STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable G. Thomas Cooper, Circuit Court Judge

DOMONEIK ANTWAN WASHINGTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000399

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when due to an unreasonable trial strategy counsel agreed there would be no mention by either party of the weapon found in the gold Impala or the positive gunshot residue tests performed on the occupants of the gold Impala, and further entered into a stipulation that "no one from the gold Impala shot at the defendant" when Petitioner's defense was self-defense, specifically that he shot at the occupants of the gold Impala because they shot at him first, and where Petitioner was prejudiced because the outcome of his trial would have been different if this exculpatory evidence had been presented to the jury?

2.

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when counsel advised Petitioner not to testify even though (1) Petitioner had no impeachable offenses, and (2) his defense was self-defense and no other evidence was presented at trial that Petitioner was acting in self-defense, which made his testimony essential, and where Petitioner was prejudiced because the outcome of his trial would have been different if Petitioner had testified that he only shot at the occupants of the gold Impala after they shot at him?

STATEMENT OF THE CASE

On March 30, 2011, a famous rapper named Lil Phat was to perform at the Palm Tree Lounge on James Island in Charleston County. App. 246, ll. 2-23. Around 2:30 that morning before Lil Phat took the stage, a fight broke out at the club between individuals from James Island, which allegedly included Petitioner, and others from downtown Charleston, including Antwan Wilson, Ronald Bryant, and Edward Wittrell. App. 198, l. 2 – 201, l. 2; App. 233, ll. 17-23; App. 247, l. 10 – 251, l. 18. The club closed after the fight, and the attendees headed to the Kangaroo Express, a nearby convenience store and gas station, which quickly became very crowded. App. 249, l. 21 – 250, l. 10; App. 269, l. 17 – 270, l. 4. Within several minutes, all the pumps were full and nearly all the parking spots were taken. See State's Exhibit No. 69 (DVD of Surveillance Footage). The crowd became increasingly "rowdy." App. 252, ll. 21-22.

Wilson, Bryant, and Wittrell arrived at the Kangaroo Express in a gold Chevrolet Impala. After maneuvering through the crowded parking lot, Wilson, who was driving, parked the Impala near the pumps, which were all full at the time. App. 201, l. 3 – 202, l. 12; See State's Exhibit No. 69 (DVD of Surveillance Footage). Petitioner, Ishmael Lemon, James Washington, and Javon Richardson, who were all from James Island, allegedly arrived together and parked at the carwash next door. App. 253, l. 17 – 254, l. 21. Petitioner ultimately exchanged words with Wilson. App. 255, ll. 3-21; See State's Exhibit No. 69 (DVD of Surveillance Footage). Shortly thereafter, gunfire rang out in the parking lot. App. 202, ll. 13-17; App. 256, ll. 11-13; See State's Exhibit No. 69 (DVD of Surveillance Footage). Petitioner shot into the Impala, striking Wilson in the upper right thigh. App. 168, l. 19 – 169, l. 6; See State's Exhibit No. 69 (DVD of Surveillance Footage). Bryant and Wittrell, who were in the backseat, were not injured. App. 202, l. 16 – 203, l. 1. Based on the forensic evidence, at least four firearms were shot at the

Kangaroo that night. App. 413, l. 25 – 414, l. 3. A surveillance camera captured what occurred in the parking lot directly in front of the store. See State's Exhibit No. 69 (DVD of Surveillance Footage).

Equette Robinson, the clerk at the Kangaroo Express during the shooting, identified Petitioner as the person who shot into the Impala. App. 164, ll. 1-3. According to Robinson, Petitioner had come into the store every Saturday night after the clubs had closed for the entire year that she had worked there. App. 164, ll. 4-24. The last time she had seen Petitioner was the Saturday before the shooting. App. 164, l. 25 – 165, l. 12. Robinson claimed she saw Petitioner arguing with Wilson in the parking lot near the gold Impala. App. 167, ll. 2-7. After the men exchanged words, Petitioner walked toward the carwash next door. App. 167, ll. 8-13. As he walked off, Robinson heard someone yell "he has a gun." App. 167, ll. 19-23. Robinson then heard gunshots. App. 167, ll. 23-24. She claimed she saw Petitioner walk up to the gold Impala and begin firing into the vehicle. App. 168, l. 19 – 169, l. 6. She saw Wilson get shot in the thigh. App. 169, ll. 7-21.

