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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

The Honorable George M. McFaddin, Jr., Circuit Court Judge

Case No. 2024-001229

Dexter L. Myers, Petitioner,

vs.

The State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner was indicted by a Richland County grand jury in August 2014 for murder (2014-GS-40-5482) and attempted murder (2014-GS-40 5481). App. 810-815. Petitioner proceeded to a jury trial in front of the Honorable J. Derham Cole from August 31-September 4, 2015. App. 001-599. Petitioner was represented at trial by Fifth Circuit Assistant Public Defenders Tracy Pinnock, Rhodes Bailey, and Catherine Mubarak. App. 001. The State was represented by Fifth Circuit Assistant Solicitors Luck Campbell, Meghan Walker, and J.J. Shellenberg. App. 001. Petitioner was actually convicted of the lesser included offense of voluntary manslaughter and attempted murder as indicted. App. 814; 817. Petitioner was sentenced by Judge Cole to thirty years imprisonment for voluntary manslaughter and twenty years imprisonment for attempted murder to run consecutively for a total of fifty years imprisonment. App. 812;815.

Petitioner filed a timely direct appeal to the South Carolina Court of Appeals which was perfected by the South Carolina Commission of Indigent Defense Division of Appellant Defense. App. 600-618.The Final Brief of Appellant was submitted on May 11, 2018, and was perfected by Appellate Defender Susan B. Hackett. App. 600-618. Petitioner raised the issue of the admission of a text message that was presented to the jury as an exception to hearsay—present sense impression—that Petitioner argued was actually inadmissible hearsay. App. 604. The South Carolina Court of Appeals dismissed the appeal through an unpublished opinion filed on March 27, 2019, and the remittitur was issued on April 17, 2019. *See The State v. Dexter Myers*, 2019- UP-119 (S.C. Ct. App. filed Mar. 27, 2019). App. 638-639.

Petitioner filed a *pro se* application for post-conviction relief (PCR) in the Richland County Court of General Sessions on May 1, 2019 (2019-CP-40-2444). App. 640-647. After a response by

the State, Petitioner filed an amended application through counsel, Tommy Thomas, on November 7, 2022. App. 652-661; 664-665. An evidentiary hearing was held on January 11, 2023, in front of the Honorable George McFaddin, Jr., in Richland County. App. 666-750. On February 8, 2023, Judge McFaddin sent a letter to Petitioner's counsel and counsel for the State relaying his decision to deny the PCR application and asked the State to draft an Order of Dismissal for review and signature by the Court. App. 751-752. Counsel for the State submitted a draft Order to the Court on July 9, 2024. The Court signed the final Order of Dismissal on July 15, 2024, and it was filed on July 25, 2024. App. 753-809.

Petitioner filed his notice of appeal of the Order of Dismissal to this Court on July 29, 2024. This petition for writ of certiorari follows.

STATEMENT OF FACTS

The incident leading to Petitioner's arrest and conviction took place on July 2, 2014, in Petitioner's sister's apartment. App. 140. Petitioner and his younger brother were staying with their sister, her husband Dajuan Harris, and their two children. App. 140. Petitioner and his younger brother slept in the living room while their sister and Harris shared a bedroom, and their two children slept in the other bedroom. App. 141.

Petitioner's sister testified at trial that on July 2, 2014, she woke up early to check on one of her children who was crying. App. 141-142. Unable to put the child back to sleep, she chose to start making breakfast for her children and Harris. App. 142-143. Harris and her daughters joined her in the kitchen and began eating while Petitioner's sister prepared her own plate. App. 143. She then stated that while she was in the kitchen away from the table, she heard gunshots. App. 144-146. Initially believing them to be firecrackers, she realized the sounds were coming from inside her own home when she stated she heard Petitioner's younger brother say, "No, Dexter no." App. 146. Petitioner's sister then saw a gun and testified that Petitioner pointed it at her, and she fell to the floor. App. 146-147. Petitioner's sister further testified that she did not remember seeing anything else and did not see Petitioner shoot Harris. App. 147-148.

