STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO RICHLAND COUNTY

William P. Keesley, Trial Judge
Paul M. Burch, PCR Judge

ANDRE T. BOONE,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000943

RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General

SAMUEL L. KEY
Assistant Attorney General
S.C. Bar No. 103206

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED FOR CERTIORARI

Petitioner's Issue Presented

Did the PCR judge err in finding that counsel was not ineffective for failing to move for a severance from the codefendant where counsel did not make a reasonable strategic decision to not file that motion where Petitioner and his codefendant were on opposite sides of a shootout and therefore, were not true codefendants?

Respondent's Counter-Statement of Issue Presented

Whether the PCR court correctly found Counsel was not ineffective for failing to move to sever Petitioner's case from his codefendant where Counsel felt the motion would have been unsuccessful and reasonably chose not to move to sever the case, and there is nothing in the record to indicate Petitioner was prejudiced by being tried jointly because the same evidence introduced at the joint trial would also have been admissible against Petitioner in a separate trial?

STATEMENT OF THE CASE

In April 2007, Andre Boone (Petitioner) was indicted for murder, breaching the peace in an aggravated nature, and unlawfully carrying a pistol. (App. 1877; 1882; 1887). Petitioner was represented by Assistant Public Defenders Camille Everhart Guthrie (Counsel), Danielle Payne, and Ashley R. Thomas. Assistant Solicitors Kathryn "Luck" Campbell Hubbird and Daniel R. Goldberg prosecuted the case. (App. 1).

On May 5–13, 2008, Petitioner proceeded to a jury trial on his murder charge before Judge William P. Keesley. Petitioner and a codefendant, Eugene Patterson, were tried jointly, and Patterson was represented by Tivis Sutherland, IV. (App. 1). The jury convicted Petitioner as indicted for murder. (App. 1624). The trial court sentenced Petitioner to serve forty-five years' imprisonment.[1] (App. 1643; 1879). Petitioner appealed.

Petitioner was represented by Chief Appellate Defender Robert Dudek on appeal. (App. 1646). The following issue was briefed to the Court of Appeals:

> 1. Whether the [trial] court erred by instructing the jury on "mutual combat" since that charge was burden shifting and inappropriate give the facts of this case since the prior agreement to fight on equal terms must be plain and not merely arise out of "fist fight or a scuffle," and defense counsel correctly cited *State v. Taylor* when objecting to this proposed jury instruction?

(App. 1649). After briefing and oral argument, the Court of Appeals affirmed on April 17, 2013. (App. 1681). Petitioner timely petitioned for rehearing on May 1, 2013. (App. 1684). The Court of Appeals denied the petition for rehearing on June 20, 2013. (App. 1689). The case was remitted back to the circuit court on September 13, 2013.

[1] The jury also convicted Patterson of murder, and the trial court sentenced him to serve forty-five years' imprisonment. (App. 1624; 1643).

Petitioner timely commenced the underlying PCR action on November 1, 2013. (App. 1690). The State submitted its return requesting an evidentiary hearing on February 24, 2016. (App. 1712). An evidentiary hearing convened on August 28, 2017, before Judge Paul M. Burch. Petitioner was present and represented by Leah B. Moody. Assistant Attorney General Jessica E. Kinard represented the State. (App. 1719). Petitioner testified on his own behalf at the hearing. (App. 1722). Counsel testified on behalf of the State. (App. 1764). On May 17, 2019, the PCR court denied relief. (App. 1873). Applicant appealed.

STATEMENT OF THE FACTS

Petitioner and Patterson's convictions stem from the death of Brian Wright. On the night of February 18–19, 2007, in a Waffle House parking lot, a fist-fight between rival gang members escalated into a shoot-out. Petitioner and Patterson were on opposite sides of the shootout, shooting at each other. Wright was a fleeing bystander. Wright was killed by a stray bullet.

