

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

CERTIORARI TO MARION COUNTY
Court of Common Pleas

APR 09 2019

The Honorable Michael G. Nettles, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2018-000630

Shawn Reaves,Petitioner,

v.

State of South Carolina,Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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STATEMENT OF THE CASE

Shawn Reaves (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marion County Clerk of Court. Petitioner was indicted at the August 2010 term of the Marion County Grand Jury for one count each of murder and assault and battery with intent to kill (ABWIK) (2010-GS-33-0375). Petitioner was represented by Thurmond Brooker, Esquire. On August 24, 2010, a jury trial was commenced in the Marion County Court of General Sessions with the Honorable William H. Seals, Jr., presiding. However, that trial ended in a mistrial. On November 8, 2010, Petitioner again proceeded to trial before the Honorable William H. Seals, Jr., and a jury. Petitioner was thereafter convicted of the lesser-included offense of voluntary manslaughter and acquitted of murder and ABWIK. Judge Seals sentenced Petitioner to a term of imprisonment of twenty-five years.

Petitioner filed a timely Notice of Appeal. An appeal was perfected by LaNelle Cantey DuRant, Esquire, of the South Carolina Commission on Indigent Defense - Appellate Defense Division. The South Carolina Court of Appeals affirmed Petitioner's conviction. State v. Reaves, Op. No. 2014-UP-057 (S.C. Ct. App. filed February 12, 2014). Petitioner's Petition for Rehearing was denied in an Order filed March 21, 2014.

Petitioner then petitioned the Supreme Court of South Carolina for a Writ of Certiorari to the Court of Appeals on June 23, 2014. The Supreme Court of South Carolina granted the Petition in an order filed August 22, 2014, and affirmed Petitioner's conviction on September 2, 2015. State v. Reaves, Op. No. 27569 (S.C. Sup. Ct. filed September 2, 2015). The Remittitur was returned on September 18, 2015.

On November 18, 2015, Petitioner filed a petition for Writ of Certiorari in the Supreme Court of the United States. The Supreme Court of the United States denied the petition on January 11, 2016.

Petitioner then timely filed an application for post-conviction relief on February 8, 2016. Respondent made its Return on February 2, 2017. The circuit court convened an evidentiary hearing into the matter on November 15, 2017, before the Honorable Michael G. Nettles at the Florence County Courthouse. Petitioner was present at the hearing and represented by Jonathan D. Waller, Esquire. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Petitioner testified on his own behalf. Thurmond Brooker, Esquire, testified on behalf of Respondent. Judge Nettles issued an order filed March 8, 2018, denying and dismissing the application with prejudice. Petitioner filed a notice of appeal from the denial of his claim for relief, and, through counsel, filed a petition for writ of certiorari on November 14, 2018. This return follows.

STATEMENT OF THE FACTS

Around 10:00 p.m. on the evening of May 13, 2007, officers with the Marion Police Department received a report of a fight in progress and began responding to East Mullins Street in Marion, South Carolina. App. pp. 596, 598-99, 601-02, 604-05, 632, 960. A few minutes later, Lieutenant Walker Davis, Sr., of the Marion Police Department was notified shots were fired at the location of the fight, and he hurried to the scene. App. pp. 596-97. Upon arriving, he observed a large crowd of people and a white car parked on the side of the road with a man slumped over inside on the back passenger seat. App. pp. 599, 610-11. Lieutenant Davis discovered the man in the vehicle, Ramel Keshawn Applewhite (Victim), had been shot, so he requested emergency medical assistance and secured the scene. App. pp. 599-600, 861. Shortly thereafter, paramedics arrived and transported Victim to a hospital. App. p. 600. However, Victim died as a result of the shooting. App. pp. 873, 877.

Following the shooting, additional officers arrived at the scene, including Lieutenant Farmer Blue of the Marion Police Department. App. pp. 946-47. Lieutenant Blue began investigating the incident and received information that potential suspects might have entered a nearby residence on East Mullins Street. App. p. 947. Lieutenant Blue obtained a search warrant, and officers entered the residence. App. pp. 949-50. When they did so, they found several people hiding inside of the home, including Joemilla Wilson-Dozier, Brandon Deshawn Bellamy, and Rodney McElveen. App. pp. 950-51. Thereafter, Detective Larry Woods of the Marion County Sheriff's Office performed gunshot residue testing on each of the individuals, which were all later determined to be negative. App. pp. 716-17, 721-24, 951. Meanwhile, Lieutenant Davis spoke with several witnesses at the scene, including Travis Lane and Jackie McGill, Jr., to find out what happened during the incident. App. pp. 609-10. Lieutenant Davis provided McGill with paper,

asked him to write out a statement, and instructed him to return the statement to him when it was completed. App. p. 617. However, McGill never returned a completed statement to the officer. App. pp. 617-18.

