

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Aiken County
Doyet A. Early, III, Plea Judge
William P. Keesley, Post-Conviction Relief Judge

Appellate Case No. 2019-000617

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Nov 06 2020

S.C. SUPREME COURT

GARY JERRELL MEANS, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES ON PETITION FOR WRIT OF CERTIORARI

Petitioner's Issues on Petition for Writ of Certiorari

- I. Did the PCR court err in finding defense counsel was not ineffective for failing to present any factual basis for a claim of self-defense during petitioner's immunity hearing where defense counsel neglected to call any witnesses?
- II. Did the PCR [court] err in finding defense counsel's deficient performance did not result in prejudice to petitioner where counsel failed to pursue a definitive ruling from the sentencing judge on counsel's request for the judge to exercise his discretionary authority to credit petition for time served on home detention?

Respondent's Counterstatement of Issue on Petition for Writ of Certiorari

- I. Did the post-conviction relief court properly find Petitioner failed to establish any constitutional ineffectiveness of counsel for electing not to present witnesses at Petitioner's pre-trial immunity hearing based on the South Carolina Protections of Persons and Property Act (S.C. Code Ann. § 16-11-410 et seq.), where Petitioner does not assert he would not have pled but for counsel's handling of the immunity hearing, counsel properly prepared for and presented evidence and arguments for immunity based on his review of the facts and circumstances of the case, and Petitioner cannot establish immunity would have been granted had witnesses been presented?
- II. Did the post-conviction relief court properly find Petitioner failed to establish any constitutional ineffectiveness of counsel regarding his handling of Petitioner's request for credit for time served while on home detention prior to his guilty plea pursuant to S.C. Code Ann. §24-13-40, where counsel properly requested such credit and the plea court indicated its intent to sentence Petitioner to as much time as possible while still honoring the plea agreement entered into between Petitioner and the State?

STATEMENT OF THE CASE

Petitioner Gary Jarrell Means, Jr. is presently confined within the South Carolina Department of Corrections serving a twenty-year sentence. On December 20, 2010, Petitioner fatally shot his close friend who had come to Petitioner's residence and was invited inside. Petitioner immediately walked to the sheriff's department and both surrendered himself and the firearm used in the shooting. Petitioner was taken into custody and subsequently indicted by the Aiken County Grand Jury for murder (2011-GS-02-0332). He retained N. Douglas Brannon, Esquire, shortly after his arrest. Deputy Solicitor David W. Miller of the Second Circuit Solicitor's Office prosecuted the case. While the matter was pending, Petitioner was released from detention and placed on monitored home detention at his sister's home. (App. 29-84).

Petitioner sought immunity from prosecution under the South Carolina Protection of Persons and Property Act (S.C. Code Ann. § 16-11-410 et seq.). On January 17, 2013, Petitioner proceeded to a pre-trial immunity hearing before the Honorable Doyet A. Early, III, circuit court judge. At the hearing, the State and Petitioner stipulated to the facts of the case, including: that Petitioner believed he was under imminent attack and feared for his life due to a mental or emotional breakdown; that Petitioner called his sister to report that he felt he was in immediate danger well before the victim came to Petitioner's residence; that Petitioner's sister immediately left the upstate area to render aid to Petitioner whom she believed was in severe distress; that the victim arrived at Petitioner's home shortly thereafter; that Petitioner initially invited the victim into his home; that the victim did not make any threats or have a weapon; that Petitioner shot the victim; and that Petitioner then immediately walked to the sheriff's department and surrendered to law enforcement. Both Petitioner and the State agreed Petitioner's sister's statement to law enforcement was uncontested for the purposes of this hearing and stipulated that Petitioner called

her believing he was in imminent danger. Counsel provided the court with a copy of Petitioner's psychiatric evaluation completed by Dr. Luther A. Diehl, a clinical psychologist retained by counsel shortly after he was retained, and argued Petitioner had schizophrenic tendencies which led him to have a reasonable belief that he was under immediate threat. Counsel argued the court should view the facts from Petitioner's viewpoint and that Petitioner reasonably believed his life was in impending danger, thereby satisfying the requirements for immunity under Section 16-11-440(C). The State responded first that the applicable subsection of the act was Section 16-11-440(A), and Petitioner could not meet the requirements for immunity because there was no evidence the victim was in the process of unlawfully or forcefully entering Petitioner's residence, as he was an invited guest. Moreover, the State argued the act required that the fear of imminent peril or threat must be objectively reasonable and there was no evidence that Petitioner was reasonably in fear for his life. Following the hearing, the court denied Petitioner's request for immunity from prosecution. (App. 1-28).

