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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Richland County
J. Derham Cole, Trial Judge
George M. McFaddin, Jr., Post-Conviction Relief Judge

Appellate Case No. 2024-001229

Dexter L. Myers, #365377,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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- I. Whether the post-conviction relief court properly determined Petitioner failed to establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to call an expert witness when Petitioner failed to have an expert witness testify at the post-conviction relief hearing and any assertion that an expert witness would have changed the outcome of trial is purely speculative?
- II. Whether the post-conviction relief court properly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to have a competency evaluation performed before trial where Petitioner failed to present any credible evidence that in fact he was incompetent at the time of his trial?
- III. Whether the post-conviction relief court properly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to prepare or advise Petitioner on testifying in his defense where the record provides the trial court conducted a thorough colloquy with Petitioner and Petitioner knowingly chose to assert his right to testify?
- IV. Whether the post-conviction relief court properly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's advice to waive his stand-your-ground hearing where the record provides the trial court conducted a thorough colloquy with Petitioner and the only testimony provided at the post-conviction relief hearing was Petitioner's and the post-conviction relief court found his testimony not credible?
- V. Whether the post-conviction relief court properly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to object to the trial court's one-word misstatement in its recharge to the jury on voluntary and involuntary manslaughter where the jury charge as a whole was correct?

STATEMENT OF THE CASE

Petitioner, Dexter L. Myers, was indicted at the August 2014 term of the Richland County Grand Jury for attempted murder (2014-GS-40-5481) and murder (2014-GS-40-5482). Petitioner was represented by Fifth Circuit Assistant Public Defenders Tracy E. Pinnock (Trial Counsel), J. Rhodes Bailey, and Catherine Mubarak, Esquires. Fifth Circuit Assistant Solicitors K. Luck Campbell, Meghan Walker, and J.J. Shellenberg, Esquires, prosecuted the case.

Petitioner proceeded to a jury trial from August 31–September 4, 2015, before the Honorable J. Derham Cole. The jury convicted Petitioner of the lesser-included offense of voluntary manslaughter and as indicted for attempted murder. Judge Cole sentenced Petitioner to serve an aggregate term of fifty years' imprisonment—twenty years for attempted murder and thirty years for voluntary manslaughter. On September 9, 2015, Trial Counsel filed a motion to reconsider. On May 2, 2017, the trial court denied the motion to reconsider.

Petitioner filed a timely Notice of Appeal. Appellate Defender Susan B. Hackett represented Petitioner on appeal and briefed the following issue:

Did the trial judge err in concluding a text message was a present sense impression, and therefore admissible as an exception to the rule against hearsay, where the state failed to present that (1) the statement described or explained an event or condition; (2) the statement was contemporaneous with the event it was describing; and (3) the declarant personally perceived the event allegedly described or explained?

The case was submitted on briefs to the Court of Appeals on February 1, 2019. On March 27, 2019, the Court of Appeals affirmed Petitioner's convictions and sentences. State v. Myers, Op. No. 2019-UP-119 (S.C. Ct. App. filed Mar. 27, 2019). The Remittitur was returned to the circuit court on April 17, 2019.

On May 1, 2019, Petitioner filed an application for post-conviction relief. The State filed its Return and Motion for a More Definite Statement on February 28, 2020, and requested an

evidentiary hearing. Through counsel, Petitioner filed an amended application on November 7, 2022. An evidentiary hearing into the matter convened on January 11, 2023, at the Richland County Courthouse before the Honorable George M. McFaddin, Jr. Petitioner was present at the hearing and represented by Tommy A. Thomas, Esquire. Senior Assistant Deputy Attorney General D. Russell Barlow, II, of the South Carolina Attorney General's Office, represented the State. (App. p. 1186). On July 25, 2024, Judge McFaddin denied Petitioner's post-conviction relief application with prejudice. (App. pp. 1271-1278).

On August 7, 2024, Petitioner timely filed a Notice of Appeal on Judge McFaddin's July 27, 2024, filed Order of Dismissal with Prejudice. On September 11, 2024, Petitioner filed his Petition for Writ of Certiorari and Appendix.

This Return to Petition for Writ of Certiorari follows.