Don Manigault was at the Palm Tree Lounge that morning with John Pendergrass and Laval Hazel. Pendergrass drove the three in his blue Lincoln. App. 268, ll. 13-25. After the club closed due to the fight, Pendergrass drove Manigault, Hazel, and Joe McKelvey to the Kangaroo Express. He parked at one of the pumps. App. 269, l. 5 – 272, l. 1; See State's Exhibit No. 69 (DVD of Surveillance Footage). Shortly after they parked, a gold Impala pulled into the parking lot and parked next to them. App. 271, ll. 16-21. While Manigault was sitting in the backseat of the Lincoln, he heard gunshots. He did not see who fired first or from which direction the shots came. App. 276, l. 20 – 277, l. 1. Pendergrass quickly began to drive away. Manigault admitted that Laval Hazel, who was also in the Lincoln, "shot back" as they were

leaving. App. 273, l. 15 – 275, l. 17. He claimed Hazel shot "way after the first shot went off" and after they had started driving away and were about to turn onto Camp Road.[1] App. 277, ll. 7-13.

Edward Wittrell, one of the passengers in the Impala, admitted he, Wilson, and Bryant were involved in a fight at the Palm Tree Lounge that morning. App. 198, l. 2 – 200, l. 24. After the club closed, they went to the Kangaroo Express. App. 201, l. 23 – 202, l. 4. Wittrell was intoxicated and claimed he did not remember much. App. 202, ll. 13-17. He did remember Wilson getting shot at the Kangaroo. App. 202, l. 18 – 203, l. 1. However, he claimed neither he, Wilson, nor Bryant fired a gun while at the gas station. App. 206, ll. 3-8.

During an *in camera* hearing, Wittrell explained that after Wilson got shot in the thigh at the Kangaroo, he began to drive towards the hospital in downtown Charleston. App. 206, l. 21 – 207, l. 10. Bryant and Wittrell were still in the backseat of the Impala. As Wilson was driving down Folly Road minutes after leaving the Kangaroo, individuals in another car, which has never identified, began firing at the Impala from behind. App. 207, ll. 11-24. Wilson got shot in the head and died. The Impala ultimately crashed. App. 208, ll. 7-22. Bryant and Wittrell, who both also got shot, had to climb out the back window. App. 208, l. 23 – 209, l. 21.

The person (or persons) who shot at the Impala as Wilson was driving down Folly Road was never identified and no one was ever charged with Wilson's murder. Significantly, the forensic evidence proved that the bullet that struck Wilson in the head during the chase was fired by a different gun than the one that fired the bullet that struck his leg at the Kangaroo Express. App. 212, ll. 1-5.

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[1] Laval Hazel also testified during trial. However, he denied firing a gun that night. App. 291, l. 8 – 293, l. 9.

A revolver with five spent shell casings was found in the Impala after it crashed. App. 216, ll. 12-17. While Wittrell admitted *in camera* that he knew a gun was found in the car, he claimed he did not know who the gun belonged to and denied that anyone inside the Impala shot a gun that morning. App. 210, l. 11 - 211, l. 1. Nevertheless, forensic evidence showed Wilson, Bryant, and Wittrell all had gunshot residue on their hands. App. 217, ll. 13-22; App. 218, ll. 19-21.

Trial counsel objected to any testimony concerning this subsequent chase and shooting arguing it was not relevant to whether Petitioner shot at the Kangaroo Express and attempted to murder Wilson, Bryant, Wittrell. App. 211, ll. 23-25. Counsel also argued the probative value of the evidence was outweighed by the danger of unfair prejudice because Petitioner was on trial for shooting the same individuals minutes earlier. App. 212, ll. 1-6.

The state conceded there was no evidence Petitioner was associated with the vehicle whose occupants chased the Impala down Folly Road and fired upon Wilson, Bryant, and Wittrell, killing Wilson. App. 213, ll. 7-17. However, the deputy solicitor argued the evidence was admissible as part of the *res gestae* and was necessary to explain to the jury why Wilson was not present to testify. App. 213, ll. 3-6. The solicitor was also concerned trial counsel would attempt to argue that the revolver with the five spent shell casings found in the Impala after it crashed along with the fact that Wilson, Bryant, and Wittrell all had gunshot residue on their hands was evidence the men fired a gun at the Kangaroo Express since Petitioner's defense was self-defense.[2] App. 217, ll. 5-23. The solicitor wanted to be able to argue this evidence was

[2] Trial counsel told the jury during his opening statement, "Now Domoneik [Petitioner] did shoot that night. There is no doubt about that. But why did he shoot. The answer is simple. He shot because somebody was shooting at him." App. 149, ll. 14-16.

from the subsequent chase and shooting, which resulted in Wilson's death, and not from the shooting at the Kangaroo. App. 217, ll. 5-14.

