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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO RICHLAND COUNTY
Robert E. Hood, Trial Judge
Brian M. Gibbons, PCR Judge

Appellate Case No. 2021-000846

HOLLY JO THOMPSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF RESPONDENT

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ISSUE PRESENTED

Petitioner's Issue

Whether the PCR court erred in denying relief where trial counsel inexplicably failed to pursue a pre-trial immunity hearing under the Protection of Persons and Property Act.

Respondent's Counterstatement of Issue

Did the PCR court properly find Petitioner did not prove trial counsel was ineffective for not requesting a pretrial immunity hearing when (1) Petitioner's testimony was inconsistent with the forensic evidence, making it not reasonably likely a trial court would have granted immunity, and (2) probative evidence supports the PCR court's finding that counsel was not deficient because counsel testified he engaged in a pro/con analysis when deciding whether to pursue immunity?

STATEMENT OF THE CASE

Procedural History

Petitioner Holly Jo Thompson is presently confined in the South Carolina Department of Corrections serving a forty-five-year sentence. In April 2014, the Richland County Grand Jury indicted her for the murder of James Solomon (Victim). On February 16-19, 2016, Petitioner proceeded to a jury trial before the Honorable Robert E. Hood. Public Defenders Robert Bank, Alicia Goode, and Rhodes Bailey represented Petitioner. Assistant Solicitors Luck Campbell, Meghan Walker, and Laura Gregg prosecuted the case. Petitioner was convicted as indicted, and the trial court sentenced her to forty-five years' imprisonment.

Petitioner filed a direct appeal that was perfected by Appellate Defender Kathrine Haggard Hudgins. On appeal, Petitioner argued the trial court erred in (1) not instructing the jury on involuntary manslaughter, (2) not requiring the State to provide defense counsel with rap sheets of jurors with convictions, and (3) refusing to allow defense counsel to recross the forensic pathologist but allowing the prosecution to recross Petitioner. On June 13, 2018, the Court of Appeals issued an opinion affirming. See State v. Thompson, 2018-UP-258 (S.C. Ct. App. filed Jun. 13, 2018). The remittitur was sent June 29, 2018.

On August 29, 2018, Petitioner filed this application for post-conviction relief (PCR). On October 29, 2019, an evidentiary hearing convened before the Honorable Brian M. Gibbons. Jonathan Waller represented Petitioner and Assistant Attorney General Samuel Key represented the State. On July 28, 2021, Judge Gibbons issued an order denying relief.

Petitioner filed a timely notice of appeal. On June 13, 2022, Petitioner filed a writ of certiorari. On September 23, 2022, Respondent filed a return. On October 16, 2022, the case was transferred to this Court. Thereafter, this Court granted certiorari on August 18, 2023.

Trial Testimony

At trial, Victim's friend Odell Middleton testified he stopped by Victim's home one afternoon to visit. (App. 96-101). He testified the front door was locked but the back door was open. (App. 101-02). Middleton noticed an odor and went inside, where he found Victim's deceased body on the living room floor. (App. 103-04). He called 911. (App. 104).

Amy Durso, the pathologist, testified Victim had multiple blunt-force trauma injuries, including three lacerations on the right side of his head, six lacerations on the top of his head, two lacerations on the back of his head, three lacerations "kind of going towards the neck," two lacerations on his forehead, a laceration over his nose, and a fractured nasal bone. (App. 309-13). Additionally, Victim had two sharp-force injuries on the back of his neck, a sharp-force injury next to his chin, two sharp-force injuries on his lower chest, five sharp-force injuries on his left thigh, seven sharp force injuries on his right hand, three sharp-force injuries on his right arm, three sharp force injuries on his right shoulder, and nine sharp-force injuries to his left-arm. (App. 321-22). Dr. Durso opined Victim died of exsanguination, or extreme blood lose, approximately two to three days before his body was discovered. (App. 322, 324).

Law enforcement testified about the bloody scene that spanned Victim's home from the bedroom, down the hall, and into the living room. (App. 115-16, 148-51, 167-70, 263, 490). Law enforcement collected a knife from the bedroom floor containing Victim's blood (App. 122, 165, 172, 200, 267, 396) and glass fragments from the hallway near a back door. (App. 116-17, 168). One of the glass fragments contained Petitioner's palmprint. (App. 358-60).

Stan Richards, an expert in bloodstain pattern analysis, opined the incident began in the bedroom and ended in the living room. (App. 288). He based this opinion on the fact the bedroom contained a smaller amount of blood, signaling the beginning of the blood-letting event. (App.

