision of law" found within section 16-11-450(A) to include the common law of self-defense. *State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019). (citing *State v. Scott*, 424 S.C. 463, 473, 819 S.E.2d 116, 120 (2018)). "This means a defendant may seek immunity from prosecution under the Act by 'demonstrating the elements of self-defense to the satisfaction of the trial court by a preponderance of the evidence.'" *Id*. (quoting *Curry*, 406 S.C. at 372, 752 S.E.2d at 267). During the pretrial hearing, a defendant must set out "a valid case of self-defense," excluding the duty to retreat prong, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013).

The Court explained that "a trial court should first consider whether the defendant has

proved the elements of self-defense by a preponderance of the evidence." *State v. Glenn*, 429 S.C. 108, 838 S.E.2d 491 (2019). "If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." *Id*. Where section 16-11-440(C) is applicable, "it replaces the duty to retreat element required to establish self-defense." *Id*. "In determining whether a defendant satisfies section 16-11-440(C), the circuit court must analyze whether, at the time of the incident, he was engaged in an unlawful activity and was attacked in another place where he had a right to be." *Id*.

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). The judge must "sit as fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." *State v. Cervantes-Pavon*, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019).

Counsel was ineffective where he failed to preserve the record by requesting the trial court act as the fact-finder in the case, resolve any disputes in the evidence, and apply those findings to the Act. Had counsel asked the trial court for the basis of the ruling the appellate court would have been able to conduct a meaningful review the denial of immunity and find petitioner satisfied the necessary elements of the Act and granted petitioner immunity under the Act.

Petitioner was entitled to immunity under the Act because the evidence presented pretrial established that petitioner shot and killed the decedent in self-defense after the decedent attacked petitioner in her car.

"There are four elements required by law to establish a case of self-defense: First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have

actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance." *Id*. at 318, 768 S.E.2d at 238-239 (internal citation omitted). As mentioned, the last element, the duty to retreat, need not be shown when seeking immunity under the Act. *Id*. at 318, 768 S.E.2d at 239 (citing *Curry*, 406 S.C. at 371, 752 S.E.2d at 266.

Petitioner's testimony pretrial established that the decedent unlawfully entered her car after petitioner ordered her out of the car, and immediately began to attack petitioner. The decedent continued punching petitioner in the head with her fists and repeatedly slammed petitioner's head into the car window. Because the decedent unlawfully entered petitioner's car after she ordered her out of the car, petitioner was "presumed to have a reasonable fear of imminent peril of death or great bodily injury" under § 16-11-440(A) when she shot the decedent. Consequently, petitioner reasonably believed under the presumption created by the statute that the decedent was going to seriously injure or kill her if she did not use deadly force to protect herself.

Additionally, petitioner established by a preponderance of the evidence that she was acting in self-defense when she shot the decedent. First, petitioner was without fault in bringing on the difficulty. Her pretrial testimony established petitioner drove decedent home from the bar

with the intention of dropping her off and leaving. Petitioner gave decedent her house keys and told her to get out of the car. While the decedent initially got out of the car, she quickly reentered the vehicle and began assaulting petitioner. Petitioner, who had a valid concealed weapons permit, only armed herself after the decedent attacked her. Therefore, there is no question petitioner was without fault in bringing on the difficulty. *Cf. State v. Dickey*, 394 S.C. 491, 500, 716 S.E.2d 97, 101 (2011) (finding the state did not produce any evidence to contradict Dickey's testimony that he routinely carried his concealed weapon for which he had a permit, and did not deliberately arm himself in anticipation of a conflict that evening, and consequently, the state did not carry its burden to disprove the elements of self-defense beyond a reasonable doubt); *State v. Slater*, 373 S.C. 66, 71, 644 S.E.2d 50, 53 (2007) (holding the trial court correctly found Slater was not entitled to a self-defense charge because his actions, including the unlawful possession of the weapon, proximately caused the exchange of gunfire and ultimately the death of the decedent, and any act of the accused in violation of the law and reasonably calculated to produce the occasion amounts to bringing on the difficulty); and *State v. Smith*, 406 S.C. 547, 554-555, 752 S.E.2d 795, 798-799 (Ct. App. 2013) (finding the state presented evidence Smith was not acting in good faith at the time of the shooting in that he took a gun to a drug deal, and holding going to a drug deal while armed with a deadly weapon is evidence of fault in bringing on the difficulty).

