STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Appellate Case No. 2014-000381

Fred R. Rutland, ... Petitioner,

v.

STATE OF SOUTH CAROLINA, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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2. Is the grant of Certiorari necessary to review whether probative evidence supports the PCR Judge's finding that Petitioner failed to prove that counsel was ineffective for failing to question a State's witness on her observations of the victim's conduct prior to his murder solely reliant upon recanted and perjured testimony?

3. Is the grant of Certiorari necessary to review whether the PCR Judge made the correctly finding that Petitioner failed to prove that counsel was ineffective for failing to properly preserve the denial of his request to charged defense of another for appellate review because the evidence did not support the charge?

STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case

SUMMARY OT THE STATE'S EVIDENCE PRESENTED AT TRIAL

At the time of his death, Mr. Jimmy Peele (the victim) lived at 234 Sandra Drive in Pelion, South Carolina. He had separated from his wife, Sally Peele, who had left him for Defendant. Mrs. Peele, a carpenter on construction crews for approximately fifteen years, had physically abused her husband throughout their marriage. She would also pick fights with other women. There was absolutely no evidence presented through the State's witnesses that the victim physically abused his wife. App.pp.201-03; pp.205-13; pp.232-35; pp.245-46; pp.290-91; p.293.

Petitioner and Mrs. Peele went to a local pawn shop shortly after 9:00 A.M. on Friday, September 4, 1992, and she purchased a 12-gauge shotgun that her husband had previously pawned (**State's Exhibit 19**) and a .25 caliber semi-automatic pistol (**State's Exhibit 12**). She also purchased ammunition for both weapons. The lovers left the store at 9:44 A.M. App.pp.265-73.

Petitioner and Mrs. Peele later went to the victim's residence. They were unaware that Mr. Bruce Sharpe, the victim's friend and neighbor, was also at the residence. Sharpe testified that he and the victim were preparing to smoke a joint shortly after 10:30 A.M. when they were interrupted by Mrs. Peele. She came into the house and pointed the .25 caliber semi-automatic pistol at the victim. He turned around and said, "Go ahead shoot me, bitch." (The victim had not previously told Mr. Sharpe that Mrs. Peele would be coming over to the house that morning). With this, Mrs. Peele backed out of the doorway and out of the house. Although unarmed, the victim followed her outside. App.pp.244-46; pp.247-51; pp.254-57; pp.274-63.

As soon as the victim walked outside, Petitioner jumped out of the van. He was armed with the 12-gauge shotgun. Petitioner immediately ran up to the victim and pointed the weapon at him. The victim went back inside briefly and told Mr. Sharpe that he better leave. Mr. Sharpe went outside and tried to leave, but could not because the van was blocking in his car. So, he watched his friend and Petitioner argue for several minutes. During the argument, Petitioner fired the shotgun into the air. He then pointed the gun at the victim again. Shortly after this, Mr. Sharpe left the residence. He denied that the victim had been looking for trouble on the morning of September 4, or that the victim had been armed. App.pp.250-55; pp.258-63.

Following this incident, the victim made a frantic 911 call. However, Petitioner and Mrs. Peele went to the house of Robbin Hunt (Mrs. Hunt) a woman who had been driving them around in her van that morning. Shortly after 12:00 P.M., Mrs. Peele telephoned a person whom she addressed as "Jimmy." She told "Jimmy" to meet her at the Bow-Wow Boutique in approximately forty-five minutes. From the names used in the conversation Mrs. Hunt inferred that the person to whom Mrs. Peele had been speaking was the victim. App.pp.475-85; **State's Exhibit 22**.

Petitioner and Mrs. Peele went to the Bow-Wow Boutique between 1:15 P.M. and 1:20 P.M. that day. They ostensibly inquired about whether or not Kim Kestner, a store employee, would sell her car to them. The Kestners were the only people present when Petitioner and Mrs. Peele arrived. After the Kestners agreed to sell the vehicle, Mr. Kestner went outside to look for the title. App.pp.99-104; pp.109-12; pp.117-25.

Roughly five minutes after Mr. Kestner went outside, the victim entered the store.