288-89). Richards testified the volume of blood increased as it moved down the hall away from the bedroom. (App. 289). He testified the area around the glass shards in the hallway contained an increased amount of blood, which was consistent with Victim being “stationary for a little while.” (App. 289, 292). Richards opined that spherical blood spatter located on an HVAC in the hall indicated an impact occurred at the same level as the HVAC, which was below waist level. (App. 294-95).

Petitioner testified in her defense. She stated she was a prostitute, and Victim often gave her crack-cocaine in exchange for sex. (App. 522-23). According to Petitioner, she had been at Victim’s home that evening smoking crack-cocaine with him. (App. 526-27). When they tried to engage in sex, Victim could not obtain an erection and became angry. (App. 528-30). Petitioner stated she attempted to leave but Victim accused her of stealing from him. (App. 529-30). She testified Victim started swinging a knife at her and “caught” her right hand, cutting it. (App. 530, 535). Petitioner stated they were in the living room, and she grabbed a glass vase to protect herself. (App. 530-31). She testified, “I swung the vase at him, and he swung at me again. The next thing I know, we’re fighting with a vase and a knife.” (App. 531).

Petitioner testified Victim had threatened to shoot her¹ and she was “scared for her life.” (App. 530, 534). She stated she was only wearing jeans and shoes; her shirt, bra, and jacket were at the end of the couch. (App. 534). Petitioner testified she attempted to get her clothes and her crack pipe, which she “never left . . . anywhere”; as she bent over to pick up her pipe, Victim swung and hit Petitioner’s left hand, bruising it. (App. 535). Petitioner testified she then swung the vase at Victim, hitting him in the face and head. (App. 535). She clarified Victim was “coming around the end of the coffee table” when she picked up the vase. (App. 534). Petitioner was

¹ Investigators did not testify to finding a gun in the home.

unsure how many times she hit Victim but thought it was five or six times. (App. 535). She stated Victim fell and she fell on top of him; she stopped hitting him when they fell and the vase broke. (App. 537). After they fell, she “got up real quick, grabbed [her] clothes, [and] went out the front door,” which was located in the living room. (App. 536). Petitioner testified Victim was still yelling and threatening to kill her as she left. (App. 536). She maintained none of the fighting occurred in the bedroom. (App. 538). On cross-examination, when asked what prevented her from running out the front door when she crossed the living room to grab the vase, she replied, “It was cold outside and I really didn’t want to run out there with no clothes on like that.” (App. 559-61, 563). She testified she did not continue hitting Victim after he fell. (App. 566). Likewise, she claimed he was facing her at the time. (App. 567).

At Petitioner’s request, the trial court charged self-defense. (App. 749-52). The jury convicted Petitioner of murder, and the trial court sentenced her to forty-five years.

PCR testimony

At the PCR hearing, Petitioner maintained she had been acting in self-defense. (App. 799). However, she stated counsel never discussed a pretrial immunity hearing. (App. 807). Petitioner acknowledged the evidence indicated Victim’s back door had been left open, which contradicted her trial testimony that she ran out the front door; however, Petitioner stated she would not have left out the back door because Victim kept a large dog in his back yard that she was afraid of. (App. 801). Petitioner averred “[s]omeone else had to have been in that house because . . . the back door was open.” (App. 811). She also asserted the knife that police found in the bedroom was in the living room when she left, and a screwdriver that police found by the back door was not on the floor while she was there. (App. 803).

Robert Bank (trial counsel) testified Petitioner told him Victim had accused her of stealing

crack-cocaine and attacked her with a weapon, and Petitioner defended herself by “grabbing a glass vase and hitting him multiple times.” (App. 813). Trial counsel also stated Petitioner told him that Victim was still alive when she left. (App. 813). Trial counsel did not recall whether he discussed the Protection of Persons and Property Act with Petitioner. (App. 816). He stated his initial concern would have been whether she was in a place that she had a right to be, although he averred evidence showing Petitioner “was invited [to Victim’s home] not only this night but regularly” could show she was in a place she had a right to be. (App. 816). Trial counsel could not recall why he did not pursue a pretrial immunity hearing. (App. 823). He elaborated, “Sitting here today, I don’t specifically remember anything regarding her case other than kind of typical pros and cons you do in any case. But, no, I don’t remember anything specific in this case in terms of why we didn’t do that.” (App. 823).