Trial counsel asserted their theory was not that the occupants of the gold Impala shot at Petitioner, but that other people at the Kangaroo were shooting at him, and he fired in self-defense. App. 220, l. 23 – 221, l. 7. Counsel agreed not to mention the firearm found in the gold Impala or the fact that its occupants later were found to have gunshot residue on their hands. The parties signed a written agreement to this effect, which was marked as Court's Exhibit No. 4.[3] Supp. App. 2. They also entered into a stipulation which was later published to the jury. It was marked as Court's Exhibit No. 3. The stipulation provided:

> 1. The parties agree that no one from the gold Impala shot at the defendant, Domoneik Washington, at the Kangaroo in the early morning of March 30, 2011.
>
> 2. The parties agree that Antwan Wilson died from causes unrelated to being shot at the Kangaroo and is not available to testify.

Supp. App. 1.

Petitioner rested without presenting any evidence. App. 485, ll. 19-25. The trial judge refused to instruct the jury on self-defense ruling there was no evidence to support the charge. She stated she assumed trial counsel had "abandoned" the defense. App. 453, l. 16 – 454, l. 1.

The deputy solicitor ultimately argued in closing:

> [T]his man, Domoneik Chip Washington [Petitioner], tried to kill Antwan Wilson and Edward Wittrell and Ronald Bryant as they sat in that gold Impala in the parking lot of the Kangaroo convenience store at 2:50 in the morning of March the 30th of 2011.
>
> **Defense counsel tells you that Mr. Washington was there and he was acting in self-defense. You have now heard two days of testimony in this**

[3] Specifically, the written agreement stated: "There will be no mention by either party on direct or cross-examination or argument of any weapon found in the Gold Impala after the crash or any positive gunshot residue tests performed on the occupants of the Gold Impala." Supp. App. 2.

case. And what you have not heard is one shred of evidence indicating that this defendant was acting in self-defense. Not one shred.

They have now entered into a stipulation which will go back to you in the jury room where they have agreed that no one from the gold Impala shot at the defendant, Domoneik Washington, at the Kangaroo that night.

That matter has been decided. It is not an issue for you. Nor is self-defense an issue for you in this case. **It is out of the case. Forget about it. It is time to move on.**

So what you need to decide next is whether or not this man, Domoneik Washington, was the one shooting the rounds into that gold Impala. And all the evidence points to the fact that he was.

App. 486, l. 13 – 487, l. 9 (emphasis added).

Despite not presenting any evidence Petitioner was acting in self-defense and also being aware the trial judge was not going to charge the jury on self-defense, trial counsel argued during her closing that Petitioner was shooting at the Lincoln, which was parked adjacent to the Impala, in self-defense after Laval Hazel and its other occupants fired at him. App. 504, l. 14 – 505, l. 19. Counsel denied Petitioner was shooting at the occupants of the Impala because "the people in the gold Impala [were] not shooting at him." App. 503, ll. 21-23.

A Charleston County grand jury indicted Petitioner on November 14, 2011 for three counts of attempted murder. App. 742-747. His case was called to trial on July 15, 2013 before the Honorable Deadra L. Jefferson, and a jury. App. 7. Deputy Solicitor Bruce DuRant represented the state, and Lori Proctor and John Kozelski represented Petitioner. App. 7. On July 17, 2013, the jury found Petitioner guilty of two counts of attempted murder and one count of the lesser included offense of assault and battery of a high and aggravated nature. App. 561, ll. 1-17. He was sentenced to twenty years for each offense. App. 656, ll. 2-11.

The Court of Appeals dismissed Petitioner's direct appeal pursuant to Anders v. California, 386 U.S. 738 (1967). App. 604-605.

On April 20, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 606-612. The state filed a return to this application dated February 5, 2016. App. 613-618. An evidentiary hearing was convened on December 6, 2016 before the Honorable G. Thomas Cooper. App. 619. Assistant Attorney General Alicia Olive represented the state, and Rodney Davis represented Petitioner. App. 619.