Petitioner testified as to the events of the shooting at trial as well. He stated that he woke up in the living room on July 2nd to loud noises. App. 398. He then heard a door slam and saw his sister rush from the back bedroom with Harris following her and being aggressive. App. 400-401. Petitioner stated he and Harris began to argue as he felt his sister was being threatened. App. 401-402. Petitioner then testified that he saw Harris go for a gun that was on the living room floor. App. 402-403. Thinking Harris was going to shoot him with the gun, Petitioner also tried to get to the

gun, but Harris got to the gun first. App. 403-404. Petitioner and Harris then struggled for control of the gun and during the struggle, Petitioner testified that the gun went off and fired several times while the fight continued. App. 403-404. Petitioner stated his sister was hit as she approached them to try to stop the fight. App. 405-406. Petitioner then ran from the apartment. App. 408.

After the shooting, Petitioner's sister ran from her apartment with her children to an apartment across the hall where the neighbor called 911. App. 17-18. First responders arrived and found Harris deceased in the apartment and Petitioner's sister was injured with two or three gunshot wounds to her leg. App. 37; 149. Law enforcement then began to search for Petitioner based on Petitioner's sister 's account and found him at another residence later in the day. App. 408-410. Petitioner initially told law enforcement he had no involvement, but later relayed to police his account involving the struggle with Harris and Harris trying to grab the gun first. App. 412-414. At trial, Petitioner did not deny that he shot both his sister and Harris, but he asserted it was in an act of self-defense or accident as to Harris and an accident as to his sister. App. 394.

The jury ultimately convicted Petitioner of voluntary manslaughter, rather than murder of Harris, and convicted as indicted of attempted murder of his sister.

ARGUMENTS

I. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to call an expert witness when Petitioner's defense was that the incident was the result of an accident or self-defense?

A criminal defendant has the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). "The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." *State v. Sterling*, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). "In order to prove counsel was ineffective, the [Petitioner] must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Lounds v. State*, 380 S.C. 454, 459, 670 S.E.2d 646, 648-649 (2008) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Id.* "Moreover, 'when a defendant's conviction is challenged, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" *Id.* (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)) (internal quotation marks and citations omitted).

In reviewing PCR cases, this Court has noted: "[o]ur standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. We review questions of law *de novo*, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839-840 (2018) (citations omitted). "The Court will reverse the PCR court's decisions when it is controlled by an error of law." *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

PCR Evidentiary Hearing

Petitioner was charged with the murder of Harris and the attempted murder of his sister. According to Counsel's testimony at the PCR hearing, there was a hybrid theory of self-defense and accident as to Harris and just accident as to Petitioner's sister. App. 728. Counsel referred to their theory of defense as "complicated", but from the time of receiving discovery, she felt that the incident did not warrant a murder charge, or even an attempted murder charge against Petitioner. App. 729;733-735. As a result of the Harris dying during the incident and the involvement of a firearm, autopsy and ballistics reports (including gunshot residue (GSR) testing) were completed and given as part of discovery to Counsel to consider in crafting Petitioner's defense. App. 736. When asked to explain her strategy in using the autopsy and ballistics report to present Petitioner's defense, Counsel testified:

> Okay. So, I think that with the autopsy report, what we were trying to establish out of that is there was—you couldn't testify as to how far, you know, Mr. Myers and Mr. Harris were when the gun started going off. The pathologist was not able to testify which injury happened first. So, we were hoping to use that to stop the State from saying he had the fatal would first versus the nonfatal wounds…to establish that she (Petitioner's sister) couldn't time anything and say which one happened first, second, or third.
>
> The ballistics…we talked to the GSR folks. There were particles found on Mr. Myers' hands. There were particles found[sic] on Mr. Harris' hands. So, we wanted to use that to establish that they—you know—at some point, Mr. Harris touched the gun. Because the State was trying to argue that there was no struggle. He never touched the gun. So, we tried to use that to establish that he did, in fact, have contact with the weapon after it was shot or when it was being shot. I don't recall anything specific that I asked or that we thought about as far as clothing or anything like that.

App. 736-737.

