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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to Anderson County
Honorable J. C. Nicholson, Jr., Trial Judge
Honorable R. Lawton McIntosh, PCR Judge
Appellate Case No. 2013-001863

THE STATE,

Respondent,

vs.

Barry Allen Evans,

Petitioner.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WALT WHITMIRE
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. Whether probative evidence supports the PCR Judge's finding that Petitioner failed to prove counsel was ineffective in his opening statement?

2. Whether probative evidence supports the PCR Judge's finding Petitioner failed to prove counsel was ineffective for failing to object to the Trial Judge' jury instruction on mutual combat?

STATEMENT OF THE CASE

Petitioner was indicted at the November 2007 term of the Anderson County Grand Jury for assault with intent to kill "AWIK" (2007-GS-04-3493) possession of a weapon during commission of a violent crime (2007-GS-04-3496) and at the July 2008 term for assault and battery with intent to kill "ABWIK" (2008-GS-04-1541). He was represented by Fletcher N. Smith, Esq.

After the State called the case to trial, the Petitioner was found guilty of ABWIK and the weapons charge but was acquitted for AWIK. On October 8, 2008, the Petitioner was sentenced by the Honorable J.C. Nicholson, Jr. to concurrent terms of five (5) years for possession of a weapon during commission of a violent crime and twenty (20) years suspended on the service of fourteen (14) years and five (5) years probation for ABWIK.

A notice of appeal was filed on Petitioner's behalf at the South Carolina Court of Appeals. LaNelle C. DuRant, Esq., of the Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Evans, Op. No. 2011-UP-147 (S.C. Ct. App. filed April 11, 2011). The South Carolina Supreme Court denied the subsequent Petition for Writ of Certiorari by order dated July 13, 2012.

Applicant filed an Application for Post-Conviction Relief (PCR) on September 4, 2012. The State filed its responsive pleadings. A hearing was convened on May 8, 2012 at the Anderson County Courthouse. Petitioner was present at the hearing and represented by W. Norman Epps, III, Esq. Walt Whitmire, Esq., of the Office of the Attorney General represented the State. The Honorable R. Lawton McIntosh denied and dismissed Petitioner's PCR Application in an order filed on July 31, 2013. Petitioner's discretionary appeal now follows.

STATEMENT OF FACTS

On September 14, 2007 an altercation took place in front of Linda Evans' home. Petitioner stabbed the victim, Billy Craft, twenty-six times where he suffered wounds on his head, chest, abdomen, back, hands, legs and feet. The injuries caused Victim Craft to go into shock; he lost a significant amount of blood. The blood loss could have resulted in Victim Craft's death.

ARGUMENT

I.

Reversal is inappropriate where ample probative evidence supports the PCR Judge's finding that Petitioner failed to prove counsel's performance in his opening statement constituted ineffective assistance of counsel.

Petitioner stated counsel should not have told the jury in his opening statement that he would prove self-defense because it shifted the burden of proof to him. Counsel testified he did not shift the burden of proof in his opening statement. Counsel testified he learned the technique he employed in his opening statement in a University of Virginia seminar. In counsel's professional assessment, he opined that his opening statement could not have harmed Petitioner's case in light of the Trial Judge's sound jury instruction. **App.pp.337-40**.

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).

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, 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, 466 U.S. at 668, 104 S. Ct. 2052)).

The First Circuit recited that U.S.S.C. has not considered ineffective assistance claims in the context of broken promises from the opening statement. Sleeper v. Spencer, 510 F.3d 32 (1st Cir. 2007). The First Circuit upheld the state disposition finding no ineffectiveness where the jury would have no basis to be disappointed when all the evidence was considered. Id. Furthermore, "strategic choices are given greater latitude during trial when time is short." Phoenix v. Matesanz, 233 F.3d 77, 84 (1st Cir. 2000).