The State's Case

Just after midnight, on February 19, 2007, Deputy Michael Beeler responded to a dispatch call referencing a fight and shots fired at the Waffle House near the intersection of Two Notch Road and I-20. The Waffle House was also next to a gas station. Beeler pulled into the gas station parking lot and saw a crowd of people and a man on the ground. (App. 334-35). The man was Brian Wright. Upon closer inspection, Beeler saw "blood and . . . brains poking out of [Wright's] head." (App. 335). Beeler knew there was nothing he could medically do to aid Wright. Beeler then began to question people from the crowd; however, the only response he received was "nobody saw anything." (App. 336).

Other officers arrived to investigate the scene. Investigator Bill Allen was the crime scene investigator who processed the scene; however, by the time of trial, Allen was working for a private security firm in Iraq. (App. 378). Lieutenant Zane Padgett was head of the forensics lab at the time, and he reviewed the pictures Allen took of the scene and his report. (App. 378). Padgett was also qualified as an expert in crime scene investigation. (App. 377). Padgett testified Allen recovered fired shell casings from two general areas of the Waffle House parking lot. (App. 377). The first area was near the front door of the Waffle House towards the front of the parking lot, and the second area was near the rear of the Waffle House parking lot. Specifically, there was a live bullet

and two fired shell casings from a .380 found in the front area of the parking lot, and two fired 9mm casings recovered from the back area of the parking lot. (App. 386-88).

A daytime search of the area uncovered an entry mark on the side of the gas station next to the Waffle House. Investigation of that mark also led to the recovery of three additional fired 9mm casings in the grass near the back of the Waffle House parking lot. (App. 392-94). The grass separates the Waffle House parking lot from the gas station parking lot. Padgett opined the reverse trajectory of the bullet mark in the gas station pointed directly to the area where the fired 9mm shells were recovered in the grass. (App. 400-01). However, Padgett noted that while the shell casings could give a general area where the shooter was standing, the location of the casings were not tied to where the shooter pointed his gun, "[i]t could be anywhere around that circle of the shell casings when he fired it." (App. 421). Wright's body was "directly across" from the front door area of the Waffle House and in front of the adjacent gas station. (App. 448).

The bullet that killed Wright was not recovered. (App. 450; 496). Pathologist Dr. Clay Nichols testified the gunshot wound to the back of Wright's head was a "through and through" wound. (R. 1023; 1029). The wound indicated the Wright's head was "ducked down forward" when he was shot. (App. 1028). Wright may have fallen immediately after being shot, or "his momentum could have carried him several feet after he was shot." His wound was consistent with his fleeing the shoot-out that occurred in the Waffle House parking lot. (App. 1029).

Karleisa Brabham testified that she was with friends on the night of the shooting, and the group went to the Waffle House to attempt to stop a planned fight they had heard one friend's boyfriend, Cedric Ruff, was going to be involved in. The group stayed in the car after arriving at the Waffle House. After Ruff arrived, a fight began. Brabham testified Petitioner walked in front of the car she and her friends were in, and she saw Petitioner fire a gun into the air. She also saw

a “brown-skinned guy in a black shirt” fire a gun from the front area of the Waffle House parking lot towards them in the back area of the parking lot. (App. 499-503).

Jerome Christopher Thompson testified he was a Blood gang member—a “Tree Top Piru” (TTP). (App. 519). Thompson testified that on the night of the shooting, he, with friends Derrick Guilyard, Bernard, Demon “Little Duke” Griffin, and Petitioner, learned a fight was to occur between Corey Sanders and his “homeboys.” The group went in search of the fight. Petitioner was driving his SUV, and the other men were passengers in the vehicle. They went to several locations in search of the fight. They eventually arrived at the Waffle House where the shooting later occurred. (App. 512-13; 520-23). Thompson saw members of the rival Crips gang drive into the parking lot, wearing their blue colors, and members of the Folk gang (who are aligned with the Crips) arrive. (App. 532; 534). Thompson testified Sanders began the fight. (App. 535).