Despite this explanation about theory of defense and Counsel actually speaking to the individuals involved with testing GSR on Petitioner and Harris, Counsel admitted she failed to do

the following: (1) hire an expert for reconstruction of the struggle, (2) considered scheduling another autopsy on the victim, and (3) get the weapon retested. App. 737-738. She noted that she did not even consider any of those in formulating her defense strategy. App. 737-738. Additionally, Counsel stated that she remembered the gun used in the incident vividly because it was "rusted" and had "loose pieces" and when she picked up the gun during cross-examination of the witness, the jurors jumped because when her finger touched the trigger, the hammer fell, indicating the weapon was not in good condition. App. 738.

On cross examination by the State, Counsel stated that she had consulted with a pathologist on the autopsy and a ballistics/ GSR examiner, but she could not recall why she did not call either to testify. App. 748. Counsel stated that, in particular, ballistics and GSR witnesses/experts would have "absolutely" been helpful to her case. App. 748-749. A reconstructionist regarding the struggle over the firearm would have also been helpful, opined Counsel, "because that was part of our issue." App. 748.

Argument

The PCR Court erred in finding that Counsel was not ineffective for failing to call witnesses highly relevant to the theory of defense—that Harris' death was the result of an accident and/or self-defense and Petitioner's sister 's shooting was the result of an accident. The PCR Court bases its finding on the fact that Petitioner failed to call expert witnesses at the PCR hearing, citing this Court's decision in *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998). App. 780. The PCR Court held:

> As an initial matter, this Court finds Applicant failed to meet his burden of proof as to this allegation because he did not present any testimony of an expert in any of

> these fields at the evidentiary hearing, and therefore, he has not established he was prejudiced by Trial Counsel's allegedly deficient representation. Additionally, Trial Counsel testified that in hindsight, she would handle Applicant's trial differently. However, this Court must scrutinize Trial Counsel's performance in a highly deferential manner, making every effort to eliminate the distorting effects of hindsight in evaluating the conduct from Trial Counsel's perspective at the time in light of then- existing circumstances. Here, it is Applicant's burden to prove his claims, and Applicant presented no experts as to this Court to establish had Trial Counsel hired experts, the results of his trial would have been different. Mere speculation and conjecture are not sufficient to substantiate an allegation that counsel's deficient performance was prejudicial.

App. 769. (internal citations and quotations omitted).

The PCR Court's holding on this point ignores the "any evidence" standard this Court is beholden to when reviewing PCR Court's decisions. This Court "will uphold the findings of the PCR court where there is *any evidence* of probative value to support them and will reverse the decision of the PCR Court when it is controlled by an error of law." *Council v. State*, 380 S.C. 159, 169, 670 S.E.2d 356, 361 (2008) (citing *Suber v. State*, 371 S.C. 554, 558-559, 640 S.E.2d 884, 886 (2007)). Therefore, even though the burden of proof rests on Applicant in a PCR proceeding, this Court must consider any evidence in their examination of the PCR Court's process.

The Court's finding on Petitioner's "failure" to present expert witnesses at the PCR evidentiary hearing, and therefore prejudice, based on counsel's ineffective assistance, sweeps too broadly. It is true that "[t]he applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." *Glover v. State*, 318 S.C. 496, 498-499, 458 S.E.2d 538, 540 (1995). The PCR Court notes that Counsel testified that she did not call important expert witnesses, did not even consider calling them even though she had contact with experts, and admitted that such witnesses would have been very helpful to Petitioner's case at trial. Yet, the PCR Court seems to find Counsel's testimony unsubstantial on this point, while simultaneously promoting her credibility in numerous other areas of the order.

See e.g. App. 771. The PCR Court seems to characterize Counsel's testimony as to the helpfulness of these experts and the changed outcome of the case as "mere speculation and conjecture." App. 769.