Petitioner testified at the PCR hearing that his defense at trial was self-defense. App. 634, ll. 13-23. He told his attorneys after his arrest that he was acting in self-defense after the men in the gold Impala began shooting at him. App. 648, ll. 15-20. He denied ever telling counsel that in defending himself he fired at the Lincoln. App. 687, ll. 7-10. Petitioner wanted to testify that he only fired at the occupants of the Impala after they shot at him first. App. 639, ll. 2-12; App. 651, ll. 21-23. However, his attorneys told him "it wasn't a good idea to testify because [he] would be cross-examined by the solicitor." App. 637, ll. 8-14. Based on counsel's advice, Petitioner chose not to testify. App. 638, ll. 1-13; App. 643, ll. 6-16.

As far as the agreement and stipulation, Petitioner testified that his attorneys "wanted to keep out" any evidence of the subsequent chase and shooting. His attorneys, specifically John Kozelski, repeatedly emphasized that "if the jury sees a dead body, it's automatically going to find you guilty." App. 640, l. 15 – 641, l. 8. However, Petitioner told counsel he had no objection to the state introducing this evidence. App. 642, ll. 3-8. He testified that the firearm found in the Impala with five spent shell casings and the fact that all three occupants of the Impala had gunshot residue on their hands would have supported his claim of self-defense. App. 642, ll. 9-17. Petitioner commented that the trial judge told his attorneys this evidence was exculpatory, but he did not know what that word meant at the time. App. 646, ll. 20-24.

Lori Proctor was lead counsel on the case. App. 679, ll. 8-9. She explained that she and co-counsel John Kozelski were concerned about the evidence of the subsequent chase and shooting being admitted because the jury could have assumed Petitioner shot and killed Antwan Wilson since Petitioner "was the one that was shooting at the gas station." App. 658, ll. 7-16. She maintained that while no one knew who killed Antwan Wilson, the deputy solicitor "wanted to assume that it was Mr. Washington [Petitioner]." App. 658, ll. 17-22. However, Proctor later acknowledged that Deputy Solicitor DuRant stated on the record during trial that he was not going to argue or suggest Petitioner was responsible for the murder. App. 662, l. 25 – 663, l. 21. She also admitted that the forensic evidence showed that the bullet that struck Wilson in the head causing his death was fired by a different firearm than the bullet that struck his thigh at the Kangaroo Express. App. 664, l. 10 – 665, l. 24.

In order to exclude any evidence of the subsequent shooting that resulted in Wilson's death, Proctor admitted they agreed not to mention the revolver that was later found in the Impala with five spent shell casings or that Wilson, Bryant, and Wittrell all had gunshot residue on their hands. App. 662, ll. 8-24.

Proctor could not remember her discussions with Petitioner pretrial about his defense. Petitioner could have told her he was defending himself from gunshots he perceived were being fired from the gold Impala. She simply could not recall. App. 673, ll. 10-23. However, she maintained her theory of self-defense was that Petitioner was being shot at by people in the Lincoln. App. 677, ll. 4-11.

Proctor also could not remember her advice to Petitioner concerning whether or not he should testify. However, she asserted that she had "never told a client he could not testify at his own trial." She likely went over with Petitioner the pros and cons of testifying and Petitioner

chose not to testify. App. 654, l. 14 – 655, l. 25. When asked by the PCR judge why she did not advise Petitioner to testify in order to establish the elements of self-defense when he had no impeachable offenses and there was a stipulation in place preventing the solicitor from questioning Petitioner about the subsequent shooting, Proctor had no explanation. She could not remember. App. 680, l. 13 – 681, l. 23.

John Kozelski, who was second chair, testified that they entered into the agreement and stipulation because they thought evidence of the subsequent chase and shooting was going to be highly prejudicial to Petitioner given that "the same person who Mr. Washington was being accused of attempting to murder [at the Kangaroo] was subsequently murdered two miles down the road." Kozelski thought it "was an opportunity for Mr. DuRant [the solicitor] to sort of backdoor a murder conviction into the trial." App. 688, l. 14 – 689, l. 3. However, Kozelski also acknowledged that Deputy Solicitor DuRant stated on the record that he did not intend to argue Petitioner was involved in the subsequent shooting which resulted in Wilson's death. App. 698, ll. 10-23.