STATEMENT OF FACTS

Petitioner was charged with the attempted murder of his sister, Mahogany Speech-Harris (Mahogany), and the murder of his brother-in-law, Dajuan Harris (Dajuan). Mahogany lived in an apartment with Dajuan, their two children, Petitioner, and her other brother. (App. p. 223). Petitioner and his brother had lived with Mahogany and Dajuan periodically for three years but were told in March 2014 that they needed to move out. (App. pp. 223–224). Mahogany and Dajuan had a bedroom, their daughters had a bedroom, and her brothers slept in the living room. (App. p. 224).

In July 2014, the brothers were still living in the apartment. On July 2, 2014, one of the children could not sleep, so Mahogany got up to make breakfast. (App. p. 225). She took her youngest daughter with her to wake up Dajuan and have him join them to eat. (App. pp. 226–227). Dajuan and the children were at the table and began eating. According to Mahogany, there were no arguments between her and her brothers or anyone and her brothers that morning. (App. pp. 231; 233–234). Mahogany turned to fix her breakfast and heard, "Something go pow, pow." (App. pp. 228–229). Mahogany said it sounded like fireworks, but then she heard her brother saying: "No, Dexter, no," and when she looked up, she saw the gun. (App. p. 229). Mahogany never saw her husband; she only saw Petitioner and indicated: "He just kept shooting" (App. pp. 230–231).

Mahogany ran across the hall to her neighbor's apartment to call 911. (App. p. 231). Mahogany's neighbor heard three gunshots. (App. p. 93). Thereafter, Mahogany ran into the neighbor's apartment, "screaming and hollering 'My brother shot my husband.'" (App. p. 94). Mahogany told her neighbor she had been shot, and her neighbor indicated that Mahogany was bleeding. (App. p. 94).

Master Deputy Fairbanks was the first officer on the scene. He found Mahogany at her neighbor's apartment. He indicated Mahogany had been shot in the leg. (App. p. 99). He entered the other apartment and found Dajuan locked in a bedroom. (App. pp. 99–100). After kicking the door open, he found Dajuan leaning up against the door. (App. p. 100).

EMS arrived and located Dajuan. He was "wedged behind the door lying prone in a pool of blood with obvious . . . trauma to his face and chest area." (App. pp. 119–120). Dajuan was not breathing; his pupils were fixed and dilated, and he was "cold." According to EMS, he was "obviously dead." (App. p. 120). EMS then approached Mahogany, who had five holes in her outer thigh and buttocks area from where she had been shot. (App. p. 121). According to the ER doctor, Mahogany had two-to-three gunshot wounds. (App. p. 284).

The pathologist performed the autopsy on Dajuan. (App. p. 404). She indicated Dajuan had a gunshot wound to the left side of his head, which exited on the right back of his head; another gunshot wound to the right side of his neck; and a gunshot wound to his lower back. (App. p. 406). The pathologist indicated the gunshot wound to the head was nonfatal as it missed the brain. (App. pp. 410–411). The bullet that entered through Dajuan's neck perforated his trachea, then perforated the major subclavian artery, went through the left upper lobe of the lung, and ultimately entered the soft tissue of his left arm. (App. p. 412). The gunshot to the neck was the fatal gunshot. (App. pp. 412–413). The final gunshot entered Dajuan's lower back and hit his small intestine twice. (App. p. 413).

After the shooting, Petitioner fled the apartment. (App. p. 520). He sought a ride from a neighbor who happened to be leaving at the time. (App. p. 214). This neighbor gave Petitioner a ride from the Apartment complex. Petitioner told her he was fighting with his girlfriend and "just

wanted to get away." (App. p. 215). Petitioner was later arrested at a friend's house. (App. pp. 324; 510; 512).

Captain McDonald interviewed Petitioner after he was arrested. After reading Petitioner's Miranda¹ rights, Petitioner agreed to speak with Captain McDonald. Petitioner initially denied any involvement and any knowledge of the shooting and further denied being present. (App. p. 328). Even after being confronted with some of the facts that the officers knew from Mahogany, Petitioner continued to deny involvement. However, Petitioner's story changed to indicate he was at the apartment that morning but had gotten up and left to buy some marijuana and had not returned by the time of the incident. (App. p. 329). Petitioner's story changed again as the questioning continued. His third version indicated he was present at the apartment, awakened in the living room, and found a gun on the floor. Petitioner indicated the gun was a dangerous gun because the hammer was always cocked. He said he picked it up, and it just went off and struck Dajuan. Petitioner told Captain McDonald he had the gun in his hand, and it "kept going off and struck [Dajuan]." (App. p. 329).