Mrs. Peele was making a telephone call in the middle section of the store when he entered. Mrs. Kestner was grooming a dog in the middle section of the store. Petitioner was standing in the doorway which leads to the front of the building. From this vantage point, Petitioner could clearly see the victim before he entered the building. App.pp.101-04; p.134.

Although Petitioner could easily have left, he made no effort to do so. Instead, he reached behind his back as soon as the victim entered the store. The victim, who did not have anything in his hand, made a similar motion. Then, Mrs. Peele screamed, "Oh, God," and Petitioner shot the victim four times. Even after the victim fell to the floor, he did not have a gun in his right hand. Mrs. Kestner then dialed 911. App.pp.104-05; pp.112-15; pp.128-33; pp.136-37; pp.145-46; pp.150-51.

Sgt. Chris Garner, of the Lexington County Sheriff's Department, arrived at the store several minutes later. He saw the victim's car and the van Petitioner had been driving parked on either side of the store. He also saw Mr. Kestner standing near the store. Mr. Kestner told him that the person who had been shot was in the building. Inside, Sgt. Garner found the .25 caliber semi-automatic pistol that Petitioner had used to shoot the victim (**State's Exhibit 12**). He also found a 9 mm. pistol laying on the floor some distance away from the victim (**State's Exhibit 13**). As soon as Sgt. Garner entered the building, Petitioner told him, "I shot him, I'm sorry, please help him." Petitioner was then arrested. He later gave several statements which were introduced against him at trial. App.pp.87-94; pp.97-98; pp.175-95; pp.215-16.

Ballistics testing on **State's Exhibit 12** revealed that the four bullets which killed

the victim were fired by this weapon. App.pp.152-59. Also, the safety on the 9 mm. pistol (**State's Exhibit 13**) was on at the time of the shooting. App.pp.87-91; pp.97-98. In **State's Exhibit 3**, Petitioner claimed that he met Mrs. Peele approximately six months before the shooting. He also claimed that she was afraid of her husband because her husband was allegedly abusing her. So, Petitioner came to Lexington County in order to help her get away from her husband. He admitted that Mrs. Peele and he spent the previous night in a local motel, and that they had bought both the shotgun and a .25 caliber semi-automatic pistol at a pawn shop early in the morning. They went to the Bow-Wow Boutique to buy a car from one of Mrs. Peele's co-workers. He claimed that he had carried the pistol into the shop and pulled it out when he saw the victim coming to the front door. He then allegedly shot the victim in self-defense, as the victim had tried to shoot him. However, he failed to mention the earlier confrontation with the victim at the victim's residence. App.pp.196-214; **State's Exhibit 3**; **State's Exhibit 7**.

Although Det. Frier investigated Petitioner's claim that the victim allegedly abused his wife, he did not find any evidence to support this. Det. Frier also discovered that Petitioner had failed to mention the incident occurring early on the morning of September 4. Therefore, he went back and took another statement from Petitioner on September 7. App.p.205-13; pp.232-35 (**State's Exhibit 9**).

After giving the written statement, Petitioner made an oral argument which he refused to allow to be reduced to writing. When asked whether Mrs. Peele and he had ever discussed plans to murder her husband he admitted that they had such a discussion approximately a month before the murder. However, Mrs. Peele had persuaded him not

to do so. He also admitted that he had spoken with an unidentified co-worker, while working down in Charleston, about having the victim murdered. App.pp.213-14.

The prosecution also presented Mr. David Jones, who had been Petitioner's cellmate following his arrest. The men discussed the murder of Mr. Peele over the course of five or six days. Petitioner initially told Mr. Jones only that he had killed a man. He later told Mr. Jones that the victim deserved it and that he had offered to do the killing approximately a month earlier. He also told Mr. Jones that the victim "wasn't worth a damn." Petitioner showed absolutely no remorse in these conversations. To the contrary, he was cocky and arrogant, almost boasting about what he had done: "He had killed Mr. Peele and he was going to run off with Mr. Peele's wife." With respect to the facts of the murder, Petitioner said they had purchased the .25 caliber pistol on the morning of the murder and had gone to the Bow-Wow Boutique because "we knew he would be there." App.pp.486-91.

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I.