Kozelski maintained his theory of the defense was that Petitioner was acting in self-defense after people in the Lincoln shot directly towards Petitioner. App. 692, ll. 4-8. However, he admitted there was little evidence to support this theory. App. 697, l. 18 – 698, l. 24.

Like Proctor, Kozelski had no recollection as to any discussions with Petitioner concerning his right to testify. App. 693, l. 15 – 694, l. 2.

By order filed February 11, 2019, the PCR judge denied Petitioner relief. The judge found Petitioner's defense at trial was that Petitioner was shooting into the Lincoln after an occupant of that vehicle had fired shots and that there was evidence presented at trial to support this defense. App. 730-731. The judge cited to the following evidence in support of this

conclusion: Don Manigault, a passenger in the Lincoln, testified that "a guy in my car shot back . . . way after the first shot went off." App. 730-731. Additionally, the judge maintained there was testimony from multiple witnesses that no one from the Impala fired a shot prior to Petitioner shooting. App. 730-731. The judge also cited to trial counsel's opening statement, in which he stated Petitioner shot "because somebody was shooting at him," to support his conclusion that Petitioner's defense was that Petitioner was shooting into the Lincoln after an occupant of that vehicle had fired shots first. App. 730-731.

The PCR judge rejected Petitioner's assertion that he never told counsel he was firing at the Lincoln in self-defense. App. 731. He further found Petitioner's testimony that if he had testified at trial, he would have told the jury that the occupants of the Impala started shooting at him and he fired back in self-defense was not credible. App. 731-732. The PCR judge maintained Counsel Proctor testified that they developed their theory of self-defense, that Petitioner was shooting at the Lincoln after occupants of that vehicle shot first, while watching the surveillance video and that this defense was consistent with the video. App. 732. The judge further maintained that Counsel Kozelski testified that he watched the video "over 500 times" and it was hard to say that any shots were fired from the occupants of the Impala. App. 732.

As to the agreement and stipulation, the PCR judge concluded trial counsel was not deficient in agreeing to exclude the evidence of the firearm and spent shell casings found in the Impala along with the fact that Wilson, Bryant, and Wittrell all had gunshot residue on their hands in return for the exclusion of the evidence of Wilson's subsequent death. App. 734. The judge found the choice to enter into the agreement and stipulation was a reasonable strategic decision that was consistent with the defense theory that Petitioner was defending himself from shots fired by occupants of the Lincoln. App. 734-735.

Lastly, concerning trial counsel's advice about testifying, the PCR judge merely found Petitioner freely and voluntarily waived his right to testify. The judge based this finding solely on the colloquy during trial between Judge Jefferson and Petitioner where the judge advised Petitioner of his right to testify or not to testify. App. 735-737.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when, (1) based on an unreasonable strategy, trial counsel agreed to exclude exculpatory evidence, and further entered into a stipulation that "no one from the gold Impala shot at the defendant, which eviscerated Petitioner's defense, and (2) counsel advised Petitioner not to testify despite the fact that he had no prior convictions which could be used as impeachment and his testimony was essential to his defense, this petition for writ for certiorari follows.

ARGUMENT

1.

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when due to an unreasonable trial strategy counsel agreed there would be no mention by either party of the weapon found in the gold Impala or the positive gunshot residue tests performed on the occupants of the gold Impala, and further entered into a stipulation that "no one from the gold Impala shot at the defendant" when Petitioner's defense was self-defense, specifically that he shot at the occupants of the gold Impala because they shot at him first, and where Petitioner was prejudiced because the outcome of his trial would have been different if this exculpatory evidence had been presented to the jury.

Trial counsel developed a theory of self-defense that was not supported by any evidence whatsoever. In furtherance of this unreasonable theory, counsel agreed to exclude exculpatory evidence which would have created reasonable doubt as to Petitioner's guilt and ultimately resulted in his acquittal. Specifically, if the jury had learned about the firearm found in the Impala with five spent shell casings and the existence of gunshot residue on the hands of its occupants coupled with argument that Petitioner was defending himself from shots fired by occupants of the Impala, there is a reasonable probability the outcome of Petitioner's trial would have been different.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"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) (citing Strickland, 466 U.S. at 668 and Cherry, 300 S.C. at 115, 386 S.E.2d at 624). "When evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" Id. (quoting Strickland v. Washington, 466 U.S. at 690).