McGill testified about the shooting, stating he met up with Victim, who was in town for Mother's Day, on the day of the incident and rode to Bellamy's house on East Mullins Street with Victim, Lane, and Victim's cousin, Karen Graves. Tr. pp. 767-70, 774. McGill indicated ten people were congregating in the yard of the residence when they arrived, and Victim asked to speak with Wilson-Dozier, who was Victim's girlfriend. App. pp. 775-76. McGill testified Victim then walked to the street with Wilson-Dozier, who was initially reluctant to come outside of the residence. App. pp. 776-77. After they did so, McGill stated Victim and Wilson-Dozier argued and began physically fighting before Victim threw Wilson-Dozier to the ground. App. pp. 777-78. Eventually, McGill indicated he was able to separate Victim and Wilson-Dozier and return Victim to the car. App. p. 779. However, he said Wilson-Dozier came over to Victim, spat on him, and then walked to the residence's porch. App. pp. 780-81. McGill testified Victim followed her, he saw Petitioner, and then he heard gunshots. App. pp. 783, 786, 788-89.

After the gunshots, McGill stated Victim fell to the ground, he heard clicking sounds that sounded like a gun was out of bullets, and Petitioner took off running.¹ App. pp. 789-90, 795. McGill testified he then tried to move Victim to the car, law enforcement officers arrived on the scene, and he provided a statement to Lieutenant Davis. App. pp. 794-95, 801-02, 814. He stated he testified to everything contained in the statement and also claimed Lane and Graves provided statements that night as well. App. pp. 801-02, 814-15. However, he denied the statement

¹ During trial, Dan Defreese, the SLED firearms expert who examined the bullets recovered from Victim's body, testified a revolver would make a clicking noise if the trigger was pulled after its ammunition was exhausted but a semi-automatic pistol ordinarily would not. App. pp. 898-99.

introduced at trial with his and Lane's names on it was his statement. App. pp. 815-17. Significantly, McGill repeatedly identified Petitioner as the shooter and indicated he was certain Petitioner was the person he saw shoot Victim.² App. pp. 826, 856.

Latoya Davis, who lived near the scene of the shooting, also testified about the incident during trial. App. pp. 1053-54. On the night of the shooting, Davis said she was with Wilson-Dozier at the residence on East Mullins Street but went home after Wilson-Dozier and Victim began fighting. App. pp. 1051-54. She indicated she did not see the shooting but heard gunshots and then saw Petitioner, whom she knew as "Mister," get into a vehicle and drive away. App. pp. 1054-55. She further testified she spoke with Lieutenant Blue on the day after the shooting and provided him with a written statement. App. pp. 1062, 1067.

Furthermore, Wilson-Dozier testified about her altercation with Victim and the subsequent shooting. App. pp. 1072-73. She stated she was in a relationship with Victim in May of 2007 but had broken up with him a month earlier. App. pp. 1069-70, 1072. Wilson-Dozier indicated she went to visit Bellamy, with whom she was involved in an intimate relationship at the time, at East Mullins Street on the day of the incident, and Victim came over several times while she was there. App. pp. 1069-72, 1084-85. She testified, when Victim came over the second time, she attempted to avoid him but eventually went outside to speak with him. App. pp. 1071-72. She stated when she did so, they argued and began physically fighting in the yard and street where approximately ten people had gathered. App. pp. 1072-73. She stated after the fight ended, one of Victim's

² In addition to McGill's testimony identifying Petitioner as the shooter, Tyler Connor, who was incarcerated in the Department of Juvenile Justice in May of 2007, testified he was placed in a cell with Petitioner after the incident and spoke with him about why he was incarcerated. App. pp. 929-32. Connor claimed Petitioner stated he was incarcerated because he shot someone with a revolver, his friend shot the person with a nine-millimeter gun, and he left town. App. pp. 933-34. Connor stated Petitioner said the incident occurred after he argued with someone who purchased drugs from him. App. pp. 940-42.

friends tried to get him to leave, and she walked towards the residence. App. pp. 1074-75. Wilson-Dozier testified as she was walking up the steps to the residence, Victim pushed Petitioner, whom she knew as "Mister," and grabbed Petitioner's chains, at which point Petitioner pulled out a silver revolver and began firing. App. pp. 1075-76. She indicated she then hid behind a car and checked on Victim before going into the residence and remaining there. App. pp. 1076-78. Wilson-Dozier further testified after the incident she selected Petitioner from a photographic line-up as the shooter, wrote a statement for Captain Gray, and had her injuries photographed by law enforcement officers. App. pp. 1079-80, 1104, 1110.