ANALYSIS

First, the PCR Judge correctly found that counsel's opening statement did not function as a burden shift. In his opening statement, trial counsel said "[w]e're going to prove to you in this case that [the Applicant] acted in self-defense on that day." The Record supports the PCR Judge's finding of law where the Trial Judge properly charged

the jury that the burden was on the State to prove the Applicant's guilt and disprove the Applicant's defense of self-defense. **App.p.235, ln. 19-23; p.338, ln. 2-6**. See Coogler v. Thompson, 286 S.C. 168, 169, 332 S.E.2d 215, 216 (Ct. App. 1985) ("When an instruction has been corrected by the court and it appears with reasonable certainty the jury was not misled, it will be presumed on appeal that the jury accepted the correction as the law of the case and applied it").

Regardless, counsel provided a sound reason for his strategy and fully explained that he learned this technique at a seminar. Counsel further explained that it aided his performance in prior representations. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel).

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.

II.

Reversal is inappropriate where the PCR Judge correctly found Petitioner failed to prove counsel's performance was purportedly ineffective for failing to object to the Trial Judge's jury instruction on mutual combat where counsel, the Trial Judge, and the PCR Judge all correctly assessed that instruction was supported by the evidence. Furthermore, ample probative evidence shows that Petitioner's theory of self-defense concerning the assault of Victim Billy Craft was incredible in light of the compelling eyewitness testimony on the stabbing in conjunction with dispositive physical evidence.

Petitioner alleged counsel should have objected to the Trial Judge's issuance of jury instructions on both mutual combat and self-defense. Counsel disagreed with Petitioner's post hoc assessment and noted that evidence supported the instructions. In particular, Petitioner's trial testimony where he explained his version of the incident as follows: Petitioner continued to relentlessly stab Victim Billy Craft because Craft's proxies in narcotics distribution acted in defense of him by assaulting and threating to assault Petitioner with deadly weapons; thus under Petitioner's version, he was unable to retreat from the altercation with Victim Craft. Simply, Petitioner would not have been entitled to a self-defense instruction but for his incredible trial testimony that also triggered the mutual combat instruction. Counsel merely presented a sound case based upon his Petitioner's statements and representations to him. **App.p.332, ln.8-11**; **p.382**; Regardless, counsel gave convincing testimony at the PCR hearing that self-defense was just not realistic concerning Petitioner's ABWIK conviction on Victim Craft based upon nature and depravity of the stabbing. **App.p.336, ln.11-20**.

Effective Assistance of Counsel

Counsel has an obligation to understand the law. Joseph v. Coyle, 469 F.3d 441, 460 (6th Cir. 2006). It is not ineffectiveness to fail to object to an instruction that was proper at the time it was given." Gaston v. Whitley, 67 F.3d 121, 123 (5th Cir.1995). If, however, an instruction as given is legally accurate, failure to request additional instructions is not ineffective assistance. Aparicio v. Artuz, 269 F.3d 78, 99-100 (2nd Cir. 2001). Failure to object to an instruction is not ineffective assistance where the instruction had no substantial or injurious effect or influence. Galvan v. Cockrell, 293 F.3d 760, 766 (5th Cir. 2002).

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). To warrant reversal, a trial judge's charge must be both erroneous and prejudicial. Ellison v. Parts Distributors, Inc., 302 S.C. 299, 395 S.E.2d 740 (Ct. App.1990).

Mutual Combat

The apparent willingness of each party to engage in an armed encounter with the other, sustains an inference that they were engaged in mutual combat at the time of the [underlying offense], and requires that the issue be submitted to the jury for determination. State v. Graham, 260 S.C. 449, 452, 196 S.E.2d 495, 496 (1973). To constitute mutual combat there must exist a mutual intent and willingness to fight. Nauful v. Milligan, 258 S.C. 139, 187 S.E.2d 511; and this intent may be manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat. State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973).