The PCR court found Petitioner failed to prove counsel was deficient for not seeking a pretrial immunity hearing because counsel articulated a valid strategy of focusing on a theory of self-defense, and counsel chose not to pursue an immunity hearing through a pro/con process performed in any case. The PCR court did not evaluate prejudice.

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found trial counsel was not ineffective for not requesting a pretrial immunity hearing when (1) Petitioner’s testimony was inconsistent with the forensic evidence, making it not reasonably likely a trial court would have granted immunity, and (2) evidence supports the PCR court’s finding that counsel was not deficient because counsel testified he engaged in a pro/con analysis when deciding whether to pursue immunity.

Petitioner asserts the PCR court erred in denying relief when trial counsel “inexplicably failed to pursue a pre-trial immunity hearing under the Protection of Persons and Property Act.” (Pet. 8-10). She contends evidence does not support the PCR court’s finding that counsel articulated a valid strategy of focusing on self-defense. (Pet. 8-9). However, probative evidence supports the PCR court’s finding that counsel was not deficient because counsel testified he engaged in a pro/con analysis when deciding whether to pursue immunity. Further—and critically—Petitioner cannot show prejudice because Petitioner’s testimony was inconsistent with the forensic evidence, making it not reasonably likely a trial court would have granted immunity.

“There is a strong presumption trial counsel provided adequate assistance.” Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687 (1984). In other words, “the applicant must show trial 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.” Green, 351 S.C. at 192, 569 S.E.2d at 322. “A reasonable probability is one sufficient to undermine confidence in the trial's outcome.” Id.

The General Assembly enacted the Protection of People and Property Act (the Act²) to

² S.C. Code Ann. § 16-11-410 to -450.

codify the common law Castle Doctrine. State v. Curry, 406 S.C. 364, 372, 752 S.E.2d 263, 267 (2013). “Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity.” Id. at 371, 752 S.E.2d at 266. “This includes all elements of self-defense, save the duty to retreat.” Id.

“[T]he legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act.” State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). Thus, upon motion, the issue of immunity under the Act must be decided prior to trial. Id. A party seeking immunity under the Act must show entitlement to immunity by a preponderance of the evidence. Id. at 411, 709 S.E.2d at 665. Common law self-defense has four elements:

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 prudent 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.

State v. Glenn, 429 S.C. 108, 116, 838 S.E.2d 491, 495 (2019)

The Act sets forth two statutory presumptions:

(A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle,

or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

(2) who uses deadly force knows or has reason to believe that an unlawful or forcible entry or unlawful and forcible act is occurring or has occurred.

(B) The presumption provided in subsection (A) does not apply if the person:

(1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling . . . ; or

...

(3) who uses deadly force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity

(C) 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

§ 16-11-440.

A. Petitioner’s testimony was inconsistent with the forensic evidence, making it not reasonably likely a court would have granted immunity.

Petitioner cannot show prejudice from trial counsel’s failure to request a pretrial immunity hearing because it is not reasonably likely a court would have granted immunity.³ Initially, Petitioner contends, “Under a preponderance of the evidence standard, it is not unreasonable to find that a court would grant immunity based upon these facts.” (BOP 15). However, the Strickland standard of prejudice requires a Court to find that but for an alleged deficiency, there is

³ The State acknowledges the PCR court did not make any finding of prejudice related to this issue in its Order. However, this Court can affirm for any reason appearing in the record.

a reasonable probability the result of the proceeding would be different. Strickland, 466 U.S. at 694. In other words, the proper question is, “If counsel had requested a pretrial immunity hearing, is there a reasonable probability the circuit court would have granted immunity?” This is different than the standard articulated by Petitioner, which would assess whether it would be unreasonable for *any* court to grant immunity.⁴ Cf. Strickland, 466 U.S. at 693 (“It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” (internal citation omitted)).

Petitioner also asserts that the determination of whether a court would grant immunity is best made at the trial court level. Although credibility is generally best assessed by a trial court, here, where Petitioner’s testimony about what occurred is so blatantly refuted by the forensic evidence, and where a jury found the State *disproved* self-defense *beyond a reasonable doubt*, the appellate court can conclude that it is not reasonably likely a circuit court judge would have found Petitioner proved self-defense by a preponderance of the evidence.⁵

At trial, Petitioner admitted she was at Victim’s home smoking crack and attempting to

⁴ Although not the proper standard, Respondent submits that given the blatant discrepancies between Petitioner’s testimony and the forensic evidence, it would be unreasonable for *any* court to grant Petitioner immunity.