Petitioner went to where Sanders was fighting, in the front of the Waffle House parking lot, and “one dude say, if he jump in, he was going to shoot them.” (App. 539). Petitioner returned to his SUV and asked Thompson for Thompson’s 9mm pistol, which was laying in Thompson’s lap and had been before they arrived at the Waffle House; and, after obtaining the gun Petitioner fired the pistol two times into the air. (App. 526-27; 542). Thompson saw two people, one light-skinned man wearing blue colors and one dark-skinned man, also open fire. (App. 544). Thompson testified Petitioner returned fire. (App. 552). Petitioner eventually got back in his vehicle. Thompson, Petitioner, and the rest of their group then drove away in Petitioner’s vehicle. Thompson later learned someone had been killed in the shootout. Thompson testified he disposed of the gun Petitioner fired at the Waffle House because Thompson “thought it had a body on it.” (App. 555-56).

Robert Portee, also a TTP Blood, was present at the Waffle House. Portee saw Sanders fight with another person named Chad. Portee also recalled that Chad had several people come to the fight with him, and basically described two groups coming together over the fight. Portee identified Applicant's codefendant, Eugene Patterson, as being one of the individuals present in the front area of the Waffle House parking lot. Portee eventually joined the fist fight with Sanders when he believed Chad was winning. Shots were then fired from the front and the back of the parking lot, and Portee fled. (App. 585-91). Portee testified he spoke to Petitioner before the fight started. Portee testified Petitioner told him that he "was going to chunk at these niggers," meaning he intended to shoot at them. Portee also heard the "racking of a gun" as Petitioner made the statement. (App. 592-93).

Quintez Clemons testified that he and Sylvester Boone were in the Waffle House parking lot that night speaking with Petitioner when a maroon car and a green car with white writing came by. Clemons recognized his friend, Karmidae a/k/a "Bay," driving the maroon car. Clemons went up to the car to say hello. However, there were two other men in the car Clemons described as "a light skinned" young man with braids, wearing blue colors, and another man. The light-skinned man pulled a gun on Clemons. When the light skinned man learned Clemons and Bay were cousins, he put the gun down. Clemons recalled the light-skinned man actually had two guns, what Clemons thought was a .357 revolver that he pointed at Clemons, and a black semiautomatic in his lap. The group of men in the maroon car later drove to the front of the Waffle House parking lot. (App. 611-14; 618). After the shooting began, Clemons recalled only seeing one "big black dude" in a black shirt shooting toward Petitioner. (App. 614-15).

William Kee, also a TTP Blood, was at the Waffle House that night. He testified that he only saw the first two shots that Petitioner fired into the air, and then he ran to his truck. (App.

623-24). Kee then heard multiple other gun shots from both the front and the back areas of the Waffle House parking lot. (App. 626).

Corey Sanders, another TTP Blood, testified that he, along with Charles Williams and Byron Morant, drove to the Waffle House so he could fight Chad. (App, 631-32). He knew Chad to be a Folk gang member. (App. 633; 636). Sanders testified he had an "ongoing beef" with Chad over "disrepect," and they set up the fight to resolve those issues. (App. 636). Sanders saw a burgundy Malibu with "Bay," co-defendant Eugene Patterson, and a "light skinned" guy inside enter the Waffle House parking lot. Patterson, who was in the back of the car, made a "gun signal," which Sanders described as he pointed an actual, high caliber, gun as if he was going to shoot, directly at him. Sanders described other people coming together for his fight with Chad, and testified "once we met up with each other, we squared off and fought." (App. 633-35; 650).