In Taylor, this Court revisited mutual doctrine framework and announced the instruction is limited to instances where (1) The parties had an antecedent agreement to fight on equal terms; (2) The parties were armed with deadly weapons; (3) Each party knew the other was armed; (4) Each party contributed to the combat. State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003).

"If the defendant is engaged in mutual combat, self-defense is unavailable unless the defendant withdraws from the conflict before the [degree harm necessary to establish the offense in question] occurs." Taylor, 356 S.C. at 232, 589 S.E.2d at 3. However, mutual combat and self-defense are not mutually exclusive. State v. Jackson, 384 S.C. 29, 38, 681 S.E.2d 17, 22 (Ct. App. 2009) (emphasis added).

ANALYSIS

A.

The PCR Judge correctly rejected Petitioner's perfunctory assignment of error to the Trial Judge for issuing mutual combat and self-defense instructions that were both soundly within the ambit of the unique evidence offered at trial appropriately described as a "melee" by Petitioner's PCR counsel. **App.p.296, ln. 18.**

First, this Court adopted the Texas and Colorado adherence to an "antecedent agreement to fight" that must exist for the court to charge mutual combat. Taylor, 356 S.C. at 233, 589 S.E.2d at 4 (internal citations omitted). Petitioner directs this Court to Petitioner and Victim Billy Craft's coy testimonies about the feud in support of his assertion that there was no evidence of an antecedent agreement to fight. The argument is entirely unpersuasive. See State v. Montanez, 894 A.2d 928, 936 (2006) ("Although the present case lacks direct evidence of an agreement to fight, the jury nonetheless could have inferred an implicit agreement to fight from the evidence"). Petitioner incorrectly employs a qualitative analysis of the evidence reserved to the province of the jury. See Jackson, 384 S.C. at 39, 681 S.E.2d at 22 (finding "only that more than one reasonable inference may be drawn as to whether the accused was the aggressor or provoked the assault and that these inferences must be resolved by the jury, not the court").

Petitioner conveniently ignores evidence introduced that established an Anderson County equivalent "Hatfield McCoy" feud between Petitioner and Victim Craft. "The doctrine has most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed occurs." Taylor, 356 S.C. at 232, 589 S.E.2d at 4 (citing State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977)). The historical animosity between Petitioner and Victim Craft was saturated with mutual hatred. Petitioner and Victim Craft married each other's ex-wives, which

turned bigamous; domestic tensions led to violent encounters. Petitioner testified Victim Craft previously pulled a gun on him in an incident involving crack cocaine. **App.p.198.** Petitioner testified "he's always been known as bad ass Billy." **App.p.197, ln. 24**. A State's witness even testified that Victim Craft had pulled a gun on the witness several years prior to the incident because "[Victim] Craft thought I was [Petitioner] knocking on his door." **App.p.105, ln. 15-16**. Prior altercations conditioned Victim Craft to automatically arm himself when he thought Petitioner was at his front door. **App.p.107**. Thus, the evidence showed a mutual expectation that altercations would be resolved through the use of deadly weapons. See State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973) ("There was ill-will between the parties. They had threatened each other and it is inferable that they had armed themselves to settle their differences at gun point").

Evidence was introduced that showed Petitioner confronted Victim Craft in an attempt to kill him. Days after Linda kicked Petitioner out of the family home, Victim Craft took up residence with Linda in Petitioner's absence. Petitioner decided to confront Victim Craft after Petitioner casually observed him in Linda's home. **App.p.109**. Petitioner's son-in-law Mark Durham gave a statement that Petitioner approached Victim Craft, knife in hand. **App.p.94, ln. 17-20**. Victim Craft also testified Petitioner threatened to kill him while brandishing a knife. **App.p.114**. Other witness offered similar accounts. Additionally, the evidence here also served to show that Petitioner's conduct contributed to the incident.