Certiorari is not warranted to review whether the PCR Judge made a sound finding that Petitioner failed to meet his burden to prove counsel's performance was ineffective for not utilizing a purported prior inconsistent statement to impeach a State's witness where Petitioner merely presented evidence that at best established ambiguity on whether the witnesses' prior statement constituted an inconsistent statement in light of her trial testimony.

At the PCR hearing, Petitioner argued counsel was ineffective in failing to utilize State witness, Kimberly Kestner's, purported prior inconsistent statements during his cross-examination of the witness. Petitioner presented Mrs. Kestner's September 4, 1992 statement in support of the allegation. **See Applicant's Exhibit 1**. App.p.821.

Counsel testified to his course of conduct on the matter. In addition, Assistant Solicitor Riddle testified to his involvement in prosecuting Applicant's case. He noted that Mrs. Kestner testified in manner consistent with his pre-trial interview with the witness; but noted possible ambiguity on whether Mrs. Kestner's trial testimony comported with her prior statements on the matter. App.pp.769-96. He was adamant that Assistant Solicitor McMahon[1] disclosed all discovery material in a timely and ethical manner. App.p.798. Riddle disputed Petitioner's interpretation of the Mrs. Kestner's statement in stating, "No, ma'am, the conclusion that I take is that -- you're drawing, is that Mr. Peele (the victim) walks in with gun in his hand then [Petitioner] pulls the gun and defends himself and I don't think that's what this statement said." App.p.802, ln. 6-

[1] The Honorable R. Knox McMahon.

10.

In denying Petitioner's application for post-conviction relief, the PCR judge found "[Petitioner] has not carried his burden of establishing prejudice in that he failed to present Kestner's testimony at the PCR hearing... [w]ithout presenting Kestner's testimony, [Petitioner] leaves this Court to speculate as to the impact the proposed impeachment of Kestner would have had at [Petitioner]'s trial." App.p.839.

Effective Assistance of Counsel

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The right to cross-examination is guaranteed by Davis v. Alaska, 415 U.S. 308, 316 (1974). Although cross-examination may not have been as effective as hoped, flawless cross-examination is rare. Sherron v. Norris, 69 F.3d 285, 290-91 (8th Cir. 1995). "A PCR applicant cannot show that he was prejudiced by counsel's failure to call a

favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)); see also U.S. v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995) (failure to show what further cross-examination would produce and how it would affect the result). An ambiguous or silent record cannot disprove the strong and continuous presumption of competence. Chandler v. U.S., 218 F.3d 1305, 1314 n. 15 (11th Cir. 2000) (en banc).

Discussion

Ample probative evidence supports the PCR Judge's finding that Petitioner failed to meet his burden to prove Strickland's prejudice prong where the allegation was solely reliant upon speculative ambiguity between Mrs. Kestner's statement, **Applicant's Exhibit** 1, and her trial testimony. At trial, Mrs. Kestner testified that a partial partition blocked her view of the victim's hands when he entered the boutique. App.pp.131-33. She noted Petitioner first reached to the back of his pants to grab an object which triggered the victim to follow suit. App.p.134.Upon hearing shots, she ducked for cover. App.p.134. Emergency dispatch instructed her to tell Petitioner to put down his pistol. App.p.150. Mrs. Kestner definitively realized the victim was also armed after he was murdered. App.p.150. In comparison, Mrs. Kestner's statement, in relevant part, simply states, "There was a guy in the boutique with [Mrs. Peele]. [The victim] came in. He reached behind him and pulled a gun. I heard 2 [sic] and [the victim] fell." **See Applicant's Exhibit 1** (emphasis added). The indefinite pronoun "he" is facially vague.

Alternatively, any possible deficiency here constituted harmless error in light of the overwhelming evidence of guilt in addition to Petitioner's trial testimony. Petitioner testified he reached for the pistol soon after the victim entered the boutique. App.pp.461-62. In pertinent part:

> McMahon: You've already got your pistol out don't you, Mr. Rutland?
> Petitioner: Yes.
>
> ***
>
> McMahon: You cannot see a weapon in his hand at all. Can You? Right now.
> Petitioner: I can't see his hand either.