When the fight was about to begin, Sanders noted "the light-skinned guy was already standing outside with a gun in his hand. He wasn't trying to hide it or anything." The light-skinned man was wearing "all blue with a blue bandana around his face" and held a revolver. Sanders also noticed another group at the back of the parking lot, a group that included Petitioner and Thompson. Sanders testified Petitioner was a Blood, but from a different sect, a "Six Deuce Brim." (App. 637-640). Sanders acknowledged the "only beef" he had with Patterson was, "I'm Blood, he's a Folk." (App. 642-43). Though he did not see who was shooting, Sanders heard shots from what he believed to be three areas, from the nearby gas station and from the more immediate parking lot areas. (App 648-49).

Chad Robinson testified similar to Sanders, that he and Sanders were fighting, another person intervened, and "the [n]ext thing you know, pow, pow, we heard shots." (App. 964).

Though he could not identify any of the shooters, Robinson did recall seeing Eugene Patterson at the Waffle House in a burgundy car. (App. 969-70).

Karmindae Legget, a/k/a "Bay," (Bay) testified he went to the Waffle House with friends Eugene "Big Gene" Patterson, a Folk, and Oliver Feldman, a Crip, to watch the fight. (App. 703-05; 721). After the fight began, Bay heard gunshots fired from the back of the Waffle House parking lot. (App. 710). Bay testified Feldman and Patterson retrieved their guns from the car. Feldman had a .32 and Patterson had a .380. They fired several shots toward the back of the parking lot, then more shots were fired towards them. Bay, Feldman, and Patterson then got into their car and fled the crime scene. (App. 711-13).

Samuel Clemons (Samuel), who was with Petitioner at the Waffle House, recalled seeing Bay, Feldman, and Patterson pull up. He recalled Feldman was wearing blue, and holding what he thought was a .357 revolver. (App. 739-40; 761). He recalled that Petitioner "shot in the air twice and then that's when [Patterson] returned fire." (App. 743).

Derrick Guilyard testified he went to the Waffle House with Petitioner. Guilyard testified had been a Blood since the sixth grade. (R. 755). Guilyard explained that Bloods do not "get along" with Folks or Crips, but that Folks and Crips could peacefully coexist. (App. 756-57). That night, he saw Petitioner approach the fight in the parking lot, then return to the car and ask Thompson for Thompson's gun. He saw Petitioner fire the gun into the air. Guilyard testified he knew what was going to happen, "I mean, after one person shoots, another person begin to shoot." (App. 766-67). Guilyard dove for cover, but he could hear multiple gunshots being fired including around the car he was hiding in. (App. 770).

Demon Griffin, who was in the car with Guilyard, did not see the shooting, but estimated there were eleven-to-twelve shots fired in the shootout. Griffin heard the shots as he was hiding in Petitioner's vehicle during the shootout. (App. 788).

Oliver Feldman, a member of the "Rolling 20's Crip Gang," testified he knew Patterson through a mutual friend. (App. 793). He also knew Patterson to be a member of the Folk Nation gang. (App. 793-94). The night of the shooting, Feldman was wearing blue with a blue bandana, "[b]ecause it represents [his] gang colors." (App. 796). Feldman testified Patterson wore black. (App. 796). He testified Patterson received a call to go to the Waffle House, and he, Patterson and Bay left, with Bay driving and Patterson in the backseat. Feldman had a .32 H&R Magnum revolver, and Eugene had a .380 semiautomatic handgun. (App. 796-99). Feldman testified that, at first, only two people were involved in the fight, "then a third party got hisself [sic] involved." (App. 801). Feldman could tell that gangs were involved, "because one came to the aid of the other one." (App. 802-03). The fight was beginning to become "a fight between gang members." (App. 803). Feldman then saw someone from the back of the parking lot shoot into the air. (App. 803). The shooter then began to fire directly at Feldman. Feldman and Patterson retrieved their weapons from their car and returned fire. (App. 804-05). Feldman testified that neither he nor Patterson would have fired but for the fact that they were fired upon first. (App. 840). In cooperating with the investigation, Feldman advised that his handgun, a .32 H&R magnum caliber handgun, was in a coat in his bedroom. The gun was recovered. The gun could easily be mistaken for a .357 revolver. (App. 954-56; 1171-72).