⁵ Although “preponderance of evidence” is a less-stringent standard than “beyond a reasonable doubt,” it is critical to remember *who* has the burden of proof. At a pretrial immunity hearing, a *defendant* has the burden of proving immunity by a preponderance of evidence. In contrast, at trial when a defendant raises self-defense, the *State* has the burden of *disproving* self-defense beyond a reasonable doubt. It is more difficult to disprove a fact beyond a reasonable doubt than it is to prove a fact by a preponderance of the evidence. Here, the State met the more-stringent burden of disproving self-defense beyond a reasonable doubt. If the State met that burden, it strains credibility to suggest that if the burden—albeit a lower one—shifted to Petitioner (as it would in a pretrial immunity hearing), it is reasonably likely a judge would grant immunity.

engage in prostitution. She claimed Victim became angry when he could not get an erection; she went into the living room to get her clothes, and Victim followed her and began swinging a crack knife at her. According to Petitioner, they were in the living room when this occurred. She denied that any fighting occurred in the bedroom. (App. 522-38).

In contrast, Stan Richards, an expert in bloodstain pattern analysis, opined the incident began in the bedroom and ended in the living room. (App. 288). He based this opinion on the fact the bedroom contained a smaller amount of blood, signaling the beginning of the blood-letting event. (App. 288-89). Richards testified the volume of blood increased as it moved down the hall away from the bedroom. (App. 289). He testified the area around the glass shards in the hallway contained an increased amount of blood, which was consistent with Victim being “stationary for a little while.” (App. 289, 292).

Based on Richards’ testimony, the forensic evidence showed (1) a blood-letting event began in the bedroom and (2) the volume of blood increased as it moved down the hall. This starkly contrasts Petitioner’s version of events. Petitioner denied any fighting occurred in the bedroom; rather, she claimed the fighting all occurred in the living room, where Victim’s body was ultimately discovered. (App. 530-38).

The State’s theory was that Petitioner attacked Victim in the bedroom. This was supported by the bent knife investigators found in the bedroom that contained Victim’s blood. Petitioner’s description of the fight is inconsistent with the forensic evidence, making unlikely a trial court would have found her testimony credible.⁶ Likewise, it is not reasonably likely a circuit court judge would have found that Petitioner’s testimony established by a preponderance of the evidence

⁶ Respondent acknowledges that conflicting evidence alone is not a reason to deny immunity. However, due to the stark contrast between Petitioner’s testimony and the forensic evidence, it is not reasonably likely a judge would find her testimony credible.

that she was without fault in bringing on the difficulty.

Additionally, Petitioner's testimony that she ran out the front door was contradicted by testimony that the front door was locked but the back door was open when Victim's body was discovered. (App. 101-02). Further, blood spatter evidence showing an impact occurred *below* waist level along with the relative size of Victim and Petitioner (who admitted she was shorter than Victim) shows Petitioner continued to beat Victim *while he was on the ground*. (App. 294-95). Cf. State v. Chhith-Berry, 437 S.C. 527, 544, 878 S.E.2d 352, 361 (Ct. App. 2022) (affirming trial court's denial of immunity when defendant "testified that he stabbed Galloway once in the shoulder and that caused Galloway to fall off of Berry and stop fighting. Despite Chhith-Berry's testimony that Galloway stopped fighting after the first stab wound, Galloway sustained another twenty-four unaccounted-for stab wounds."). Due to the lack of credibility (based on the forensic evidence) in Petitioner's overall testimony, it is not reasonably likely a court would have found she proved by a preponderance of evidence that she had no other reasonable means of escape than to brutally beat Victim.⁷ Thus, it is not reasonably likely a circuit court would have granted immunity, and Petitioner cannot show prejudice.

Finally, the presumptions of the immunity statute do not apply. Initially, the presumption of subsection 16-11-440(A) does not apply because this incident occurred at Victim's home.

⁷ The brutality of the beating itself further illustrates why it is not reasonably likely a Court would have found by a preponderance of evidence that Petitioner had no other reasonable means of escape or that Petitioner reasonably believed her actions were necessary to prevent great bodily injury. Specifically, Victim had multiple blunt-force injuries on his head, including three on the right side, six on the upper back, two more lower down on the back of the head, and three toward the neck (App. 311-12); two sharp-force injuries on the back of the neck (App. 312); three blunt-force injuries and one sharp-force injury on his face (App. 313); two sharp-force injuries on his right lower chest (App. 318); a cluster of five sharp-force injuries on his left thigh (App. 318-19); seven sharp-force injuries on his right hand (App. 319); three sharp-force injuries on his right lower arm (App. 320); two sharp-force injuries on his right shoulder (App. 320); and nine sharp-force injuries on his left lower arm (App. 320).