This characterization ignores the long history of this Court in affirming grants and denials of PCR based on speculative testimony of trial counsel. *See Martinez v. State*, 304 S.C. 39, 41, 403 S.E.2d 113, 114 (1991) (affirming grant of PCR and in finding that "by counsel's own admission" the testimony of a witness trial counsel failed to subpoena "may have made the difference in obtaining an acquittal" and therefore counsel was ineffective.); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (affirming denial of PCR based on trial counsel's testimony that by "his judgment at the time, their testimony would not have been of value to petitioner's case."); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985) (affirming denial of PCR based on trial counsel's testimony and descriptions of conversation with client.).

A reasonable reading of the record and the consideration of the testimony from Counsel at the PCR hearing displays Counsel was ineffective for failing to call upon experts in accident reconstruction and ballistics/GSR. The incorporation of these experts would not have only countered the State's perception of what occurred but bolstered the described theory of defense promoted by Counsel. Counsel admitted that hiring and retaining these experts would have been extremely helpful. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case. Where trial counsel articulates a valid reason for certain trial strategy, counsel will not be deemed ineffective." *McKnight v. State*, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008) (citations omitted). In this case,

Counsel readily admitted that she had no idea why she did not call upon experts, which is not an articulable or valid trial strategy. Therefore, Counsel must be deemed ineffective.

Petitioner also faced significant prejudice as a result of Counsel's failure to call upon expert witnesses. This Court has noted that "[i]n some cases, there is 'overwhelming [evidence] such that is categorically precludes a finding of prejudice.'" *Martin v. State*, 427 S.C. 450, 455, 832 S.E.2d 277, 280 (2019) (quoting *Smalls v. State*, 422 S.C. 174, 190-191, 810 S.E.2d 836, 844-845 (2018). However, that evidence must be "something conclusive" or "a combination of physical and corroborating evidence so strong that the *Strickland* standard of a reasonable probability the factfinder would have had a reasonable doubt cannot possibly be met." *Id.* (citing *Smalls*, 422 S.C. 174 at 191) (quoting *Strickland*, 466 U.S. 668, 695 (1984)) (internal quotations omitted). Therefore, the evidence should be so strong that there is no probability that counsel's errors contributed to Petitioner's conviction. *Id.* at 456.

The evidence against Petitioner is far from conclusive or overwhelming. Many questions remain about the actual timeline of the shooting and the logistics of why and how it occurred. Even Petitioner's sister, who survived, could really not offer any concrete details, especially about the death of Mr. Harris. It can be inferred from the jury's questioning and request of the judge to explain the difference between voluntary and involuntary manslaughter and their eventual verdict of voluntary manslaughter that even they had significant doubts about the mechanics of the shooting. Had Counsel hired experts, who could have extrapolated on the issues with the State's case, the jury likely would have acquitted Petitioner as evidenced by their already present doubts in the original trial. Therefore, Counsel's performance constituted ineffective assistance and

because of that ineffective assistance Petitioner was prejudiced. Counsel's performance fell below the constitutional floor provided under *Strickland*. The PCR Court erred in finding otherwise.

Petitioner respectfully asks this Court to grant him relief and order a new trial.

II. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to have a competency evaluation performed on Petitioner prior to trial?

PCR Evidentiary Hearing

Petitioner testified at length during the PCR hearing, under oath, regarding his struggles with mental health and other mental infirmities that have existed since he was a child, and which did exist at the time of trial. On direct examination, Petitioner noted that he did not finish his high school education and that it was known that he has "been on mental health since I was a child." App. 682-683.[1] He further stated that he has had a multitude of diagnoses, and he could specifically remember diagnoses of Attention-Deficit/hyperactivity disorder (ADHD), bipolar disorder, and schizophrenia. App. 682. Petitioner told Counsel about his struggles and was also, at the time, figuring out if he was supposed to be receiving mental health treatment while he was incarcerated pre-trial as he had been "mental health on the street." App. 682. Petitioner further testified that he did not understand what was going on during pre-trial preparations and just went "off what they (trial counsel) told me to do. App. 682. Petitioner testified that he felt he should have had a competency evaluation prior to trial and that his mental health had an effect on his ability to participate in his own defense with Counsel. App. 698. Counsel confirmed during her testimony that she did not order a competency evaluation during her representation of Petitioner. App. 746.