Sgt. William McRoberts took Patterson's initial statement. In his initial statement, Patterson admitted being at the Waffle House and seeing the fight, but claimed he left when the fight started. He further claimed he heard gunshots as he was backing out to leave, and drove

"straight home . . . ." (App. 880-81). Patterson was later arrested as the investigation revealed more facts of his involvement. In his second statement, Patterson still denied involvement but stated he saw Feldman shoot at the crowd and towards the gas station. (App. 892-95). Patterson would later admit, in a third statement, that he did not drive himself to the Waffle House, but was with Bay and Feldman in Bay's burgundy Malibu. Patterson saw a man in the back of the Waffle House parking lot fire into the air once and into the crowd twice.[2] Patterson then stated that he and Feldman ran to their car, and Feldman began to return fire. (App. 920-22).

Forensic testing confirmed that all five spent 9mm casings recovered from the Waffle House parking lot or nearby grass were fired by the same gun—a 9mm semiautomatic pistol. Further, the two spent .380 casings recovered from the Waffle House parking lot were fired by the same gun—a .380 semiautomatic pistol; and the one unfired .380 bullet, recovered near the two spent .380 casings, had been loaded into the same gun that fired the .380 shell casings. (App. 1051-52; 1053-54).

Petitioner, in his statement to investigating officers, admitted he was a "TTP Blood" and was at the Waffle House to fight a "Folk" named Dameon. As people began to arrive, Sanders "yelled over" that "the people in the cars were the Folks who we had been supposed to fight earlier in the night . . . . We later figured out that they were leading us around just so they could get enough people to outnumber us. We figured out that they were wasting time so that they could get their group up." (App. 1255-58). According to his statement, when Petitioner approached the fight between Chad and Sanders, a light-skinned man he thought to be a Crip (Feldman) told him to back up or he would be shot. Petitioner saw a gun in the man's waistband. Petitioner then went

[2] Patterson's third statement was redacted pursuant to *Bruton v. United States*, 391 U.S. 123 (1968), to avoid any error. (App. 1448-49).

back and got Thompson's 9mm pistol. Petitioner fired it twice in the air. He saw "the Crip" and another person[3] point their guns in his direction. Petitioner took cover behind his car and fired five more times directly at the Crip, then fled. (App. 1258-59). He opined that none of his shots could have hit Wright because he fired directly over the Crip's head, and no one was in his line of fire. However, Petitioner admitted the first shot he fired as he took cover behind his SUV was fired wildly, and as a result, could possibly have struck Wright or the side of the gas station. (App. 1260-61).

Law enforcement learned Wright came to the Waffle House with members of the Folk Nation; however, there was no evidence Wright was a gang member. (App. 1295-96).

Petitioner's Defense

Petitioner called Donald Girndt in his defense. Girndt was qualified as an expert in crime scene interpretation. (App. 1362). Girndt opined Wright did not move far after being shot before collapsing. He also testified, based on the location of the recovered shell casings from the back of the Waffle House parking lot, Wright would not have been in the line of fire of that shooter (Petitioner). (App. 1363).

Petitioner testified at trial similar to the statement he gave law enforcement—he shot twice in the air, the light-skinned man (Feldman) and a dark-skinned man (Patterson) fired towards him, and he returned fire four times, aiming over their heads. Petitioner also claimed that he believed he needed to stop the fight or "somebody [was] going to end up getting hurt," and the only way he knew to do so was to fire in the air so everyone would disperse and go home. (App. 1380-84; 1386-87). Petitioner reiterated that no one was in the cross-fire. (App. 1416-18; 1424). However, at trial

3 This statement was also redacted pursuant to *Bruton* to avoid any error. Applicant later testified in his own defense; however, even though he testified, only the redacted version of his statement went to the jury, which omitted the reference to Patterson. (App. 1432-33).