Eventually, Petitioner led other investigators to where he had disposed of the gun. (App. p. 331). After returning, he again spoke with Captain McDonald and gave a written statement which differed from his prior statements. He indicated they had a gun at the apartment for protection and kept it under the couch in the living room. Petitioner stated Dajuan picked up the gun so none of the children would get it. (App. p. 332). Dajuan put the gun in Petitioner's hand after Petitioner warned him about the hammer being cocked. Petitioner explained the gun just went off and hit Dajuan, and then it went off a few more times, and it hit Mahogany. (App. p.

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

333). He indicated there was no argument with Dajuan that morning and that he did not intentionally shoot Dajuan. (App. p. 334).

Petitioner later gave a second written statement. (App. p. 582). In this statement, Petitioner indicated Mahogany entered the kitchen mad with Dajuan in tow. Dajuan then looked at him and said, "Man," which the Petitioner took to mean that Dajuan wanted him to move. Dajuan was coming at him and going for the gun. (App. p. 583). Petitioner said he grabbed the gun, and it fired, shooting Dajuan. He said Dajuan was still on him, so he shot him again. Mahogany then charged Petitioner, and Petitioner shot her. (App. p. 584). This is a similar version of events to the one Petitioner testified to at trial, but, at trial, he had difficulties remembering many details of the events. (App. pp. 519–523).

The trial court ultimately charged the jury with murder, voluntary manslaughter, and involuntary manslaughter as it related to the killing of Dajuan. The trial court charged both attempted murder and assault and battery of a high and aggravated nature (ABHAN) as it related to the wounds sustained by Mahogany. The trial court also charged accident and self-defense. (App. pp. 666–684). The jury convicted Petitioner of voluntary manslaughter for killing Dajuan and attempted murder as to Mahogany.

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 post-conviction relief 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. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. Appellate courts will reverse the decision of the post-conviction relief 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

- I. **The post-conviction relief court properly determined Petitioner failed to establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to call an expert witness when Petitioner failed to have an expert witness testify at the post-conviction relief hearing and any assertion that an expert witness would have changed the outcome of trial is purely speculative.**

On appeal, Petitioner asserts the post-conviction relief court erred in not finding Trial Counsel's representation constitutionally ineffective for failing to call an expert witness in GSR and ballistics when Petitioner's defense was that the incident was the result of an accident. Specifically, Petitioner contends that the post-conviction relief court's assessment of Petitioner not presenting the testimony of an expert witness as the basis of dismissal was an error where Trial Counsel testified that an expert witness could have been helpful. However, as the post-conviction relief court properly found, Petitioner failed to present an expert witness to testify, and the post-conviction relief court was clearly not persuaded by Trial Counsel's testimony. (App. pp. 877 – 879). Therefore, Petitioner failed to establish the requisite prejudice necessary for relief—that the result of his proceeding would have been different but for Trial Counsel's failure to have an expert witness testify. This Court should deny certiorari to this issue.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "assist[ance] by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 685(1984). In post-conviction relief actions, the reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the Petitioner's conviction. Id. at 687. To obtain relief, a post-conviction relief Petitioner must prove (1) counsel's performance fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for

counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing Strickland, 466 U.S. 668). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700.

Petitioner bears the heavy burden of establishing both prongs of the Strickland standard. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRPC. To prove deficient performance, the Petitioner must establish that, in light of all the circumstances, the acts or omissions complained of "fell below an objective standard of reasonableness" as measured by "prevailing professional norms." Strickland, 466 U.S. at 688. Reviewing courts should be deferential in this inquiry and apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

With respect to prejudice, the Petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Id. When evaluating this probability, the reviewing court "should consider the specific impact counsel's error had on the outcome of the trial" coupled with "the strength of the State's case in light of . . . the [totality of the] evidence presented to the jury." Smalls, 422 S.C. at 188, 810 S.E.2d at 843. Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696.

This Court has "repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing" in order to prevail on a claim of failure to call an expert witness. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); see also Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (finding no prejudice where witnesses applicant claimed could have provided an alibi

defense did not testify at the PCR hearing); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (finding no prejudice where applicant did not offer witnesses at PCR hearing but merely alleged witnesses would have provided him with alibi defense); Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (finding no prejudice from counsel's failure to investigate criminal backgrounds of witnesses where applicant failed to substantiate at PCR hearing that witnesses had criminal records); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial).

"Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for post-conviction relief." Bannister, 333 S.C. at 303, 509 S.E.2d at 809; see, e.g., Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (holding that "pure conjecture" as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different); Glover v. State, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995) (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden).

Here, Petitioner argues that the post-conviction relief court ignored the "any evidence" standard and that the post-conviction relief court ignored this Court's "long history" in affirming and denying post-conviction relief based on speculative testimony. (PWC pp. 11–13). Petitioner further argues that the record and testimony of Trial Counsel establish Trial Counsel was ineffective for failing to call experts. (PWC p. 13). However, the case law Petitioner relies on to support his claim that this Court has a "long history" in affirming and denying post-conviction relief based on speculative testimony is readily distinguishable from the case *sub judice*.

For example, in Martinez², this Court found counsel was ineffective for failing to subpoena a witness who likely could have substantiated an alibi claim. The distinction between this case and the Martinez case is that the alibi witness was not an expert witness. Furthermore, counsel in Martinez testified to having knowledge that the witness's testimony may have made a difference in the outcome of Martinez's trial. Here, Trial Counsel did not testify to the same; rather, Trial Counsel merely testified that expert witnesses could have been helpful and, in hindsight, she would now call an expert.

Petitioner also relies on Stokes³, a case in which a petitioner was charged with the murder of her husband, and at trial, her defense was that her husband committed suicide. Stokes was ultimately convicted of the murder of her husband. Stokes filed a post-conviction relief application claiming counsel was ineffective for failing to call witnesses who were available to testify and would have supported her defense. The distinction between Stokes and the case *sub judice* is that Stokes was not a case of speculative testimony; rather, counsel in Stokes provided testimony that the witnesses "vacillated when offering their recollections to him and presented no evidence that the husband actually committed suicide." Stokes, 308 S.C. at 548, 419 S.E.2d at 779. This starkly contrasts the testimony presented at Petitioner's post-conviction relief hearing, as there was no expert witness presented to testify, and Trial Counsel only testified that expert witnesses could have been helpful, and in hindsight, if she did the trial again, she would call expert witnesses.⁴

Next, Petitioner argues that the record and Trial Counsel's testimony that she did not know why she did not call expert witnesses "is not an articulable or valid trial strategy"; thus, Trial

² State v. Martinez, 304 S.C. 39, 403 S.E.2d 113 (1991).

³ State v. Stokes, 308 S.C. 546, 419 S.E.2d 778 (1992).

⁴ Petitioner also relies on Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) to support his position. For the sake of brevity, Respondent maintains that Butler is not a case that was decided on speculative testimony, and so it does not support Petitioner's conclusory argument.

Counsel "must be deemed ineffective." (PWC pp. 13–14). While Respondent does not concede that Trial Counsel's representation was deficient, a reasonable reading of the Order of Dismissal indicates that the post-conviction relief court likely dispensed with the reasonableness inquiry and focused on the prejudice prong. See Strickland, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

Turning to prejudice, Petitioner contends he was prejudiced by the failure to call expert witnesses because the evidence was not "conclusive or overwhelming," and the expert witnesses "could have extrapolated on the issues with the State's case" and "the jury would have acquitted Petitioner" (PWC p. 14). Petitioner's conclusory argument is wrought with speculation. While Trial Counsel did testify that, in hindsight, she would call expert witnesses to testify, there is nothing in the record as to how the testimony from expert witnesses would have or could have changed the outcome of Petitioner's trial. See Strickland, 466 U.S. at 689 (The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made.). Petitioner did not introduce any affidavits from experts and did not produce the testimony of experts; rather, Petitioner only presented the testimony of Trial Counsel that ostensibly indicated having expert testimony would have or could have helped without anything further of how it could have or would have changed the outcome of Petitioner's trial. Pure speculation, which is exactly what is before this Court, is insufficient to show a reasonable probability the result at trial would have been different. See Bannister, Clark, Glover, *supra*.

Furthermore, the record before this Court establishes that Petitioner failed to call the expert witnesses he deems would have changed the outcome of his trial to present their testimony to the

post-conviction relief court for its consideration. The only testimony provided was that Trial Counsel did not know why she did not call them and that they would have been helpful. Without more, the post-conviction relief court properly found that because Petitioner failed to present the expert witnesses to render testimony, Petitioner failed to prove any prejudice from Trial Counsel's alleged deficient performance. Therefore, this Court should deny certiorari.