The day after the shooting, Dr. Cynthia Schandl, a forensic pathologist at the Medical University of South Carolina and an expert in forensics, performed an autopsy on Victim. App. pp. 858, 861. While conducting the autopsy, Dr. Schandl located five different gunshot wounds to Victim's body. App. p. 870. Three of the wounds – one to the right side of Victim's back, one to Victim's stomach, and one to Victim's left side – resulted from bullets that entered and exited Victim's body. App. pp. 870-71. The fourth wound occurred when a bullet entered and remained in Victim's shoulder. App. p. 871. The final gunshot wound occurred when a bullet entered Victim's upper back, struck his lung, aorta, and liver, and stopped in his colon. App. pp. 871-72. Both of the bullets were recovered from Victim's body during the autopsy, and Dr. Schandl concluded the bullet removed from Victim's colon led to his death. App. pp. 875, 879-80.

Subsequently, Dan Defreese, a SLED firearms expert, examined the bullets recovered during the Victim's autopsy. App. p. 888-89, 892. He concluded the bullet recovered from Victim's colon was consistent with a .38-caliber or .357-caliber cartridge and was most likely fired from a revolver. App. pp. 893-95. He further determined the bullet recovered from Victim's shoulder was consistent with a nine-millimeter cartridge and was most likely fired from a semi-

automatic pistol. App. pp. 895-96. Based on his examination, he concluded the two bullets were not fired by the same gun, App. p. 896.

As the investigation into the incident progressed, Lieutenant Blue discovered the primary suspect in the shooting was known as "Mister," which was Petitioner's alias. App. p. 953. Lieutenant Blue learned Petitioner was observed at the scene of the shooting with a weapon and was seen fleeing from the area after the incident.³ App. p. 954. As a result, officers obtained warrants for Petitioner's arrest, and he was apprehended in Philadelphia, Pennsylvania, several days after the shooting. App. pp. 633-34. Following his arrest, Petitioner was transported back to South Carolina and indicted for murder and assault and battery with intent to kill. App. p. 499, 633.

The jury convicted Applicant of the lesser-included offense of voluntary manslaughter and acquitted him of the charges of murder and ABWIK. App. p. 1267. The trial judge then sentenced Petitioner to a twenty-five-year term of imprisonment. App. p. 1278.

³ During the investigation, Lieutenant Blue prepared a photographic line-up containing Petitioner photograph and showed it to McGill and Lane. App. pp. 1015-16, 1023-24. However, they did not identify Petitioner as the shooter at that time and, instead, selected another photograph from the line-up. App. pp. 1017, 1023-24.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, a Petitioner has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When a Petitioner alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 688.

ARGUMENT

The PCR court correctly found trial counsel was not ineffective for failing to make a motion to have Petitioner declared immune from prosecution under the Protection of Persons and Property Act where Counsel testified to a reasonable strategic decision not to seek immunity because, among other things, he did not believe Petitioner qualified for immunity as Petitioner was engaged in an unlawful act at the time of the shooting, so Counsel chose to present a defense of self-defense instead.

The PCR court correctly found Counsel was not deficient, nor was Petitioner prejudiced by trial counsel's failure to make a motion to have Petitioner declared immune from prosecution under the Protection of Persons and Property Act because Counsel explained he did not believe Petitioner qualified for immunity because Petitioner was engaged in an unlawful act at the time of the shooting and where the Victim was unarmed and not actively threatening Petitioner, so Counsel chose to present a defense of self-defense instead.

In 2006, the South Carolina Legislature codified the common-law "Castle Doctrine" in the Protection of Persons and Property Act (Act): S.C. Code Ann. § 16-11-420(A) (2015) ("It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business"). The Castle Doctrine stands for the proposition that "one attacked, without fault on his part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense." See State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016) (citing State v. Gordon, 128 S.C. 422, 122 S.E. 501 (1924)). The Act provides "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution. . . ." S.C. Code Ann. § 16-11-450 (2015).