Trial counsel developed a theory of self-defense, specifically that Petitioner was shooting at the Lincoln after its occupants fired at him, which was not supported by any evidence whatsoever and was directly refuted by the surveillance footage from the Kangaroo, Petitioner's own statements to counsel, and the testimony of other witnesses. This constitutes deficient performance. While Don Manigault, a passenger in the Lincoln, admitted that Laval Hazel, another passenger, "shot back," he claimed Hazel shot "way after the first shot went off" and after they had started driving away and were about to turn onto Camp Road. App. 273, l. 15 –

275, l. 17; App. 277, ll. 7-13. Moreover, it does not appear from the video that anyone from the Lincoln fired a gun that morning or that Petitioner was shooting towards the Lincoln. See State's Exhibit No. 69 (DVD of Surveillance Footage). Instead, the video clearly shows Petitioner shooting at the Impala whose occupants he is seen arguing with immediately prior to the shooting and with whom he had allegedly fought with at the Palm Tree Lounge earlier that morning. See State's Exhibit No. 69 (DVD of Surveillance Footage). Equette Robinson, the only witness who admitted to seeing the shooting, testified consistent with the video. She claimed she saw Petitioner walk up to the gold Impala and begin firing into the vehicle. App. 168, l. 19 – 169, l. 6.

Most importantly, Petitioner told counsel he was shooting in self-defense after the occupants of the Impala fired at him first. App. 639, ll. 2-12; App. 648, ll. 9-20; App. 651, ll. 10-23. While neither of Petitioner's attorneys could remember whether Petitioner said he was shooting at the Impala after Wilson, Bryant, and Witrell fired at him first, Proctor admitted Petitioner could have told her this. App. 673, ll. 4-23. Petitioner's assertion that he was shooting at Wilson, Bryant, and Wittrell, is consistent with the video, which shows him firing at the Impala, and consistent with the facts of the case. See State's Exhibit No. 69 (DVD of Surveillance Footage). Petitioner had allegedly fought with Wilson, Bryant, and Wittrell at the club and was seen exchanging words with Wilson immediately before the shooting. It is logical that these men shot at Petitioner as a result of the earlier confrontation and that Petitioner shot back in self-defense. However, there was no evidence Petitioner had any dispute with the occupants of the Lincoln.

Consequently, trial counsel was deficient for developing and presenting an unreasonable theory of self-defense, which was not supported by any evidence whatsoever and was specifically contradicted by the video and witness testimony.

Based on this unreasonable trial strategy, counsel entered into an agreement to exclude exculpatory evidence and a related stipulation, which completely eviscerated any defense Petitioner had to the charges. Counsel agreed not to mention any evidence that a revolver with five spent shell casings was found in the Impala after it crashed or that Wilson, Bryant, and Wittrell all had gunshot residue on their hands. This evidence would have supported Petitioner's defense that he was acting in self-defense and only shot at the occupants of the Impala after they fired at him first. Counsel's reasoning for agreeing to exclude this evidence was they were afraid the deputy solicitor would try to "backdoor a murder conviction" and suggest Petitioner was responsible for Wilson's subsequent death. However, the solicitor made clear on the record that there was no evidence Petitioner was involved in this subsequent chase and shooting and that he did not intend to argue such to the jury. Moreover, the forensic evidence established that the bullet that struck and killed Wilson during the chase was fired from a different gun than the bullet that struck Wilson in the thigh at the Kangaroo Express. Counsel's decision to enter into this agreement was therefore totally unreasonable.

In addition to this agreement, counsel also entered into a related stipulation, which completely did away with any reasonable defense Petitioner had to the charges. This was evidenced by the deputy solicitor's closing argument:

> **Defense counsel tells you that Mr. Washington was there and he was acting in self-defense. You have now heard two days of testimony in this case. And what you have not heard is one shred of evidence indicating that this defendant was acting in self-defense. Not one shred.**

> ***They have now entered into a stipulation which will go back to you in the jury room where they have agreed that no one from the gold Impala shot at the defendant, Domoneik Washington, at the Kangaroo that night.***
>
> That matter has been decided. It is not an issue for you. Nor is self-defense an issue for you in this case. It is out of the case. Forget about it. It is time to move on.

App. 486, l. 18 – 487, l. 5 (emphasis added).

Because of counsel's deficient performance, Petitioner had no defense whatsoever. Counsel's random argument during closing that Petitioner was acting in self-defense and shot at the Lincoln after Laval Hazel fired first was wholly incredible and worthless, particularly when the trial judge refused to charge self-defense. See App. 504, l. 14 – 505, l. 19.