Following the denial of immunity, Petitioner elected to forego his jury trial and enter a guilty plea to the lesser included offense of voluntary manslaughter pursuant to a plea agreement between Petitioner and the State for a recommended sentence of no more than twenty years of imprisonment. Petitioner entered his guilty plea to voluntary manslaughter on October 8, 2013, but sentencing was deferred by mutual agreement to allow Dr. Diehl to be present and address the court on Petitioner's behalf. (App. 29-46).

The court reconvened for sentencing on April 14, 2014, and after listening to presentations from Petitioner and the State, Judge Early followed the recommendation and sentenced Petitioner to twenty years of imprisonment. Counsel requested the court order Petitioner receive credit for the time he was confined on home detention pursuant to Section 24-

13-40 but the court declined to make any such finding. Petitioner did not pursue any post-plea motions or a direct appeal. (App. 47-84).

Thereafter, on March 23, 2015, Petitioner timely sought post-conviction relief based on a claims of ineffective assistance of counsel and requesting he be awarded credit for the time he was on home detention and a “sentence deal with a cap of 15 years.” Respondent filed its return and requested an evidentiary hearing to resolve the claims. Counsel, through retained counsel Tara D. Shurling, filed an amended application. (App. 85-101).

On October 31, 2018, an evidentiary hearing was convened before the Honorable William P. Keelsey, circuit court judge. At the conclusion of the hearing, Judge Keelsey requested several memorandums from the parties. After a review of these memorandums and the transcript from the evidentiary hearing, Judge Keesley issued an order denying post-conviction relief that was filed January 17, 2019. Petitioner subsequently filed a motion to reconsider, alter, or amend this order pursuant to Rule 59(e), SCRCPC, and following a return and reply to the return, Judge Keesely summarily denied the motion by written order dated March 11, 2019. (App. 102-426).

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, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (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. Smalls, 422 S.C. 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).

ARGUMENT

On appeal, Petitioner asserts the post-conviction relief court erred in denying him relief as to two separate grounds of ineffective assistance of counsel—first, Petitioner claims counsel was ineffective for failing to present witnesses at his pre-trial immunity hearing; and second, Petitioner claims counsel was ineffective for failing to effectively argue to the sentencing court that Petitioner was entitled to discretionary credit from the time he served on home detention prior to his plea. However, the PCR court properly considered the record in its entirety, listened to the evidence and arguments presented, and determined Petitioner did not meet his burden of establishing counsel was constitutionally ineffective as to either claim. These findings are supported by ample probative evidence and not premised on any errors of law, and accordingly, this Court should deny certiorari.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Petitioner has the burden of proving the allegations in his PCR action, and when alleging counsel was constitutionally ineffective, he must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Petitioner must prove counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the

attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced 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. 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. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from a rigid rule of representation. Rather, Strickland requires the applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. The function of the PCR court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney.” Id. at 690. “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Because the Sixth Amendment right to counsel also applies to a defendant entering a

guilty plea, Hill v. Lockhart extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel.” Hill, 474 U.S. 52; cf. Padilla, 559 U.S. at 373 (recognizing the guilty plea process is a “critical phase of litigation” for purposes of the Sixth Amendment right to effective assistance of counsel).

When reviewing a guilty plea, the analysis of counsel’s performance under the first prong of Strickland remains unchanged—the applicant must show counsel’s representation fell below the objective standard of reasonableness demanded of attorneys in criminal cases. Hill, 474 U.S. at 58–59. The second, or “prejudice” prong, however, “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” Id. at 58–59. Specifically, when an applicant claims counsel’s deficient performance caused him to accept a plea, the applicant “must show that there is a reasonable probability that, but for [plea] counsel’s [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial.” Id. at 59. This inquiry “focuses on a defendant’s decisionmaking” and does not turn on the outcome of a defendant’s actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. Padilla, 559 U.S. at 372.

Surmounting Strickland’s high bar is never an easy task, and the strong societal interest in finality has “special force with respect to convictions based on guilty pleas.” Lee, 582 U.S. ___, 137 S. Ct. at 1967 (internal citations and quotation marks omitted); cf. Hill, 474 U.S. at 58 (“[R]equiring a ‘prejudice’ showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel ‘will serve the fundamental interest in the finality of guilty pleas.’”). Reviewing “[c]ourts should not upset a plea solely

because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." Lee, 582 U.S. ____, 137 S. Ct. at 1967. Rather, judges should "look to contemporaneous evidence to substantiate a defendant's expressed preferences." Id. In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. Harres, 282 S.C. at 134, 318 S.E.2d at 361.