Similarly, evidence was introduced that established Victim Craft had shared the willingness to fight and kill Petitioner. Petitioner testified that he planned to report Linda and Victim Craft's narcotics enterprise to law enforcement. **App.p.206, ln. 12-13**. Even

State witnesses testified Victim Craft was Linda's wholesale narcotics supplier. **App.p.104**. Petitioner testified that he approached Linda's home to visit their daughter when Victim Craft attacked him with a knife. **App.p.197**. John Johnson, another resident in the trailer park and friend of Petitioner, witnessed the incident from his front porch and testified Victim Craft told Petitioner, "that he was going to get him." **App.p.178, ln. 19**. John had known Victim Craft for over twelve years and testified "anybody knows if [Victim Craft]'d of come out he's always got a knife or a gun. **App.p.188, ln. 4-5**. Additionally, the evidence of adultery and narcotics distribution in a home occupied by Petitioner's child showed Victim Craft's conduct also contributed to the incident.

Second, evidence was introduced that each side offered deadly armed parties into the fight. In Taylor, this Court looked to Georgia, the jurisdiction with extensive jurisprudence on mutual combat doctrine, in adopting its standard that "mutual combat arises only when the parties are armed with deadly weapons, and that mutual combat does not arise from "a mere fist fight or scuffle." Taylor, 356 S.C. at 233, 589 S.E.2d at 4 (citing Flowers v. State, 247 S.E.2d 217, 218 (1978); Grant v. State, 170 S.E.2d 55, 56 (1969)). Georgia further applies its mutual combat doctrine to accomplice liability. "Participation in mutual combat by providing a weapon to one of the other parties is sufficient to support a conviction for voluntary manslaughter as a party to the crime." Mitchell v. State, 225 Ga. App. 26, 27, 482 S.E.2d 419, 421 (1997).

Applying Mitchell, the relevant matter here is not whether Petitioner and Victim Craft were both armed with deadly weapons during the fight.[1] Instead, the dispositive inquiry is whether any evidence that established an inference that Victim Craft acted in

[1] Petitioner and Victim Craft both claim the other combatant brought the knife into the fight; ergo, only a single weapon. However, their testimonies established the element that each party knew that the other was typically armed with deadly weapons.

concert with other deadly armed combatants in a fight against an armed Petitioner.[2] John Johnson witnessed Linda strike Petitioner with her car that she was sitting in when the fight began. **App.p.181**. Thus, evidence sustained an inference that Linda entered the "melee" armed with a deadly weapon based on her use of the vehicle. Similarly, numerous other witnesses testified Kevin Lavoie, the second victim, armed with a machete, and Mark Durham, armed with a gun, were other parties in the faceoff against Petitioner.

The evidence sustained an inference that Linda, Mark Durham, and Kevin Lavoie acted under the direction of Victim Craft during the fight. The other two armed parties, Mark Durham and Victim Lavoie, made admissions about their illegal narcotics transactions with Victim Craft. Furthermore, Victim Craft testified that he directed Mark Durham to shoot his own father-in-law. Certainly, Victim Craft's posture in directing a third party to shoot and kill a family member sustained an inference that Victim Craft exercised his rank in the narcotics outfit to marshal the other parties to use their deadly weapons to kill Petitioner.

Petitioner's testimony that he was going to alert the police about the narcotics operation alternatively sustained an inference that the other deadly armed parties were acting under Victim Craft's control against Petitioner where Petitioner's posture implicated criminal prosecutions on each one of them. The statement sustained an

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[2] In the event that this Court rejects Mitchell and the progeny of other Georgia case law here, Petitioner cannot as a matter of law prove counsel's performance deficient where he is not bound by a duty of clairvoyance to anticipate a novel issues of law. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) 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. Certainly, it is objectively reasonable performance to reason that an objection to the mutual combat charge would have proved fruitless based on this Court's past reliance on jurisprudence from Georgia in this area of law.

inference that Petitioner believed the fight concerned more than the love triangle and that it involved more than a single hostile party. The day after the incident, Petitioner gave a statement to police that in part noted, "I think [Linda]'s tried to run over me because I told her I was going to turn her in for selling drugs." **App.p.205, ln. 12-14**.