[1] Petitioner also noted that he did not finish his high school education during his testimony at trial. App. 395.

Argument

The PCR Court erred in finding that Counsel was not ineffective for failing to request a competency evaluation of Petitioner despite his noted lifelong struggles with mental health. The PCR Court held that:

> "As an initial matter, this Court finds Applicant's testimony **not credible** and Trial Counsel's testimony **credible** on this issue. Trial counsel **credibly testified** that based on the interaction and observations of Applicant that she did [not] seek a competency evaluation because she did not think one was necessary." [2]

App. 790.

"Due process prohibits the conviction of an incompetent defendant." *Matthews v. State*, 358 S.C. 456, 458, 596 S.E.2d 49, 52 (2004) (citing *Jeter v. State*, 308 S.C. 230, 232, 417 S.E.2d 594, 595-596 (1992). "A defendant may not be put to trial unless he 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding…[and] a rational as well as factual understanding of the proceedings against him.'" *Cooper v. Oklahoma*, 517 U.S. 348, 355 (1966) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)). "In a PCR action, the petitioner must prove by a preponderance of the evidence that he was incompetent" at the time of the action. *Id.* at 459. "In order to find that petitioner's trial counsel was ineffective for refusing to

[2] Petitioner finds it important to note that as Respondent drafted this Order of Dismissal, the credibility determinations, and the **bolding and underlining**, can be inferred to be mostly the product of their evaluation and opinions of the case. This Order of Dismissal was written by the party whose job it is to oppose any and all appeals from individuals convicted of crimes in our state and promote the idea that "an entire class of citizens, those convicted of a crime, are inherently unreliable witnesses whose sworn testimony is unworthy of belief." *Glover v. State*, 318 S.C. 496, 501, 458 S.E.2d 538, 542 (1995) (Waller, J., dissenting).

request a *Blair*[3] hearing on petitioner's competence to stand trial, petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner's proceedings." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984); *Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (1992)).

Petitioner testified under oath at the PCR hearing that he has suffered from a multitude of mental health conditions since childhood and those conditions existed at the time he went to trial. Petitioner further noted that at the time of trial he was trying to receive mental health services at the jail as he had accessed it on the street and that he told trial counsel of this fact. Despite this, Counsel failed to request a competency hearing. Petitioner further testified that he did not know what was going on in preparing for his defense. The PCR Court ignores the fact that in order for the defendant to be deemed competent to stand trial he must have sufficient ability to understand the process which he is subjected to *and have* an understanding of what was occurring. Petitioner testified that he did not have understanding of the process against him. By not requesting a competency hearing in a trial that was based solely on what the defendant did or did not do and why he acted in the manner that he did based on the circumstances, Counsel rendered ineffective assistance. Had Counsel brought up the fact of Petitioner's mental illness and promoted its significance in the trial, the State would have been constitutionally required to provide Petitioner was an evaluator's assistance as he was indigent. *See Ake v. Oklahoma*, 478 U.S. 68, 74 (1985). Petitioner was prejudiced by Counsel's failure in that he had to continue in a process, where his

[3] *State v. Blair*, 275 S.C. 529, 534, 273 S.E.2d 536, 538 (1981) ("[O]n remand, if the hearing reveals Blair was incompetent to stand trial, an order reversing his conviction should be entered and a new trial granted when he is presently competent to stand trial. However, if the hearing reveals Blair was competent to stand trial, the conviction will stand.").

liberty was at stake, that he did not fully understand. Had Counsel requested a hearing, Petitioner's trial would have been different. The PCR Court erred in finding otherwise.

Petitioner respectfully asks this Court to grant him relief and order a new trial.

III. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to properly prepare or advise Petitioner on testifying in his own defense at trial?

PCR Evidentiary Hearing

Petitioner testified in his own defense at trial on the advice of Counsel. App. 700. At the PCR hearing, Petitioner relayed that Counsel came to see him the day before he was to testify to run through her cross examination and she told him to take the stand so he "could get my view out there to the juror[s]." App. 700-701. Petitioner further noted that Counsel did not go through the advantages and disadvantages of testifying. App. 701. Petitioner noted he was apprised of his rights regarding taking the stand at trial and stated he "remembere[d] him (Judge Cole) saying stuff." App. 720. Counsel did not speak on Petitioner's trial testimony at the PCR hearing.