II. The post-conviction relief court properly determined Petitioner failed to establish Trial Counsel's representation was deficient or the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to have a competency evaluation performed before trial where Petitioner failed to present any credible evidence that in fact he was incompetent at the time of his trial.

Next, Petitioner asserts the post-conviction relief court erred in finding that Trial Counsel's representation was constitutionally ineffective for failing to have a competency evaluation performed on Petitioner prior to trial. Specifically, Petitioner contends his testimony alone at the post-conviction relief hearing was sufficient to support a finding of deficient performance, and the prejudice is that if Trial Counsel had requested a Blair⁵ hearing, he would have been found incompetent to stand trial. However, the post-conviction relief court properly found Petitioner had failed in his burden where no independent evidence of incompetency was offered except for Petitioner's own self-serving testimony, which the post-conviction relief court found not credible.⁶

⁵ State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

⁶ In a footnote, Petitioner highlights that the credibility findings in the Order of Dismissal "can be inferred to be mostly the product of [Respondent's] evaluation and opinions of the case." (PWC p. 16). While Respondent did draft the proposed Order of Dismissal, an editable copy of the proposed order of dismissal was provided to post-conviction relief counsel due to the collaborative nature of drafting orders for the courts. Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). Upon review and changes, if post-conviction relief counsel deems changes necessary, the editable copy of the proposed order is submitted to the post-conviction relief court for consideration. The post-conviction relief court is not precluded from adopting the findings of fact and conclusions of law to include credibility findings.

Additionally, the post-conviction relief court found Trial Counsel's testimony credible, that she had no concerns about Applicant's competency based on her observations and meetings with Applicant. (App. pp. 899–901). Therefore, Petitioner failed to establish the requisite deficiency or prejudice necessary for relief—that he was, in fact, incompetent at the time of his trial. This Court should deny certiorari to this issue.

"Due process of law prohibits the conviction of a person who is mentally incompetent." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 595 (1992). An accused is competent to stand trial if he or she has sufficient capability to consult with his or her lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings. Id., 308 S.C. at 232, 417 S.E.2d at 596. "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he [or she] has the *ability* to understand the proceedings." Garren v. State, 423 S.C. 1, 14, 813 S.E.2d 704, 711 (2018) (quoting Godinez v. Moran, 509 U.S. 389 (1993)).

As to the deficiency prong under Strickland, an attorney may reasonably rely upon his or her own perceptions of a defendant in determining whether or not their client should be mentally evaluated. Jeter, 308 S.C. at 233, 417 S.E.2d at 596. When establishing Strickland prejudice in the context of counsel's failure to request a mental competency evaluation, the applicant need only show a reasonable probability that he was incompetent at the time of the original proceeding. Garren, 423 S.C. at 12, 813 S.E.2d at 710 (citing Ramirez v. State, 419 S.C. 14, 21, 795 S.E.2d 841, 845 (2017)). As is the case with any other allegation that a defense attorney failed to adequately investigate some matter, an applicant must present some proof of identifiable mental health issues that undermine his or her competency; mere speculation and conjecture by the applicant is insufficient to establish prejudice. Id., 423 S.C. at 13-14, 813 S.E.2d at 711.

Here, Petitioner contends that his testimony at the post-conviction relief hearing was sufficient to establish he was incompetent to stand trial. Petitioner further contends that the post-conviction relief court ignored the fact that a defendant must understand the process and what is occurring. However, Petitioner wholly glosses over the credibility findings of the post-conviction relief court and offers no basis to substantiate his claims other than his testimony, which the post-conviction relief court found not credible. See, e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."). Additionally, the post-conviction relief court found Trial Counsel's testimony credible that, based on her observations and interactions with Petitioner, she did not see any reason to have Petitioner evaluated. See Jeter, *supra*.

The post-conviction relief court properly found Petitioner failed to present any credible evidence that he was, in fact, incompetent at the time of his trial. Additionally, there is nothing in the record to support Petitioner's conjecture that had a Blair hearing been conducted, Petitioner would have been found incompetent to stand trial. Therefore, Petitioner failed to establish the requisite deficiency or prejudice necessary for relief—that the result of his proceeding would have been different but for Trial Counsel's failure to have a competency evaluation completed on Applicant. This Court should deny certiorari to this issue.

