RECEIVED
May 07 2025
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON PETITION FOR CERTIORARI FROM THE COURT OF APPEALS
Appeal from Richland County

Robert E. Hood, Trial Judge
Brian M. Gibbons, Post-Conviction Relief Judge

Appellate Case No. 2025-000654

HOLLY JO THOMPSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

DANIELLE DIXON
Assistant Attorney General

BRIAN H. GIBBS
Assistant Attorney General
S.C. Bar No. 104137

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Phone: 803-734-3727

Attorneys for Respondent

TABLE OF CONTENTS

PETITIONER'S QUESTION PRESENTED

"Whether the Court of Appeals erred in finding that trial counsel was not ineffective for failing to pursue immunity under the Protection of Persons and Property Act where the Court determined that an open question remains as to whether a person can invoke immunity under the Act when the person was a social guest and used force against an attacker in the attacker's home?"

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, a 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 Senior 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 June 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, the PCR court 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 the Court of Appeals, which granted certiorari on August 18, 2023. On December

3, 2024, the Court of Appeals heard oral arguments in this case, and on January 23, 2025, the Court of Appeals issued an opinion affirming the PCR court's order denying relief. *See Thompson v. State*, 2025-UP-017 (S.C. Ct. App. filed Jan. 23, 2025). On February 5, 2025, Petitioner filed a petition for rehearing, which the Court of Appeals denied on March 6, 2025.

On April 7, 2025, Petitioner filed a timely petition for writ of certiorari with this Court.

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, a 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, 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 her. (App. 530, 535). Petitioner stated that they were in the living room and that 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 her[1] 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

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

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 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. (App. 758). The trial court sentenced her to forty-five years' imprisonment. (App. 773).

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 that Victim had accused her of stealing crack cocaine and attacked her with a weapon and that 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. (App. 856-58). Based on its deficiency finding, the PCR court did not evaluate prejudice. (App. 856-58).

Court of Appeals Opinion

The Court of Appeals affirmed the PCR court's dismissal, holding that trial counsel's performance was not deficient because "at the time of trial, and even now, an open question remains as to whether a person can invoke immunity under the Act when the person was a social guest and used force against an attacker in the attacker's home." *Thompson v. State*, 2025-UP-017 at 4-5. The Court of Appeals stated that trial counsel could not be deficient for "failing to pursue a course of action that would require expanding existing precedent and testing unproven theories of law." *Id*. at 5. Like the PCR court, the Court of Appeals did not reach prejudice due to its holding that trial counsel's performance was not deficient. *Id*.

This appeal followed.

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

I. The Court of Appeals correctly held that trial counsel was not ineffective for failing to request a pretrial immunity hearing.

Here, 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[2] (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 [to] be shielded from trial if they use deadly force

[2] S.C. Code Ann. §§ 16-11-410 to -450.

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. As this Court has previously stated, 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 forcibly 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, which makes it not reasonably likely that 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] The *Strickland* standard of prejudice requires a court to find that but for an alleged deficiency, there is 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?" *See 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)).

Although credibility is generally best assessed by a trial court, here, where Petitioner's

[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.

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*, an 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.[4]

At trial, Petitioner admitted she was at Victim's home smoking crack and attempting to 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 his 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 toward the living

[4] 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, the *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.

room. 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 it unlikely that a trial court would have found her testimony credible. The State acknowledges that conflicting evidence *alone* is not reason to deny immunity; however, due to the stark contrast between Petitioner's testimony and the forensic evidence, it is not reasonably likely that a judge would find her testimony credible. Likewise, it is not reasonably likely a circuit court judge would have found that Petitioner's testimony established by a preponderance of the evidence 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 the 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.[5] 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. § 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. 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]

[5] 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).

person who **is not engaged in unlawful activity**" has no duty to retreat in certain circumstances (emphasis added)).