Argument

The PCR Court erred in finding that Counsel was not ineffective for failing to properly advise and prepare Petitioner to testify at trial. The PCR Court held that:

> This Court finds Applicant was fully aware of his right to testify and the advantages and disadvantages of doing so. The record reflects Applicant engaged in a thorough colloquy with the trial court and knowingly chose to assert his right to testify. […] Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom.

App. 795-796.

"There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331,2 642 S.E.2d 590, 596 (2007). However, in this case, Counsel's failure to properly prepare and advise Petitioner—not speaking to him about his testimony until the night before, not going through and extrapolating on the advantages and disadvantages of testifying—cannot be deemed to reasonable professional judgment, especially in light of Petitioner's mental health issues. Petitioner's version of events was crucial to his defense and by not preparing him, Counsel rendered ineffective assistance of counsel. Given that the State had little evidence except for a murky re-telling of events by Petitioner's sister, Counsel's unreasonable performance undoubtedly prejudiced Petitioner. This PCR Court erred in finding otherwise.

Petitioner respectfully asks this Court to grant him relief and order a new trial.

IV. Whether the PCR Court erred in finding trial counsel was not ineffective for improperly advising Petitioner to waive his stand-your-ground hearing?

PCR Evidentiary Hearing

Petitioner testified at the PCR hearing that Counsel told him to waive his stand-your-ground (SYG) hearing despite conferring with Counsel that the shooting of Mr. Harris was in self-defense. App. 686-687. As a result of Counsel's advice, he did waive his right to a hearing pursuant to S.C. Code Ann. §16-11-440 (2006) prior to the trial beginning. App. 002. In her testimony at the PCR hearing, Counsel stated that after reviewing the discovery and speaking to Petitioner, that she "honestly didn't believe…that it should been charged as murder." App. 729;733-735. Counsel also testified that self-defense was part of their greater strategy especially as to Mr. Harris, as Petitioner

had stated there was a struggle over the gun and he felt Mr. Harris was threatening his sister. App. 729;733-735.

Argument

The PCR Court erred in finding Counsel was not ineffective for improperly advising Petitioner to waive his SYG hearing as Petitioner would have very likely received immunity as a result of an SYG hearing and, therefore, not had to stand trial for murder. The PCR Court holding focused solely on the colloquy that Petitioner had with the trial court which was infected with the unreasonable advice of Counsel to waive the SYG hearing. App. 793-794.

This Court in *State v. McCarty*, 437 S.C. 355, 366-368, 878 S.E.2d 902, 908-909 (2022) extrapolated on the Act and summarized its purpose and factors. *See* S.C. Code Ann. §§ 16-11-410 to -450 (2015). This Court noted:

> The "Stand Your Ground Law", as the [South Carolina Protection of Persons and Property Act] is informally known was enacted by the South Carolina General Assembly in 2006 and provides a person is immune from criminal prosecution and civil action for the use of deadly force in circumstances that are permitted by the Act or by another provision of law. By its terms, the Act does not apply to the use of deadly force against law enforcement officers.
>
> We have observed that the Act codified the common law Castle Doctrine and extended its reach. Under the Castle Doctrine, one attacked, without fault on his part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense.
>
> […]
>
> In section 16-11-440, the General Assembly has set for the circumstances justifying the use of deadly force…[U]nder subsection (C), which generally provides that one who is not engaged in unlawful conduct and who is attacked in another place where he has a right to be has no duty to retreat and may use deadly force if he reasonably believes it is needed to (1) prevent death or great bodily injury to himself or another, or (2) prevent the commission of a violent crime. We emphasize the General

> Assembly's use of the word "prevent" because it underscores the Act's protective focus; its terms to do not require the undesirable has to occur before defensive action is justified.

Id. (internal citations and quotations omitted).