III. The post-conviction relief court properly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to prepare or advise Petitioner on testifying in his defense where the record provides the trial court conducted a thorough colloquy with Petitioner and Petitioner knowingly chose to assert his right to testify.

Next, Petitioner asserts the post-conviction relief court erred in finding that Trial Counsel's representation was not constitutionally ineffective for failing to advise him of his right to take the

stand and testify in his own defense. Specifically, Petitioner contends that his testimony indicates Trial Counsel met with him the night before he took the stand and did not explain the advantages and disadvantages of testifying, which "cannot be deemed reasonable professional judgment." (PWC p. 19). However, the post-conviction relief court properly found Petitioner had failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial where the trial court conducted a thorough colloquy with Petitioner and Petitioner knowingly chose to assert his right to testify. (App. pp. 904–905). Therefore, Petitioner failed to establish the requisite deficiency or prejudice necessary for relief—that the result of his proceeding would have been different but for Trial Counsel's failure to advise him of his right to take the stand and testify. This Court should deny certiorari to this issue.

"The right of a criminally accused to testify or not to testify is fundamental." State v. Riviera, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013) (citing Rock v. Arkansas, 483 U.S. 44, 52 (1987)). "[F]undamental to a personal defense ... is an accused's right to present his own version of the events in his own words." Id. "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." Id. (quoting Harris v. New York, 401 U.S. 222, 230 (1971)). "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). This right may be waived, and all that is necessary for a defendant to waive the right is to know that a right to testify exists. United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991).

Here, Petitioner asserts that "[Trial] 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."⁷ Petitioner goes on to argue, conclusively, that Trial Counsel did not prep Petitioner, and his version of events was crucial to his defense, so Petitioner was "undoubtedly prejudiced." Petitioner fails to provide any case law to support his position.

Contrary to Petitioner's conclusory arguments, the post-conviction relief court properly found "[Petitioner] was fully aware of his right to testify and the advantages and disadvantages of doing so . . ." where the "record reflects [Petitioner] engaged in a thorough colloquy with the trial court and knowingly chose to assert his right to testify." At trial, under oath, Petitioner affirmed that he had plenty of time to speak with Trial Counsel about his right to testify and that he understood the advantages and disadvantages. Petitioner affirmed, a second time, that he could appreciate and understand the advantages and disadvantages of testifying. (App. pp. 491–494).

Assuming, *arguendo*, that Trial Counsel met with Petitioner the night before trial to prep him for testimony, Petitioner failed to show how that was deficient or how he was prejudiced. Notably, Petitioner failed to present what defenses or further testimony Petitioner could have developed had he spent more time in preparation with Trial Counsel, which would have changed the outcome of his trial. Instead, Petitioner stands on his conclusory arguments and ignores the post-conviction relief court's findings from the record. This alone is insufficient to support a reversal of the post-conviction relief court's Order of Dismissal. This Court should deny certiorari to this issue.

⁷ Once again, Petitioner highlighted his mental health issues but brought no experts and had no evaluations done for the post-conviction relief court to consider.

IV. The post-conviction relief court properly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's advice to waive his stand-your-ground hearing where the record provides the trial court conducted a thorough colloquy with Petitioner and the only testimony provided at the post-conviction relief hearing was Petitioner's and the post-conviction relief court found his testimony not credible.

Next, Petitioner asserts the post-conviction relief court erred in finding that Trial Counsel's representation was not constitutionally ineffective for improperly advising Petitioner to waive his stand-your-ground hearing. Specifically, Petitioner contends that he would have succeeded at a stand-your-ground hearing because he was protecting his sister. However, the post-conviction relief court properly found the record did not support Petitioner's assertion that he would have been successful at a stand-your-ground hearing. (App. pp. 916–917). Notably, Petitioner wholly disregards Mahogany's testimony at trial, stating that Petitioner's actions were unprovoked and Petitioner cannot have brought the difficulty upon himself.⁸ (App. pp. 225–231). Based on his sister's testimony, Petitioner cannot establish the requisite deficiency or prejudice necessary for relief—that but for Trial Counsel's advice to waive his stand-your-ground hearing he would have been granted immunity. This Court should deny certiorari to this issue.