App.p.464, ln. 22—p.465, ln. 2. By Petitioner's account, he was the aggressor and brandished his pistol prior to having to the opportunity to observe whether the victim was in fact armed for the occasion. Furthermore, Petitioner's trial testimony undercut the import of Mrs. Kestner's testimony either the defense's case or the State's case. He testified that at trial that he and Mrs. Peele moved to the other side of the room to confront the victim while Mrs. Kestner remained at her station and continued to groom the Chow puppy throughout the fatal incident. App.p.400, ln 1-3; p.402, ln. 9—p.403, ln. 8. In pertinent part she testified:

> Counsel: And where was [Mrs. Kestner] at this time?
> Petitioner: She was -- well, this is her table but it <u>was way back in here</u>. She was back in here.[2]

App.p.403, ln.12-14 (emphasis added). Accordingly, Petitioner failed to prove the second prong of <u>Strickland</u> – that he was prejudiced by counsel's performance.

II.

Certiorari is inappropriate where the PCR Judge made the correct credibility finding concerning recanted testimony from a State's witness that constituted perjured, contradictory, and biased testimony that discredited the allegation that counsel's performance was ineffective for failing to question the witness on matters concerning the victim's conduct.

At the PCR hearing, Petitioner argued counsel was ineffective in failing to question State's witness Robin Lankford (Mrs. Hunt) on her observations of the victim's purported violent conduct against her and Mrs. Peele on the days prior to his murder. Mrs. Hunt testified at the PCR hearing that she was never 100% certain if her trial testimony concerning Mrs. Peele's phone conversation to the victim where she instructed the victim to meet at boutique was accurate. App.p.775. She further testified on other speculative and uncorroborated matters. Again, counsel testified to his course of conduct on the matter. App.p.776; p.778; p.780. Riddle adamantly refuted the allegation of witness intimidation. App.pp.795-97.

In denying Petitioner's application for post-conviction relief, the PCR judge found Mrs. Hunt lacked credibility. The PCR Judge specifically noted "[Petitioner] has failed to show his defense suffered because of the lack of this non-credible and biased testimony." App.p.841.

S.C. Code § 17-27-80.

"The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing." S.C. Code Ann. §

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[2] Trial testimony references **State's Exh 1**. App.p.396.

17-27-80. "The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. This order is a final judgment." § 17-27-80. "This Court will uphold the findings of the PCR court when 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." Lomax v. State, 379, S.C. 93, 101, 665 S.E.2d 164, 168 (2008). "The PCR court's findings on matters of credibility are given great deference by this Court." Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (internal citation omitted); see also Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993).

Discussion

Ample probative evidence supports the PCR Judge's finding that Mrs. Hunt's PCR testimony was biased and non-credible. Mrs. Hunts offered testimony at the PCR testimony that was categorically inconsistent and contradictory. First, she testified that "[the victim] had been attacking [Mrs. Peele] and chasing her around and also had come after me; that [Petitioner and Mrs. Peele] purchased the pistol for [Mrs. Peele]'s protection because [the victim] had been make threats [sic] toward her and he had also made threats and [sic] come after me;" last she testified that two days prior to the victim's murder, he threatened to kill her and attempted to assault her with his vehicle. App.p.773, ln.11-12; ln.17-22; ln. 23-25; p.774, ln.4-10. Yet, despite enduring the victim's purportedly monstrous and terrifying conduct, Mrs. Hunt subsequently testified that she shared a warm conversation with the victim just hours prior to his murder; a conversation most consistent with an intimate and cherished long-standing friendship. Mrs. Hunt testified in pertinent part: "I talked to [the victim] that morning before he came up and he

indicated to me that he was on the coast and I told him, I said [the victim and Mrs. Peele] need to sit down and talk about this. This has gotten completely out of hand. I've known both of y'all for a long time. You just need to sit down and talk." App.p.780, ln.15-20 (emphasis added). Continuing on the incredible revisionist sentiment, Mrs. Hunt testified "[Petitioner] said he wasn't going to kill [the victim], [Petitioner] just would have crippled him had [the victim] continued to come after them." App.p.783, ln. 23-25 (emphasis added).

Furthermore, the PCR Judge made a sound finding on Mrs. Hunt's bias that was supported in numerous instances in her PCR testimony. Mrs. Hunt testified that she provided the surety bond for Petitioner after his arrest for murder. App.p.779-80. She further arranged for counsel's representation on Petitioner's case; even counsel testified that she was heavily involved in the defense.