The Act states:

(A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

(B) The presumption provided in subsection (A) does not apply if the person:

(1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder; 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; or

...

(C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440 (2015).

The shooting in this case arose out of an incident at a home in Marion, where both Victim and Petitioner were guests, and Victim was shot multiple times in the yard and died. App. pp. 596-97, 774-76. Victim had been involved in a physical altercation with his girlfriend in the street in front of the house, and both Victim and the girlfriend were in the process of entering the house when the shooting occurred. App. pp. 777-78, 783, 1071-76. There was some evidence and

testimony Victim pushed Petitioner and snatched some gold chains from Petitioner's neck as Victim made his way toward the house. App. pp. 1074-76. However, there was no evidence Victim had a weapon or that he was threatening Petitioner with great bodily harm at the time of the shooting. App. pp. 783, 786, 788-89, 802-03, 1074-76.

At the evidentiary hearing, Counsel testified he initially reviewed all of the witness statements, then conducted further investigation on his own, including visiting the incident location, and interviewing the occupants of the house, Victim's ex-girlfriend, and a witness who lived in the house across the street. App. pp. 1555. Regarding the issue of self-defense and applicability of the Act, Counsel explained the testimony at trial was that Victim was going up the stairs to the house after his ex-girlfriend, and it was an issue at trial as to exactly where Victim was standing when he was shot. App. p. 1558. Counsel testified he felt this was an important fact in determining whether Petitioner had an argument under the Act because Petitioner needed to be acting in defense of a "dwelling" in order for section 440(A) to apply, and it was not clear that the yard would be covered under that definition. App. pp. 1558-59.

Further, Counsel testified his understanding was the Act would not apply if Petitioner was engaged in an unlawful act, and in this case, Petitioner was unlawfully carrying a firearm, and in fact, shot Victim with that same gun. App. pp. 1560-62. Counsel testified, in his opinion, given the witness statements saying the shooting took place in the yard and Petitioner's unlawful possession of a weapon, the situation did not fall within the scope of the Act. App. p. 1561. Counsel testified he had dealt with this issue before, and he knew at least one judge's opinion was that the Act was simply a codification of self-defense, and the defendant needed to have clean hands in order to invoke it. App. pp. 1561, 1564-65. Counsel explained there was conflicting testimony as to who started the fight, where exactly Victim was standing, and whether Victim was

threatening Petitioner, and in that situation, a judge usually cannot make a determination on whether immunity would apply prior to trial. App. pp. 1565-66. Finally, Counsel testified he made a tactical decision not to file a motion for immunity and instead ask for a self-defense instruction at trial because he did not see a reasonable possibility of success on the motion. App. p. 1567. Counsel testified pursuing immunity would have given the State advance notice of what the defense strategy would be, and it required Petitioner's testimony, which could then be used against him if there were any discrepancies at trial. App. p. 1568.

Counsel's analysis was correct because sections 440(A) and 440(C) of the Act require Petitioner not to have been involved in an unlawful activity at the time of the shooting and because Petitioner must have been *defending a residence or dwelling* which the Victim was *unlawfully or forcefully* trying to enter. S.C. Code Ann. §§ 440(A)(1), (B)(3), (C). Here, there were several potential problems with seeking immunity under the Act because there is no evidence Victim was unlawfully or forcefully trying to enter the house, which was not Petitioner's residence, when he was shot; Petitioner was armed with an "unlicensed firearm;"⁴ and Petitioner had no reason to be in fear for his life or of the infliction of great bodily harm. App. pp. 1565, 1568-69.

First, the testimony at trial established Victim was standing the yard, possibly attempting to follow his girlfriend into the house, presumably to continue their fight, but there was no evidence Victim's entry into the home was forceful or unlawful. App. pp. 777-78, 783, 1071-76. Further,

⁴ Petitioner finds fault with the terminology used by Counsel at the evidentiary hearing and argues there is no prohibition on carrying an "unlicensed firearm" in South Carolina since the law does not require gun owners to register their weapons. PWC p. 22. However, Counsel clarified the issue was Petitioner was "in possession of a weapon on his body without a carry permit" at the time of the shooting. Petitioner was sixteen-years old at the time of this offense. App. p. 1553. Thus, notwithstanding Petitioner's semantic quibble, his carrying of a handgun was clearly unlawful. See S.C. Code Ann. §§ 23-31-215 (must be at least twenty-one years of age for issuance of concealable weapon permit); 16-23-20 (providing it is "unlawful for anyone to carry about the person any handgun, whether concealed or not" unless one of the enumerated exceptions applies).

trial testimony established both Victim and Petitioner were guests at the home, which would make the presumption Petitioner was in fear “of imminent peril of death or great bodily injury to himself or another person” inapplicable. Jones, 416 S.C. at 292, 786 S.E.2d at 137 (“[T]he presumption of subsection (A) does not apply if the victim has an equal right to be in the dwelling or residence.”).