§ 16-11-440(B)(1) (providing the presumption of §16-11-440(A) does not apply when the force is used against a lawful resident of the dwelling). Additionally, the presumption of subsection 16-11-440(C) should not apply because Petitioner was a guest in Victim’s home. See Curry, 406 S.C. at 374, 752 S.E.2d at 267 (“Under the Castle Doctrine, the absence of a duty to retreat does not extend to a visitor or social guest in the home of another unless “the attacker is an intruder.”). Likewise, neither presumption applies because the uncontradicted evidence showed Petitioner was engaged in unlawful activity at the time of the incident that *by her own testimony* proximately caused the fatal beating.⁸ Petitioner admitted to two unlawful activities she was engaging in at the time of this incident: prostitution and drug use. Because Petitioner was engaged in unlawful activity, the presumptions of subsections 16-11-440(A) and (C) would not apply. See § 16-11-440(B)(3) (providing the presumption of subsection 16-11-440(A) does not apply if the person using deadly force was engaged in unlawful activity); § 16-11-440(C) (providing “[a] person who **is not engaged in unlawful activity**” has no duty to retreat in certain circumstances (emphasis added)).

B. Evidence supports the PCR court’s finding that Petitioner did not prove counsel was deficient because counsel conducted a pro/con analysis when deciding not to pursue a pretrial immunity hearing.

Respondent acknowledges that pursuing pretrial immunity would not preclude pursuing self-defense at trial, and trial counsel testified a pretrial immunity hearing would not have precluded Petitioner from pursuing self-defense at trial. (App. 816). However, probative evidence supports the PCR court’s finding that counsel was not deficient because counsel conducted a pro/con analysis when deciding not to pursue pretrial immunity. Specifically, when asked why they did not pursue pretrial immunity, counsel testified, “Sitting here today, I don’t specifically

⁸ According to Petitioner, she was engaging in prostitution and smoking crack with Victim.

remember anything regarding her case other than kind of typical pros and cons you do in any case. But, no, I don't remember anything specific in this case in terms of why we didn't do that." (App. 823). Based on this testimony, counsel *did* conduct a pro/con analysis when determining whether to request an immunity hearing. Because counsel conducted a pro/con analysis when determining whether to request an immunity hearing, Petitioner failed to meet his burden in overcoming the strong presumption that trial counsel rendered adequate assistance. See Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013) ("There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case."); Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989) ("The defendant is required to overcome the presumption that counsel was effective in order to receive relief.").

Petitioner argues, "Even if there had been some affirmative decision to forego a hearing and focus on self-defense, Counsel Bank was still required to articulate a valid reason for *not* pursuing immunity under the Act." (Pet. 11). This argument, however, constitutes burden-shifting. In a PCR action, it is the applicant's burden to prove her case. Further, "[t]here is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." Taylor, 404 S.C. at 360, 745 S.E.2d at 102. Here, the forensic evidence itself—and the fact it directly contradicted Petitioner's story—must be considered when assessing whether counsel's decision to forego an immunity hearing was reasonable under prevailing professional norms. Because Petitioner's story itself was so directly refuted by the forensic evidence, and because lawyers frequently recognize that immunity hearings can provide the State a preview of the defense and potential fodder to impeach the defendant during cross-examination at trial, Petitioner did not overcome the presumption that

counsel's decision to forego an immunity hearing was reasonable under prevailing professional norms.⁹ Cf. Dent v. State, 810 S.E.2d 527 (Ga. 2018) (finding counsel was not ineffective for not moving for pretrial immunity when counsel explained he did not want to expose defendant to pretrial cross-examination from the State).

⁹ Applicant does not raise any claim related to the jury trial itself. If this Court determines counsel was deficient and this Court cannot evaluate prejudice, the proper remedy is a remand for the PCR court to consider prejudice.

CONCLUSION

Based on the foregoing, the PCR court properly found Petitioner failed to prove trial counsel was ineffective for not requesting a pretrial immunity hearing. Thus, this Court should affirm the PCR court's order denying relief.

Respectfully Submitted,

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This 3rd day of January, 2024