Notably, Mrs. Hunt displayed her familiarity and adeptness to the legal process, indicative of an experienced paralegal, when she testified, "I was never 100 percent sure about [observation of Mrs. Peele's phone call to the victim that set up his murder] – but I was told that I could not say I was not 100 percent sure about it, so I didn't. I trusted [counsel] to cross-examine me about it so I could offer into evidence that I was unsure about it." App.p.775, ln.17-21 (emphasis added). Notably distinct from the admission concerning her intent to commit nuanced perjury, Petitioner previously presented Mrs. Hunt's purported affidavit in support of his post-trial Rule 29 Motion where she projects herself in a strikingly different posture. App.pp.620-45; pp.657-62. In pertinent part:

> a. that on the day of [Mrs. Hunt]'s testimony affiant was under the influence of prescription medication, Prozac, and as a result was unable to

think clearly;

f. that as noted in the 10/26/92 transcription of the 10/23/92 taped statement affiant gave LCSD Sgt. Harris, both some months prior to and during the time of 09/04/92, affiant was taking Prozac on a daily basis and that affiant is informed and believes that this medication so affected her memory that throughout this period of time she could not precisely correlate events with the given dates in which they occurred.

App.p.658; p.659 (emphasis added). She further perjured herself in stating, "affiant is informed and believes that the only telephone call she is certain [Mrs. Peele] made from affiant's home on 09/04/92 was on [Mrs. Peele] made to the school where her daughter was enrolled." App.p.660.

Respondent submits that not only did the PCR Judge make a sound credibility finding here, it was the correct ruling. In the interest of judicial economy, Respondent submits that further discussion is unnecessary. Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

III.

Certiorari is unwarranted where the PCR Judge correctly found that Petitioner failed to meet his burden to prove counsel was ineffective for failing to preserve a request to charge defense of another for appellate review where charge was unsupported by the evidence presented at trial.

At the PCR hearing, Petitioner alleged counsel was ineffective for failing to properly preserve the Trial Judge's rejection the request to charge defense of another for appellate review. In denying Petitioner's application for post-conviction relief, the PCR Judge rejected the efficacy of Petitioner's argument and found a defense of another charge was inappropriate in Petitioner's case. App.p.842.

Effective Assistance of Counsel

"This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). Failure to request particular instructions is not ineffectiveness where those given by the court are adequate, Campbell v. U.S., 364 F.3d 727, 733 (6th Cir. 2004). And instructions need not be requested that are inconsistent with the trial theory. (Butcher v. Marquez, 758 F.2d 373, 376-77 (9th Cir. 1985)). "A defendant is entitled to a defense of another charge only where there is evidence he was lawfully defending another person, i.e., the other person would have had the right to take decedent's life in self-defense." Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1980)

The law to be charged is determined by the evidence presented at trial. State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). In determining whether a defendant was

prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution. Todd v. State, 355 S.C. 396, 399, 585 S.E.2d 305, 306 (2003). In order to establish self-defense the defendant must establish the following elements:

> 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 to save himself from serious bodily harm or losing his own life, and; 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.

Goodson, 312 S.C. at 280, 440 S.E.2d at 372. The principle difference between defense of another and self-defense is that, in addition, the defendant must also establish that the person he assisted would have been entitled to use the same degree of force in his or her own defense. State v. Francis, 152 S.C. 17, 149 S.E. 348 (1929).

Discussion

The PCR Judge correctly assessed that Petitioner's case did not support an instruction on defense of another. Cleary, the State's evidence tended to prove that Petitioner murdered the victim; he killed Mr. Peele with malice aforethought, as the result of a preconceived plan. This evidence obviously would not support a jury instruction since the State's evidence reasonably tended to prove that Petitioner and Mrs. Peele were

at fault in bringing on the difficulty; that Mrs. Peele lured her husband to the boutique, where Petitioner was lying in wait; and, that Petitioner shot the victim before he had a chance to defend himself.

Likewise, the evidence presented by Petitioner did not support a charge on defense of another, separate and distinct from the self-defense charge that was given. His evidence reasonably tended to show that on September 4, 1992, he wanted to help Mrs. Peele leave her husband and Lexington County. However, neither one of them owned a car and both were in need of transportation. When they arrived at the boutique to purchase a vehicle from Mrs. Kestner, Petitioner carried a .25 caliber pistol into the store because the victim had purportedly threatened his life several hours earlier.