Additionally, the presumption of section 440(A) was also not available if Petitioner was engaged in unlawful activity or was using the residence or dwelling in furtherance of unlawful activity. S.C. Code Ann. § 16-11-440(B)(3). Similarly, in order for Petitioner to qualify for immunity under section 440(C), Petitioner cannot have been engaged in unlawful activity. Id. § 16-11-440(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 . . . has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime. . . .”). As noted above, Petitioner was not acting lawfully because he was illegally carrying a handgun.⁵ “Although [unlawful possession of a weapon] alone does not automatically bar a self-defense charge, it is evidence of an unlawful activity which can preclude the assertion of self-defense.” In re Tracy B., 391 S.C. 51, 71, 704 S.E.2d 71, 81 (Ct. App. 2010); cf. Dawkins v. State, 252 P.3d 214, 217-218 (Okla. Crim. App. 2011) (“Dawkins had an illegally modified weapon – his sawed-off shotgun – and used it to shoot Sanford. At the time he used deadly force, he was engaged in an unlawful act, and he does not get the benefit of the [“stand your ground”] statute. . . . Dawkins asks this Court to read into the statute a nexus requirement between the unlawful act and the use of deadly force. He suggests that, under such a reading, the type of weapon he used had

⁵ There was also testimony from a jailhouse informant at trial that Petitioner shot Victim over an argument involving a drug transaction. App. pp. 940-42.

nothing to do with his use of deadly force and there is no nexus between his unlawful act (possession of an illegal weapon) and the crime. . . . The statute neither specifies a type of unlawful activity nor requires that it be connected to the use of defensive force. That is, the statute contains no nexus requirement.”). Accordingly, Counsel correctly determined Petitioner was not entitled to immunity under section 440(A).

Section 440(C) also requires Petitioner to have been in reasonable fear of death or great bodily injury to himself or another, or attempting to prevent the commission of a violent crime. As discussed above, the trial record establishes Victim and Victim’s girlfriend had been involved in a physical fight, but that altercation had ended, at least for the moment, at the time of the shooting, so Petitioner could not have been acting to prevent the commission of a violent crime.⁶ App. pp. 777-78, 783, 1071-76. The only evidence of aggression between Petitioner and Victim was testimony by Victim’s girlfriend she saw Victim shove Petitioner and grab or attempt to grab at chains around Petitioner’s neck. There was no evidence Victim was armed when he did so, that he threatened Petitioner at the time, or that Petitioner was injured by Victim’s actions. App. pp. 783, 786, 788-89, 802-03, 1074-76. Under those circumstances, Petitioner was not under attack and could not have reasonably believed the force he used against Victim was necessary to prevent death or the infliction of great bodily injury upon himself or to prevent the commission of any violent crime. Therefore, Counsel correctly determined Petitioner was not entitled to immunity under section 440(C).

Accordingly, based Counsel’s explanation of his investigation into the facts of the incident, his legal research and conclusion the Act was likely not applicable, and his explanation of why he

⁶ There has never been any suggestion Petitioner shot in an effort to protect Victim’s girlfriend. His defense strategy was self-defense, not defense of others.

did not want to have Petitioner testify before trial, the PCR court correctly found Counsel provided effective assistance in this case. “[S]trategic choices made after a thorough examination of law and facts relevant to plausible options are virtually unchallengeable. . . .” Strickland, 466 U.S. at 690. Counsel’s reading of the Protection of Persons and Property Act, and his conclusion Petitioner could not avail himself of the presumptions of section 440(A) or 440(C) because he was engaged in unlawful activity by unlawfully possessing a firearm and was not in fear of death or great bodily harm, was reasonable. See S.C. Code Ann. § 16-11-440(B) (instructing the presumptions established by Section 16-11-440(A) do **not** apply if the person “who uses deadly force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity). Accordingly, the PCR court correctly found Petitioner had failed to prove any deficiency on Counsel’s part in not pursuing immunity under the Act. App. pp. 1619-20.