Petitioner was prejudiced by counsel's deficient performance because the outcome of his trial would have been different if counsel had presented the credible defense that Petitioner was shooting at the occupants of the Impala after they fired at him and introduced the exculpatory evidence, specifically that a firearm and five spent shell casings were later found in the Impala and Wilson, Bryant, and Wittrell all had gunshot residue on their hands, which supported this defense.

Respectfully, this Court should hold the PCR judge erred, find counsel was ineffective, and remand for a new trial.

2.

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when counsel advised Petitioner not to testify even though (1) Petitioner had no impeachable offenses, and (2) his defense was self-defense and no other evidence was presented at trial that Petitioner was acting in self-defense, which made his testimony essential, and where Petitioner was prejudiced because the outcome of his trial would have been different if Petitioner had testified that he only shot at the occupants of the gold Impala after they shot at him.

Trial counsel was ineffective for advising Petitioner not to testify when his testimony was essential to his defense since no other evidence was presented at trial that Petitioner was acting in self-defense that morning. Significantly, Petitioner had no prior convictions that the solicitor could have used to impeach him. Any reasonably competent criminal defense attorney would have known that it would be near impossible to establish Petitioner was acting in self-defense during the shootout without Petitioner's testimony. Counsel also should have known the trial judge was going to refuse to charge self-defense based only on the evidence presented during the state's case in chief. Consequently, the only reasonable advice was that Petitioner should testify.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if he had testified in his defense that he only shot at the Impala after its occupants shot at him, particularly where the video of the shooting was inconclusive and in no way refuted Petitioner's assertion. See App. 689, ll. 21-23; App. 691, ll. 2-7; State's Exhibit No. 69 (DVD of Surveillance Footage).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's

conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing Rule 609, SCRE). "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id. (citing State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991) (waiver of Fifth Amendment right must be knowing and voluntary), *overruled in part on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

In Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999), this Court held trial counsel was ineffective when he failed to consider the possibility of Foye testifying in his defense given the evidence presented at trial. Foye was charged with trafficking cocaine. Id. at 588, 518 S.E.2d at 266. He was tried jointly with his father. Id. at 591, 518 S.E.2d at 268. After his father told Foye's counsel that he would testify Foye did not know cocaine was in the gym bag, counsel advised Foye not to testify because of his prior convictions. Id. However, at trial, his father testified he told Foye cocaine was in the gym bag as the pair were walking into the hotel to deliver the drugs and that Foye wanted to help his father because he was afraid his father would get hurt. Id. The two passed the bag back and forth before his father insisted Foye should not get involved and took the bag away from him prior to entering the hotel. Id. Foye waited in the lobby while his father delivered the cocaine. Id.

This Court held Foye's counsel was ineffective because he did not consider the possibility of Foye testifying after his father's damaging testimony. Id. at 592, 518 S.E.2d at 268. The Court concluded "counsel failed to use his discretion in employing an appropriate trial strategy in light of the unexpected testimony." Id. The Court emphasized counsel's admission that it may have been proper to put Foye on the stand after his father's damaging testimony. Id.

In this case, trial counsel was deficient because they advised Petitioner not to testify despite the fact that he had no impeachable offenses and that his testimony was essential to his defense of self-defense. Any reasonably competent criminal defense attorney would have known that without Petitioner's testimony, it was guaranteed the trial judge would refuse to instruct the jury on self-defense, which is what happened at trial. The trial judge found counsel had "abandoned" the defense. App. 453, l. 16 – 454, l. 1. Counsel should have been explicitly clear

to Petitioner that if he did not testify, the judge would not charge self-defense. The only reasonable advice to Petitioner given the facts of this particular case was that he should testify.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if he had testified that he acted in self-defense and only shot at Wilson, Bryant, and Wittrell after they fired at him first. Petitioner's testimony was consistent with the video and the other evidence at trial and would have created a reasonable doubt as to his guilt.

Because there is no evidence to support the PCR court's finding that counsel rendered effective assistance of counsel, Petitioner respectfully requests this Court reverse the order of the PCR court, vacate his convictions and sentence, and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issues presented.

Respectfully Submitted,

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of August, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable G. Thomas Cooper, Circuit Court Judge

DOMONEIK ANTWAN WASHINGTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix have been served on Domoneik Antwan Washington, #356158, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 21st day of August, 2019.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of August, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.