To the extent that a trial court would need to perform a proximate cause analysis to determine whether the unlawful activity was the proximate cause of the incident, Petitioner's trial testimony provides such a proximate cause. *See Glenn*, 429 S.C. at 120-21, 838 S.E.2d at 497-98 ("[W]e find a proximate cause analysis must also be applied to the unlawful activity element of subsection (C)."). Petitioner testified that she went to Victim's residence to engage in prostitution and smoke crack cocaine with him; however, according to Petitioner, Victim became enraged when he could not sexually perform after smoking crack cocaine. (App. 522-38). Further, instead of leaving the home when, according to her, Victim attempted to attack her, Petitioner went back for her crack pipe, which was more important to her than escaping from an allegedly enraged attacker. (App. 522-38). Therefore, the State could show beyond a reasonable doubt that the illegal activities Petitioner was engaged in were a proximate cause of the incident, which would bar the application of subsection (C) to Petitioner's claim of self-defense. *See generally State v. Goodson*, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1994) ("[T]he burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide.").

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.

The State 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, trial counsel testified, "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). 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 her 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.").

Any argument that if there had been some affirmative decision to forego a hearing and focus on self-defense, then trial counsel was still required to articulate a valid reason for *not* pursuing immunity under the Act 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 trial 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.[6] *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).

C. Trial counsel cannot be deficient for failing to pursue a course of action that would require expanding existing precedent and testing unproven theories of law.

The Court of Appeals held that trial counsel's performance was not deficient because "an open question remains as to whether a person can invoke immunity under the Act when the person was a social guest and used force against an attacker in the attacker's home." *See Thompson*, 2025-UP-017 at 4-5. As the Court of Appeals noted, both the State and Petitioner conceded at oral argument that South Carolina is without case law to support or reject the application of the Act to a social guest who uses force against a homeowner in the homeowner's home. *Id*. at 5 n.2.

This Court need not determine whether the Act applies in such a fashion due to Petitioner's illegal acts leading up to Victim's death, which would preclude a finding of self-defense at an immunity hearing as discussed above. However, the Court of Appeals' determination is another avenue for affirming the PCR court's denial of PCR, given the parties' concession from oral argument that there is an open question about the applicability of the Act in the specific circumstance of a social guest being attacked in the attacker's home. *See Strickland*, 466 U.S. at 690 ("[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."); *Robinson v. State*, 308 S.C. 74, 78, 417 S.E.2d 88, 91 (1992) (holding that trial counsel was not ineffective for failing to request a charge on battered woman's syndrome when the theory was not well known at the time and had

[6] 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.

not been recognized by our supreme court as relevant to a claim of self-defense); *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial."), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 351 n.4, 520 S.E.2d 614, 615 n.4 (1999); *Arnette v. State*, 306 S.C. 556, 557-58, 413 S.E.2d 803, 804 (1992) (holding trial counsel provided effective assistance although he failed to consider the defense of accident because there was no evidence that the defense could be applied to the applicant); *Winkler v. State*, 418 S.C. 643, 653-54, 795 S.E.2d 686, 692 (2016) (holding that trial counsel was not deficient for failing to object to the trial court's decision not to answer the jury's questions because then-existing case law interpreting the relevant statute did not provide any support for trial counsel making such an objection); *State v. Moussa*, 53 A.3d 630, 637 (N.H. 2012) ("An attorney is not obligated to pursue weak options when it appears, in light of informed professional judgment, that a defense is implausible or insubstantial." (quoting *United States v. Woodard*, 291 F.3d 95, 108 (1st Cir. 2002))); *Esprit v. State*, 826 S.E.2d 7, 15 (Ga. 2019) ("A criminal defense attorney does not perform deficiently when he fails to advance a legal theory that would require 'an extension of existing precedents and the adoption of an unproven theory of law.'" (quoting *Williams v. State*, 818 S.E.2d 653 (Ga. 2018))).

[*conclusion and signature block on following page*]

CONCLUSION

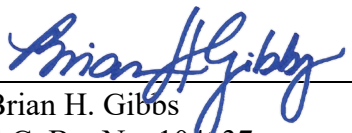
Based on the foregoing, the PCR court correctly determined that Petitioner failed to show that trial counsel and appellate counsel provided constitutionally ineffective assistance. Therefore, this Court should deny Petitioner's Petition for Writ of Certiorari.

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

DANIELLE DIXON
Assistant Attorney General

BRIAN H. GIBBS
Assistant Attorney General

By: 
Brian H. Gibbs
S.C. Bar No. 104137

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
803-734-3727

Attorneys for Respondent

May 7, 2025
Columbia, South Carolina