Further, the PCR court also correctly found Petitioner had not met his burden of proving he was prejudiced by Counsel’s decision. App. p. 1620. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Strickland, 466 U.S. at 691. To establish prejudice, Petitioner is required to show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694. “[W]hen a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence.” State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). In an appeal from a circuit court judge’s pre-trial determination regarding a claim of statutory immunity, the appellate court reviews the circuit court judge’s ruling for an abuse of discretion. State v. Douglas, 411 S.C. 307, 316,

768 S.E.2d 232, 237 (Ct. App. 2015); see State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (“[T]his court reviews [a claim of immunity under the Act] under an abuse of discretion standard of review.”).

Therefore, even if this Court finds Counsel should have made a motion for an immunity determination under the Act, Petitioner can prove prejudice only by showing he was entitled to immunity by a preponderance of the evidence, and the denial of immunity based on these facts would have been an abuse of the trial judge’s discretion. See Jones, 416 S.C. at 290, 786 S.E.2d at 186 (“An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.”) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). Petitioner has not met this burden because he did not testify in his own defense at trial, nor he did he offer any testimony to establish a case of immunity or self-defense at the PCR evidentiary hearing. App. pp. 494-96, 1540-52. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (“This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . .”).

Because Petitioner is not entitled to the presumptions of the Act, Counsel correctly determined the appropriate course of action was to present a defense of self-defense at trial. App. p. 1567. Petitioner’s case is substantially similar to State v. Curry, wherein Curry attempted to invoke section 440(C) of the act at the directed verdict stage, which the trial court denied. 406 S.C. 364, 752 S.E.2d 263 (2013). In Curry, the defendant shot his cousin multiple times in the back after engaging in two physical altercations with the cousin throughout the night. Id. at 368-69,

752 S.E.2d at 265. This Court upheld the trial court's denial of a directed verdict on immunity grounds, holding:

[c]onsistent 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. This includes all elements of self-defense, save the duty to retreat. . . . Given the facts as presented [at trial]. . . *[Curry's] claim of self-defense presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution.* Accordingly, we find the case was properly submitted to the jury, with the claim of self-defense being fully presented, and the State having the burden to disprove at least one element of self-defense beyond a reasonable doubt.

Id. at 372, 752 S.E.2d at 267 (emphasis added). Ultimately, the jury found Curry guilty of voluntary manslaughter. Id. at 369-70, 752 S.E.2d at 265.

Similarly, in Petitioner's case, self-defense was presented to the jury, and the trial court gave a thorough and appropriate jury instruction on that issue, which Petitioner has not challenged. Petitioner was nonetheless found guilty of voluntary manslaughter. App. pp. 1253-56. The fact of Petitioner's conviction means the State proved beyond a reasonable doubt he did not act in self-defense, making it unlikely the trial court would have found he could establish immunity by a preponderance of the evidence. Accordingly, the PCR court correctly found Petitioner did not prove he was prejudiced by Counsel's representation.

CONCLUSION

For all the foregoing reasons, the State requests this Court deny the petition for a writ of certiorari and affirm the post-conviction relief court's dismissal of Petitioner's application for relief.

Respectfully submitted,

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Attorney General

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ATTORNEYS FOR PETITIONER.

April 1, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO MARION COUNTY
Court of Common Pleas
The Honorable Michael G. Nettles, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2018-000630

Shawn Reaves,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

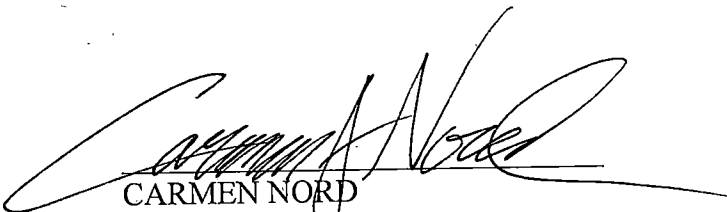
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the 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:

Susan Barber Hackett
S.C. Commission on Indigent Defense
Division Of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 1st day of April, 2019


CARMEN NORD
Legal Assistant



RECEIVED

APR 09 2019

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

April 1, 2019

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

Re: Shawn Reaves v. State of South Carolina
Appellate Case No. 2018-000630
Lower Court Case No. 2016-CP-33-0071

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Lindsey McCallister
Assistant Attorney General
SC Bar No. 79054

LM/can
Enclosures

cc: Susan B. Hackett, Esquire (2 copies)