Petitioner denied being a gang member. (App. 1388; 1394). Petitioner also admitted he initially misled law enforcement by telling the investigators he fired a .22 revolver up into the air, not Thompson's 9mm pistol. Petitioner admitted he actually showed police where this .22 pistol was located. Applicant admitted that when law enforcement confronted him about the .22, he admitted he misled the police and claimed he actually fired Thompson's 9mm pistol. (App. 1388-89).

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Appellate courts give great deference to a PCR court's credibility findings because appellate courts "lack[] the opportunity to directly observe the witnesses." *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, appellate courts give no deference to a PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985).

"In assessing prejudice under *Strickland*, the question ***is not*** whether a court can be certain counsel's performance had no effect on the outcome . . . ." *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (emphasis added). "Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

ARGUMENT

The PCR court correctly found Counsel was not ineffective for failing to move to sever Petitioner's case from his codefendant where Counsel felt the motion would have been unsuccessful and reasonably chose not to move to sever the case, and there is nothing in the record to indicate Petitioner was prejudiced by being tried jointly because the same evidence introduced at the joint trial would also have been admissible against Petitioner in a separate trial

Petitioner argues the PCR court erred in finding Counsel was not ineffective for failing to move for a severance from the codefendant because Counsel did not make a reasonable strategic decision to not file that motion because Petitioner and his codefendant were on opposite sides of a shootout and therefore, were not true codefendants. (Pet. 5). The PCR court found Counsel credibly testified she considered moving to sever Petitioner's case from his codefendant and discussed the issue with the defense team. The PCR court found Counsel made a reasoned professional judgment, after discussing with the defense team, "that it was strategically in [Petitioner's] best interest that [Petitioner] be tried with another co-defendant or co-defendants." (App. 1830). Further, the PCR court found Counsel credibly testified the defense team researched whether Applicant would be entitled to a severance and discovered the motion would not likely be successful. (App. 1831). Based upon these findings of fact, the PCR court concluded Counsel was not ineffective for making a reasonable strategic decision after a complete and thorough investigation. (App. 1830). The PCR court did not err, and certiorari should be denied.

Petitioner argues Counsel's PCR testimony is inconsistent with the PCR court's factual finding that Counsel made a "reasoned professional judgment that it was strategically in [Petitioner's] best interest that [Petitioner] be tried with another co-defendant or co-defendants." (Pet. 7) quoting (App. 1830). However, there is evidence in the record to support the PCR court's findings.

Petitioner focuses on Counsel's testimony, that she initially thought Petitioner would lose if tried with codefendants, in arguing nothing in the record supports the PCR court's finding. (Pet. 7). However, Counsel was concerned about this issue, and from her testimony it appears that is the reason she discussed the issue with co-counsel and her supervisor. (App. 1771-72; 1789). Specifically, Counsel testified her notes reflected, "We were all in agreement that the state [was] hoping . . . to get all three [codefendants] to duke it out in court, pointing the finger at each other. If that happens, I think we lose." (App. 1771). Counsel recalled her co-counsel researched the severance issue, and it appeared the defense did not have a good argument for severing the case. (App. 1771). Further, Counsel testified she discussed the issue with Lauren Mobley, her supervisor at the Public Defender's Office, and Mobley felt "a jury would be more likely to convict [Petitioner] if he is the only one there that [the jury] can blame, less likely if [the jury] [had] several to choose from." (App. 1772). Counsel testified her notes reflected the issue was discussed, but she "did not have the reasoning for why we did not do it." (App. 1772).

The above referenced testimony supports the PCR court's finding that Counsel made a reasonable strategic decision not to move to sever the case. It is uncontested the issue was discussed. Counsel's co-counsel researched the issue and they felt the motion would be unsuccessful. Counsel's assessment the motion to sever would likely be unsuccessful was reasonable. *See Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001) ("The general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a co-defendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime."); *Id.* ("A severance should be granted only when there is a serious **risk that a joint trial would compromise a specific trial right of a co-defendant** or

prevent the jury from making a reliable judgment about a co-defendant's guilt.") (emphasis in original).