Protection of Persons and Property Act⁹ (the Act) provides the following:

(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 death or 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,

⁸ Petitioner's contention here that he would have been successful at a stand-your-ground hearing because he was protecting his sister is further diluted by his own testimony at the evidentiary hearing that his sister's version was that Petitioner was not supposed to be in the apartment, and she was telling the Assistant Solicitor that she wanted Petitioner to receive the maximum sentence for killing her husband. (App. p. 821–822).

⁹ S.C. Code Ann. § 16-11-410 to -450.

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 and 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, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder;
- (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 or to prevent the commission of a violent crime as defined in Section 16-1-60.

The General Assembly enacted the Act to 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. Moreover, the Act is predicated on the absence of aggression or fault on the defendant's part in bringing on the difficulty. State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), citing State v. Grantham, 224 S.C. 41, 45, 77 S.E.2d 291, 292 (1953). Notably, the Act is a procedural provision that "does not contain any substantive provisions of

law"; thus, it "is not relevant to the work of a jury." State v. Marin, 404 S.C. 615, 625, 745 S.E.2d 148, 154 (Ct. App. 2013). A defendant must establish four things in asserting self-defense:

- (1) the defendant must be without fault in bringing on the difficulty.
- (2) 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.
- (3) 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.
- (4) 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. If, however, the defendant was on his own premises, he had no duty to retreat before acting in self-defense.

A trial court must consider the elements of self-defense in determining whether a defendant is entitled to immunity. State v. Glenn, 429 S.C. 108, 118, 838 S.E.2d 491, 496 (2019), citing Curry, 406 S.C. at 371-72, 752 S.E.2d at 266-67.

Here, Petitioner contends that Trial Counsel's representation was constitutionally ineffective in advising him to waive his stand-your-ground hearing. Petitioner argues that he was protecting his sister and would have succeeded in a stand-your-ground hearing on that basis. However, Applicant ignores the evidence and testimony entered at trial that counters his very assertions. For instance, State's Exhibit 3 was Petitioner's statement to law enforcement where he details that his sister came at him and he shot her. (App. pp. 582–583). There was testimony at trial that Petitioner told law enforcement that he had no love for Mahogany and her husband was soft. (App. p. 556). There was testimony at trial regarding phone calls made by Petitioner from jail where Petitioner bragged about "catching a body" and how he "slumped" Mahogany's husband. (App. pp. 527–529). Furthermore, Petitioner fails to consider Mahogany's testimony at trial that Petitioner opened fire on her and her husband unprovoked. (App. p. 225–231).

Notably, these are witnesses who would likely have been called for the stand-your-ground hearing. It can be presumed that their testimony at the stand-your-ground hearing would have been the same as it was at trial. Any assertion by Petitioner that he would have been successful at a stand-your-ground hearing because he was protecting his sister is wholly unsupported by the record before this Court. Strikingly, it is only now that Petitioner claims he was protecting his sister when, during his testimony at trial, he testified that his sister was coming at him, and he shot her. (App. pp. 507–508). Petitioner cannot be protecting someone while also claiming he shot them because he feared for his life. Therefore, the post-conviction relief court properly determined that any contention by Petitioner that he would have been granted immunity at a stand-your-ground hearing is not supported by the record. This Court should deny certiorari to this issue.

V. The post-conviction relief court properly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to object to the trial court's one-word misstatement in its recharge to the jury on voluntary and involuntary manslaughter where the jury charge as a whole was correct.

Lastly, Petitioner asserts the post-conviction relief court erred in finding that Trial Counsel's representation was not constitutionally ineffective for failing to object to the trial court's single misstatement of involuntary instead of voluntary while re-charging the jurors on the law. However, the post-conviction relief court properly found Petitioner had failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to object to the trial court's one-word misstatement of involuntary in the last sentence of the voluntary manslaughter recharge where the jury charge as a whole was correct. Therefore, Petitioner failed to establish the requisite deficiency or prejudice necessary for relief—that the result of his proceeding would have been

different but for Trial Counsel's failure to object to the trial court's error during its recharging of voluntary and involuntary manslaughter. This Court should deny certiorari to this issue.

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). In reviewing a trial judge's jury instructions, the court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). "[A] charge is sufficient if, when considered as a whole, it covers the law applicable to the case." State v. Burton, 302 S.C. 494, 498, 397 S.E.2d 90, 92 (1990) (citing State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980)). If the charge "is substantially correct and covers the law [it] does not require reversal." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (citing State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996)).