In *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013), this Court further noted that the "a defendant must show by a preponderance of the evidence a valid claim of self-defense and the Circuit Court must consider all the elements of self-defense—except the duty to retreat—" which is excused under the Act. *Curry* also laid out the elements of self-defense, with the last element, again being excused by the Act:

> 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.

Id. at 371 n.4 (quoting *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)).

When a claim of immunity is made, "the circuit court must weigh evidence and make its own credibility and factual findings before reaching a decision as to immunity." *McCarty*, 437 S.C. at 372 (citing *State v. Andrews*, 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019)).

An examination of Petitioner's testimony at trial and other evidence not only warranted an SYG hearing but displayed that Petitioner would have been found immune and would not have had to stand trial. Petitioner testified that he was protecting his sister which could have been a claim under S.C. Code Ann. §16-11-440 (C). Petitioner stated, that while lawfully in his sister and Harris'

apartment as a guest, he woke up on the morning of the incident and saw his sister rush from a room with Harris aggressively following her. App. 398-401. Petitioner and Harris exchanged words as Petitioner felt his sister was being threatened and Harris went for a gun that was on the floor of the apartment. App. 402-403. Petitioner, in fear of what Harris would do with that gun to everyone in the apartment, also went for the gun on the floor. App. 403. Harris got to the gun first and the two struggled for control of. App. 403-404. During the struggle the gun went off, and then went off again as the struggled continued. App. 404-406. Petitioner's sister tried to approach but was hit by the gun fire. App. 405-406. GSR was found on Harris's hands indicating he touched the gun.

If these facts had been presented, and the Circuit Court was required to consider them as per the Act, Petitioner would have been found immune. He was in fear for his life and for his sister's life and was lawfully in the residence. He was responding to the aggression of Harris and had no duty to retreat under the Act. Petitioner testified to these facts under oath and evidence, and including the faulty gun and the GSR on Harris' hands, illuminated Petitioner's version of events. Counsel should have gone forward with the SYG hearing and her advice to Petitioner to waive such a critical hearing constituted ineffective assistance of counsel. Had Petitioner had the SYG hearing, the result of the proceeding would have been different. The PCR Court erred in finding otherwise.

Petitioner respectfully asks this Court to grant him relief and order a new trial.

V. Whether the PCR Court erred in finding that trial counsel was not ineffective for failing to object when the trial court misstated the law to the jury during deliberations?

Trial Proceedings

The jury sent a note during deliberations to the trial court asking for clarification on the difference in the law between voluntary manslaughter and involuntary manslaughter. App. 587. The

trial court instructed the jury on both offenses; however, the Court misstated the law regarding voluntary manslaughter by stating:

> Therefore, as stated, involuntary manslaughter is an unlawful homicide committed in the absence of malice, but in the sudden heat of passion, aroused by sufficient legal provocation.

App. 589.

The trial court then when on to confusingly read the definition of involuntary manslaughter which was different from what he expressed above. App. 589. The jury returned to deliberations after these instructions. App. 590. Trial counsel did not object.

PCR Evidentiary Hearing

Petitioner testified that Counsel failed to object when the trial court misstated the law of voluntary manslaughter versus involuntary manslaughter when it re-stated the law at the request of the jury. App. 695. The jury had been deliberating and asked for clarification between the two offenses. App. 695-698.

Argument

The PCR Court erred when it found that Counsel was not ineffective for failing to object to the misstatement in the jury instructions by the trial court, considering this distinction was key to the outcome of Petitioner's trial. Counsel further did not articulate any valid trial strategy to this failure as is required. Counsel's failure to object caused the jury to hear an inaccurate recitation of the law during a critical stage of deliberations. Had Counsel properly objected to the misstatement, the outcome of Petitioner's trial would have been different. The PCR Court erred in finding otherwise.

Petitioner respectfully asks this Court to grant him relief and order a new trial.

CONCLUSION

Petitioner therefore asks this Court to grant the writ of certiorari and allow appellate review of the Order of Dismissal signed by the Honorable George M. McFaddin, Jr., Circuit Court Judge.

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Respectfully submitted,

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