Importantly, Counsel conferred with her supervisor who offered a different opinion regarding the severance—Petitioner stood a better chance if he was not the only one on trial because the jury could blame someone else. Counsel did not testify she had no reason for choosing not to move to sever; rather, she testified she could not specifically recall why she did not move to sever. Based on the facts of this case, it can be reasonably assumed Counsel did not move to sever based off her supervisor's opinion that the jury was less likely to convict Petitioner if it had another person to blame. *See Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"). Counsel faced a difficult strategic decision whether to move to sever Petitioner's case, and she ultimately chose not to so move. Counsel's decision was reasonably thought out and researched; therefore, her decision should not be second guessed in hindsight. *See Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992) (stating courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel). Therefore, the PCR court did not err because the record supports the PCR court's factual findings, and Petitioner failed to show Counsel's decision not to move to sever the case was unreasonable. As such, Petitioner failed to show Counsel was deficient and certiorari should be denied as to this issue.

As for prejudice, Petitioner argues he was prejudiced by Counsel's failure to move for a severance because Petitioner and Patterson were on opposite sides of a shootout and should not have been considered codefendants. (Pet. 9). The PCR court found Petitioner was not prejudiced

in this respect because, based on the record and Counsel's credible testimony, it was made abundantly clear throughout trial that Petitioner and Patterson were not true codefendants but were on opposite sides of the shootout. (App. 1833). The PCR court further found Petitioner was not prejudiced because the trial court gave proper cautionary instructions stating that the jury consider the evidence against each defendant separately. (App. 1833).

As the PCR court correctly found, it was made clear to the jury by Counsel, the State, and the trial court that Petitioner and Patterson were on opposite sides of the shootout. (App. 305-29; 283-84; 291; 1603-04; 1616-18). Because it was clear that Petitioner and Patterson were on opposite sides of the shootout and not traditional codefendants, no prejudice resulted from Petitioner and Patterson being tried as codefendants.

Petitioner also argues a jury would have been more likely to reject the State's mutual combat argument that all the shooters were responsible for the victim's death. (Pet. 9). However, Petitioner does not dispute that a mutual combat charge was warranted and that issue was decided on direct appeal. Additionally, Petitioner failed to show what evidence would not have been admissible had he and Patterson been tried separately. Because the evidence would have substantially been the same if he were tried separately from Patterson, Petitioner has failed to show prejudice. *See Harrington*, 562 U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable."). Because Petitioner failed to show any prejudice resulted from Counsel's alleged failure to move to sever the case, Counsel was not constitutionally ineffective; as such, certiorari should be denied as to this issue.

CONCLUSION

Based on the foregoing, Counsel was not constitutionally ineffective. The record supports the PCR court's findings that Counsel reasonably chose not to move to sever the case after the defense team researched the issue; Counsel conferred with her supervisor; and Counsel's supervisor offered a different perspective as to whether a joint or separate trial would benefit Petitioner. The PCR court found it reasonable for Counsel to follow her supervisor's advice and chose not to move for a severance; therefore, Counsel was not deficient. Further, Petitioner failed to show prejudice resulted from Counsel's alleged deficiency. First, had Counsel moved to sever the case, it is likely the trial court would have denied the motion based on existing case law. Second, it was made clear to the jury that Petitioner and Patterson were on opposite sides of the shootout and not traditional codefendants. Finally, Petitioner failed to show what evidence introduced during the joint trial would have been inadmissible in a separate trial. Therefore, Petitioner failed to show prejudice resulted from Counsel's alleged deficiency. As such, certiorari should be denied.

Respectfully submitted,

s/ Samuel L. Key

ALAN WILSON
Attorney General

SAMUEL L. KEY
Assistant Attorney General
S.C. Bar No. 103206

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

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