At trial, the trial court received a note asking for clarification on the difference between voluntary and involuntary manslaughter. (App. pp. 690–691). On recharging the jury, the trial court charged the following:

Voluntary manslaughter is defined as the unlawful killing of another human being which is committed in a sudden heat of passion provoked by a sufficient legal provocation. The law recognizes that a sudden heat of passion arising out of exasperation, rage, anger, sudden resentment, fear or terror, may for the time being affect the self-control of an individual temporarily disturbing the ability to properly reason creating an uncontrollable impulse to do violence and, therefore, reduces the crime from that of murder to that of voluntary manslaughter provided that the sudden heat of passion arose from a sufficient legal provocation. The sudden heat of passion aroused by sufficient legal provocation which may reduce an unlawful homicide from that of murder to that of manslaughter need not be something which dethrones reason entirely or shuts out knowledge or volition, but it must be such heat of passion provoked by such facts or circumstances as would naturally disturb the ability of an ordinary, reasonable and prudent person to properly reason rendering his mind enable of cool reflection and reducing what according to human experience may be described as an uncontrollable impulse to do violence. Therefore, as stated, **involuntary manslaughter** is an unlawful homicide committed in the absence of malice, but in a sudden heat of passion, aroused by a sufficient legal provocation.

Involuntary manslaughter is defined as the unintentional killing of another person without malice while engaged in a lawful activity with a reckless disregard for the safety of others. Unintentional means that the Defendant was acting without malice and did not intend to kill or seriously injure anyone, but acted recklessly in the handling of a dangerous instrumentality which resulted in the death or injury to some other person. A reckless disregard for the safety of others and recklessness refers to a state of mind in which a person consciously acts notwithstanding knowledge that his conduct creates a risk to the safety of another person. Before the Defendant can be found guilty of involuntary manslaughter, it would be necessary that the evidence establishes to your satisfaction beyond a reasonable doubt that the Defendant without malice unintentionally killed another person while he was engaged in a lawful activity, but with a reckless disregard for the safety of others.

(App. pp. 691–692) (emphasis added).

Applicant contends this one-word misstatement and Trial Counsel's failure to object rises to the requisite level of deficiency and prejudice to grant Petitioner a new trial. However, when reviewing the jury recharge as a whole, it is clear that the trial court is charging voluntary manslaughter, and the insertion of involuntary at the end of voluntary was a misstatement. See Render v. State, 288 Ga. 420, 704 S.E.2d 767 (2011) (citing Arthur v. Walker, 285 Ga. 578, 579–580, 679 S.E.2d 13 (2009) ("[A]s a general rule, the existence of a mere verbal inaccuracy in a jury instruction, resulting from a palpable 'slip of the tongue' and which could not have misled or confused the jury will not provide a basis for reversal of a defendant's conviction."). Also, when the jury charge is considered as a whole, the instruction is free of error except for the isolated one-word misstatement. See Mattison, *supra*.

Furthermore, Trial Counsel's error is reviewed under an objective standard of reasonableness—that no reasonable attorney would have failed to object to the one-word misstatement. Petitioner has not shown that. Rather, Petitioner highlights the trial court's slip of the tongue and then argues conclusively that Trial Counsel's failure to object was deficient and prejudicial. Nonetheless, Petitioner has failed to show that no reasonable attorney would have

missed the trial court's slip of the tongue. In fact, neither Trial Counsel, co-counsel, or the Assistant Solicitors took exception to the recharge.¹⁰ (App. p. 693).

The post-conviction relief court properly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to object to the trial court's one-word misstatement in its recharge to the jury on voluntary and involuntary manslaughter where the jury charge as a whole was correct. This Court should deny certiorari to this issue.

CONCLUSION

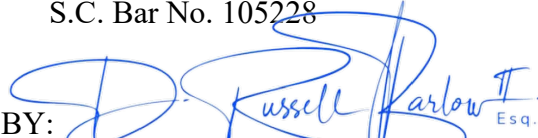
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the post-conviction relief court's denial of relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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¹⁰ Notably, from the record, three Assistant Solicitors prosecuted the case, and Petitioner was represented by three Assistant Public Defenders. Assuming all were present for the jury recharge, that would be six attorneys who took no exception to the jury recharge. (App. p. 1).