Counsel explicitly presented a defense theory that Linda, Kevin, and Petitioner's son-in-law acted on behalf of Victim Craft and commented on the matter in his closing argument.

> At least 3 people had weapons out against [Petitioner]. It's undisputed there was a gun that Mark Durham had. It's undisputed that Linda Evans ran him over with a car, and its undisputed that someone came at him with a machete. And under all those circumstances it only happed within an 8-minute period of time.
>
> ***
>
> How to do you get away when you are being boxed in by three or four druggies. Three or four druggies. How do you get away from three or four druggies? They know he's a supplier so they're going to do it.

App.p.216, ln. 22—p.217, ln. 2; p.221, ln. 3-6 (emphasis added). The incident was a melee. Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms.

B.

Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. Petitioner presents the conclusory argument that counsel's purported failure to object to the mutual combat instruction undermined the outcome of Petitioner's trial merely because it "confused the self-defense issue." **Petitioner's BOP, p.24**. Respondent first submits that Petitioner's argument is facially defective. See Miller v. Johnson, 200 F.3d 274, 282 (5th Cir. 2000) (A conclusory allegation of ineffectiveness raises no constitutional issue because a petitioner must show

how counsel was deficient and how there was prejudice). Second, probative evidence supports the PCR Judge's finding that Applicant fell well short of his burden to prove Strickland's prejudice prong in light of the eyewitness testimony to the incident and physical evidence that invalidated any theory of self-defense. **App.pp.405-06.**

Jackson v. State, 355 S.C. 568, 586 S.E.2d 562 (2003), is dispositive to the present case. In reversing the circuit court's grant of PCR, this Court held that the defense attorney's deficient performance for failing to request a jury instruction does not relieve an applicant of his burden to prove prejudice; that there must still be a "reasonable probability that, had the charge been given, the outcome of the trial would have been different." Id. (citing Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994)); Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991). Specifically, the deficient performance must undermine the Court's "confidence in the outcome of [an applicant]'s trial."[3] Jackson at 573, 586 S.E.2d at 564. In Jackson, this Court supported its holding through its determination that the defendant's testimony was "highly incredible" and unsupported by the physical evidence. Id.

In the present case, there is almost no evidence actually supporting Petitioner's version of events – that he took the knife from Victim Craft. Even Petitioner's own witness testified that he did not see Petitioner take the weapon away from Victim Craft because vehicles obstructed his view. **App. p. 179, ln. 4-7.**[4] Additionally, every witness

[3] Noting there are direct appeal precedent where the trial court has been reversed for failing to give a self-defense instruction (or for giving one incorrectly) where self-defense was the sole issue at trial. See Taylor, 356 S.C. at 227, 589 S.E.2d at 1; State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002). Respondent submits that the review of the present is confined within PCR jurisprudence and its unique prejudice requirements. See, e.g., Lorenzen v. State, 376 S.C. 521, 529-30, 657 S.E.2d 771, 776 (beyond certain limited circumstances, an applicant must generally show actual prejudice to obtain relief) (emphasis added) (citing Nance v. Ozmint, 367 S.C. 547, 551, 626 S.E.2d 878, 880 (2006). As a result, the more practical and later decided Jackson analysis is the appropriate standard.

[4] While John Johnson does say that the victim had the knife, he never quite says that he sees Victim Craft with the knife. Instead, he states that "[Victim Craft] had the weapon because [Petitioner] did not have

who actually saw the initial altercation says that Petitioner appeared by the vehicle and drew the knife on Victim Craft. Several witnesses described Petitioner's movement toward Victim Craft as in a "crouched" or "Indian" position. **App. p. 56, ln. 1-9**; **p. 71, ln. 17-18**. Witnesses then maintained that Petitioner started "cutting," "carving," or "slicing" the victim. **App. p. 57, ln. 1-10; p. 72, ln. 14-16; p. 95, ln. 13-14**. Petitioner meticulously carved the victim for an extended period of time – only leaving to ward off anyone attempting to intervene, and even then returning to continue slicing up the victim.