Moreover, not only did petitioner believe she was in imminent danger of losing her life or sustaining serious bodily injury, she actually was in such imminent danger. As seen *supra*, the decedent was holding petitioner by the hair with her left hand and continually punching her in the head with her right fist. *See State v. Davis*, 309 S.C. 326, 344, 422 S.E.2d 133, 144 (1992) *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999) (holding

a hand or fist may be a deadly weapon). Decedent was also slamming petitioner's head into the car window. Petitioner testified that she had no "other option" but to shoot the decedent, and that if she had not shot decedent, it would have been decedent on trial instead of petitioner. App. 36, ll. 1-6. Due to the constant attack, petitioner feared she would be seriously injured or killed if she did not shoot the decedent. App. 34, ll. 7-9. Under the circumstances, a reasonable person in petitioner's position would have likewise believed he or she was in imminent danger and acted as petitioner acted in order to save herself from serious bodily injury or death.

As mentioned, the last element, the duty to retreat, need not be shown when seeking immunity under the Act. *Id*. at 318, 768 S.E.2d at 239 (citing *Curry*, 406 S.C. at 371, 752 S.E.2d at 266. Therefore, when petitioner reached under her seat, grabbed her gun, and shot the decedent once, she was lawfully acting in self-defense.

II. The PCR court erred finding defense counsel was not ineffective for failure to adequately prepare for trial where counsel failed to present any other evidence supporting petitioner's claim of self-defense including: the recording of both 911 calls, decedent's toxicology report, and the testimony of Dustin Lawson all of which corroborated petitioner's trial testimony.

Trial

During pre-trial motions the solicitor moved to suppress evidence of decedent's toxicology report under Rules 401, 402, and 403, SCRE. App. 9, l. 23-11, l. 24. The solicitor contended that this evidence was "highly prejudicial." App. 16, ll. 4-11. Defense counsel argued that because the case centered on self-defense the drunkenness of the decedent was probative as to decedent's actions and was admissible. App. 12, l. 1-13, l. 19; 15, l. 9-19; 16, l. 14-17, l. 2.

The court asked defense counsel if he was going to introduce the toxicology report. Counsel admitted that he was under the impression that the state would call the toxicologist as a witness and that he failed have that witness under subpoena. App. 17, ll. 3-24. The court declined to rule on the state's motion stating "we'll address that when and if we need to." App. 19, ll. 1-13.

During the defense's case petitioner testified, which was substantially the same as her testimony at the pre-trial immunity hearing. App. 192-234. Petitioner testified, as she did pre-trial, that she called 911 and told them what happened. App. 206, ll. 14-25. Defense counsel asked petitioner if she knew if her 911 call was recorded or if any other individual had called 911. Petitioner was not aware if her call was recorded, or another call was made. App. 207, ll. 19-23. Additionally, counsel introduced three photographs of decedent's body taken at the scene. App. 209-10.

During closing arguments defense counsel pointed out to the jury all the evidence missing from the state's presentation of its case. "Who calls 911?" "Where's the tape?" "Where's the 911 operator?" "Why don't they come and tell you what was said?" App. 252, ll. 3-4. Counsel also pointed out the state had not called the toxicologist as a witness during his closing. App. 255, ll. 9-16. He indicated to the jury that it was odd that while the incident took place in an apartment complex no residents made any statements to police. App. 256, l. 20-257, l. 7

PCR hearing

During petitioner's testimony at the evidentiary hearing, Applicant's exhibit 5, the written statement of a man named Dustin Lawson, was admitted as well as, Applicant's exhibit 4, the recording of his call to 911 regarding the incident.[6] App. 370-72; 420. Lawson was a resident of the same apartment complex who heard the couple arguing and told law enforcement he heard "what sounded like someone beating on a door." App. 371, l. 20-372, l. 3; 420-21.