Petitioner immediately first observed the victim outside of the boutique. He immediately walked into the middle section of the store and warned Mrs. Peele that her husband was there. Petitioner testified that Mr. Peele approached directed his attention first towards Mrs. Peele, loaded his piston, then pointed at her stomach. Mrs. Peele exhibited her imminent fear by walking closer to her husband. Petitioner noted that as soon as he saw the victim display his weapon, Petitioner engaged in brinkmanship and pointed his pistol in the victim's direction. According to Petitioner, Mr. Peele redirected his aim towards him after Petitioner pleaded with him to stand down. Mrs. Peele initially attempted to step between the two men, but abruptly stopped when Petitioner shot the victim under the mistaken belief that the victim had pulled the trigger on his weapon. After shooting the victim in his side, Petitioner fired three kill shots under the same mistaken belief.

First, Petitioner testified he carried the weapon into the boutique because of Mr. Peele's purported threats on his life. He initially intervened on Mrs. Peele's behalf when the victim accosted her. However, he did not shoot the victim until he thought his own life was in danger. Compare Hewitt, 205 S.C. 207, 31 S.E.2d at 257 (1944) (The Court found that in Hewitt there was two incidents, separated by fifteen minutes; on the first occasion, the defendant was acting in defense of his wife and not himself; but, in the second incident, he was acting only in self-defense). Unlike the situation before this Court in Hewitt, there was only one incident here, and Petitioner did not shoot until after the victim allegedly tried to shoot him. Id. Thus, under the unique circumstances presented in this case, the decision to charge on self-defense was sufficient and there was no error. See State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989); Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992).

Alternatively, Mrs. Peele would not have had the right to kill her husband in self-defense at the time of the shooting, since she could not meet all four of the elements to establish self-defense. See Goodson, 312 S.C. at 280, 440 S.E.2d at 372. First, her husband was pointing his weapon at Petitioner when the shooting occurred. Obviously, Mrs. Peele was no longer in either actual or apparent immediate danger of losing her life or sustaining bodily injury, thus expiring her right to use lethal force. The mere fact that the victim had previously pointed his gun on her would not give her the right to use lethal force against him. See State v. Bodie, 33 S.C. 117, 11 S.E. 624 (1890). Second, the only evidence presented at trial was that Mrs. Peele was at fault in bringing on the difficulty because she initiated the original encounter at the marital home. She admitted that she

had drawn the .25 caliber pistol on her unarmed husband; the spark that initiated the conflict. Thus, her undisputed fault in in bringing on the subsequent difficultly at the boutique precluded the right to then use lethal force against the victim. See State v. Strickland, 147 S.C. 514, 145 S.E. 404 (1928). Last, Mrs. Peele's aggressive posture in approaching the victim after he first drew on her negated the plausibility that she experienced imminent fear of death or great bodily injury. Thus, the PCR Judge correctly found that as a matter of law the charge here unsupported by evidence presented at Petitioner's trial. See State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004) ("To warrant reversal, a trial [court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.). Thus, Petitioner's argument that counsel's failure to properly preserve the matter for appellate review is without merit. See U.S. v. Bosch, 914 F.2d 1239, 1247 (9th Cir. 1990) (Generally, however, claims arise in the context of failure to object and this claim will fail unless the complainant can show that the evidence was inadmissible.).

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on these issues, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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Jan 5th, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Lexington County
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

FRED RUTLAND, PETITIONER,

v.

THE STATE OF SOUTH CAROLINA, RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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SCCID, Division of Appellate Defense
1330 Lady Street; Suite 401
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This 5th day of January, 2015.

Ashley Haworth
ASHLEY HAWORTH
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ALAN WILSON
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January 5, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Fred Rutland v. State of South Carolina**
Lower Court Case No: 2003-CP-11-1983
Appellate Case No. 2014-000381

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

J. Walter Whitmire
Assistant Attorney General
SC Bar No. 100793

JWW/ah
Enclosures

cc: Susan B. Hacket, Esquire (2 copies)
Trisha Allen. Victim Services (1 copy)