In contrast to the State's presentation of compelling eyewitness testimony, Petitioner's version of the incident was wholly incredible. Even at face value, a theory of self-defense was not viable concerning the ABWIK conviction on Victim Craft. Petitioner testified at trial that he approached the vehicle the Victim Craft was located in. Next, he testified that Victim Craft purportedly "started" toward him, which triggered his reciprocal aggressive approach. **App.p. 196, ln. 3-4**. Victim Craft purportedly pulled a knife out of his pocket and, after somewhat of a struggle, Petitioner was able to retrieve the weapon. **App. p. 196, ln. 5-7**. According to Petitioner, this was the moment when Victim Craft's hand was cut. Id. Petitioner claimed that he attempted to flee but was assaulted by a car. **App.p. 196, ln. 9-10**. Purportedly bottled in by Victim Lavoie with a machete, Mark with a gun, Linda with a car, Victim Craft was able to subdue and stomp on him, Petitioner says he got out from under the car and "just started cutting" so he could get free. **App.p.196, ln. 9-17**. Petitioner's incredible testimony here mirrored his statement to police but was materially inconsistent to other portions of his testimony. **App.p.200, ln. 4-5**.

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one." **App. p. 179, ln. 10-11**. He knew, even though he did not pat Petitioner down, but he "asked him if he had any kind of weapons or anything on him...." **App. p. 187, ln. 9-11**. He also is not entirely clear on whether he saw the Victim Craft with a knife, saying that "[Victim Craft] come [sic] out of his pocket" and "[a]nybody knows if he'd of come out of he's always got a knife or a gun." **App. p. 188, ln. 4-7**.

Moreover, not only was Petitioner's version of incident incredible in light of the contrary eyewitness testimony, it was simply implausible in light of the physical evidence. Victim Craft sustained twenty-six (26) lacerations, "from head to toe" on his body. **App.p. 144, ln. 8-14**. Certainly between first and the twenty-sixth stabbing it becomes per se unreasonable for a jury to believe – under any set of facts – that Petitioner committed each successive stabbing in self-defense. Instead, Respondent submits the physical evidence established compelling Petitioner's malice that undercut any theory of self-defense. Thus, ample probative evidence supports the PCR Judge's finding that Petitioner failed to meet his burden to prove Strickland's prejudice prong.

As Petitioner failed to meet his burden of proving ineffective assistance of counsel on this issue, 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 all the foregoing reasons, it is respectfully submitted that the judgment and of the PCR Court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WALT WHITMIRE
Assistant Attorney General

BY: _____
Walt Whitmire

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

May 13, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to Anderson County
The Honorable J. C. Nicholson, Jr., Trial Judge
The Honorable R. Lawton McIntosh, PCR Judge

Appellate Case No. 2013-001863

Barry Allen Evans,.....Petitioner,

v.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Brief of Petitioner** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

Lara M. Caudy, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 13h day of May, 2015.

J. Walt Whitmire
J. WALT WHITMIRE
ATTORNEY FOR RESPONDENT

SWORN to before me this 13th day of May, 2015.

Ashley Hamer
Notary Public for South Carolina.
My Commission Expires: 3-18-23

ALAN WILSON
ATTORNEY GENERAL

May 13, 2015

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

Re: **Barry Allen Evans v. State of South Carolina**
Appellate Case No. 2013-001863
Lower Court Case No. 2012-CP-04-2912

Dear Mr. Shearouse:

I am enclosing the original and thirteen (13) copies of the **Brief of Respondent** in the above case.

Sincerely,

J. Walt Whitmire
Assistant Attorney General
S.C. Bar No. 100793

JWW/ah

cc: Lara M. Caudy, Esquire (2 copies)
Trisha Allen, Victim Services