Defense counsel testified regarding the case he presented at trial. He said he spoke to "some" though not all of the potential witnesses in this case. App. 399, ll. 13-16. Defense counsel testified that he was under the mistaken impression that all the witnesses the solicitor had on their witness list would be called by the state and be available for him to question at trial. App. 18-22. He stated "[i]t was my [] mistake [] believing that the people [the solicitor' put on the witness list she intended to . . . use as witness." App. 395, ll. 20-25.

Regarding Applicant's exhibit 4, the recording of the 911 calls, counsel did not remember whether he failed to enter the exhibit because he just missed it or if it was a strategic decision. App. 400, ll. 12-23. He admitted that evidence in the 911 recordings and Lawson's written

6 Applicant's exhibit 4, recording of 911 calls includes petitioner's call to 911.

statement would have been helpful to the case because while petitioner was a good witness, it would have made a "world of difference" for the jury to hear for themselves her call to 911. App. 400, l. 24-401, l. 6; 403, l. 14-404, l. 10.

Discussion

Petitioner was indicted for murder a serious charge that carries a severe penalty. Trial counsel's failure to admit key pieces of evidence that corroborated petitioner's version of the incident during petitioner's murder trial was unreasonable and thus deficient where it "undermined the proper functioning of the adversarial process [and] cannot be relied upon as having produced a just result." *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). Petitioner was prejudiced where the case was clearly very close and hinged completely on her credibility. Those key pieces of evidence would have resulted in a not guilty verdict on petitioner's behalf. The PCR court erred denying PCR regarding each of the following claims.

As to the toxicology report the PCR court found it was reasonable that counsel failed to subpoena or call the toxicologist because they were on the state's list and found the report would not have added anything to the trial that would have changed the outcome. First it is patently unreasonable for counsel to have failed to subpoena witnesses that he planned to call at trial and instead rely on the state's witness list. Second, as counsel admitted pre-trial decedent's toxicology report was highly probative to her behavior during the incident which was also evident by the state's concern and attempt to suppress t this evidence that was harmful to their prosecution. The PCR court wrongly found it would not have "added" anything to the trial when in fact it would have corroborated petitioner's testimony in a trial where she asserted self-defense and the jury determination hinged on her credibility.

As to Applicant's exhibit 4, the recordings of the 911 calls, the PCR court, in three

sentences, declared the recordings would not have impacted the jury's determination of credibility. However, defense counsel readily admitted during the evidentiary hearing this evidence would have made a "world of difference." It is one thing for the jury to hear petitioner's testimony at trial but quite another to hear her immediately after the incident. In the recording petitioner is clearly hysterical and in shock. Further the recording lends credibility to petitioner's contention that she had no choice because the call is filled with remorse. The second recording of Dustin Lawson's calls further corroborates petitioner's version of the incident where he heard screaming and banging. Both these calls corroborate petitioner's testimony and would have been impactful for the jury to hear in petitioner's self-defense case.

Similarly, counsel failed to call Dustin Lawson as a witness though Lawson gave a written statement to law enforcement. It is unknown whether defense counsel interviewed Lawson but as stated above Lawson's testimony would have been crucial to proving petitioner's claim of self-defense. He heard something that sounded like banging on a door. Petitioner testified that her head was being banged into the car door.

There was no strategy articulated by defense counsel for the failure to present any evidence that corroborated petitioner's testimony at the evidentiary hearing and based on his own testimony counsel either did not consider the possibility of presenting the evidence or failed to be sure that any witnesses were subpoenaed by him, not the state, and available to testify. *See Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992) (if counsel articulates a valid reason for employing certain trial strategy, such tactics will not be deemed ineffective assistance of counsel); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992).

Defense counsel was ineffective where he failed to adequately prepare for petitioner's trial and present any evidence other than her testimony. But for counsel's failure to present

corroborating evidence the outcome of trial would have been different.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing of these issues.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of October, 2023.