I. The post-conviction relief court properly found Petitioner failed to establish any constitutional ineffectiveness of counsel for electing not to present witnesses at Petitioner's pre-trial immunity hearing based on the South Carolina Protections of Persons and Property Act (S.C. Code Ann. § 16-11-410 et seq.), where Petitioner does not assert he would not have pled but for counsel's handling of the immunity hearing, counsel properly prepared for and presented evidence and arguments for immunity based on his review of the facts and circumstances of the case, and Petitioner cannot establish immunity would have been granted had witnesses been presented.

Petitioner asserts counsel was constitutionally ineffective in his handling of the pre-trial immunity hearing and the post-conviction relief court erred in refusing to grant relief on this ground. Specifically, Petitioner argues it was necessary for counsel to present witnesses (and more specifically, Petitioner himself) at the immunity hearing to establish self-defense and counsel's failure to present Petitioner or other witnesses amounts to deficient performance. Moreover, Petitioner boldly asserts if he had he testified, his testimony would have established a viable claim of self-defense and resulted in a grant of immunity from prosecution. Critically, Petitioner does not argue his guilty plea was involuntary based on counsel's performance or that he would not have entered his guilty plea but for counsel's purportedly deficient performance as to his immunity hearing.

After hearing Petitioner's testimony at the evidentiary hearing, in conjunction with counsel's testimony and a thorough review of the record, the post-conviction relief court

properly rejected Petitioner's claims of constitutional ineffectiveness, finding counsel's performance was reasonable based on the facts and circumstances of this particular case and Petitioner failed to establish he would have been granted immunity if Petitioner had testified or presented other witnesses. These findings are supported by probative evidence in the record and the law. A review of the record shows that while counsel audaciously attempted to invoke the South Carolina Protections of Persons and Property Act in an unrealistic attempt to secure immunity for Petitioner, the evidence in the record from both the general sessions and post-conviction record does not support a grant of immunity under the Act. This Court should deny certiorari.

Following the denial of immunity, Petitioner waived his constitutional rights, freely admitted his guilt, and voluntarily pled guilty to the lesser-included offense of voluntary manslaughter. Nowhere in the record does Petitioner assert his plea was entered involuntarily or coerced based on counsel's handling of his immunity hearing. Petitioner never asserted he would not have pled guilty but for counsel's performance at the immunity hearing. On appeal, Petitioner similarly fails to make any such argument. Accordingly, as an initial matter, Petitioner's claims must fail as a matter of law because he has failed to establish (or even argue on appeal) that his plea was induced by counsel's ineffectiveness and he would not have pled guilty but for counsel's performance. See Hill, 474 U.S. at 59 (“[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”); Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018) (“In order to establish prejudice when challenging a guilty plea, a defendant must prove there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would

have gone to trial. The crux of the inquiry is whether counsel’s ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial.”) (internal citations and quotations omitted). Because Petitioner does not argue and did not present any evidence that he would not have pled but for counsel’s performance at his immunity hearing, this claim fails.

Notwithstanding Petitioner’s complete failure to argue or present evidence that he would not have pled but for counsel’s performance at his immunity hearing, the post-conviction relief court properly denied relief because there is no evidence establishing Petitioner was entitled to immunity under the Act and counsel provided competent representation based on the facts and circumstances of Petitioner’s case.

Petitioner sought protection under the Protection of Persons and Property Act, which provides any law-abiding person who uses deadly force in a manner permitted by the provisions of the Act is immune from criminal prosecution for the use of deadly force. S.C. Code Ann. § 16-11-450(A); see S.C. Code Ann. § 16-11-420(B) (“[I]t is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.”). The intent of the legislature in implementing the Act was to “codify the common law Castle Doctrine” and “to extend the doctrine to include an occupied vehicle and the person’s place of business.” S.C. Code Ann. § 16-11-420(A). In carrying out that intention, the legislature instructed:

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 or 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.

S.C. Code Ann. § 16-11-440(A). Additionally, the legislature further instructed:

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(C) (emphasis added).

Pursuant to the Act, the defendant has the burden on establishing he or she is entitled to immunity by a preponderance of the evidence in a pre-trial hearing. State v. Glenn, 429 S.C. 108, 116, 838 S.E.2d 491, 495 (2019), reh'g denied (Mar. 12, 2020) (citing State v. Duncan, 392 S.C. 404, 410-11, 709 S.E.2d 662, 665 (2011)). When seeking immunity pursuant to Section 16-11-440(C), the defendant must establish the existence of all the elements of self-defense aside from the duty to the retreat. See State v. Jones, 416 S.C. 283, 301, 786 S.E.2d 132, 141 (2016) (recognizing “the defendant must demonstrate the elements of self-defense, save the duty to retreat, by a preponderance of the evidence” in order to establish entitlement to a grant of immunity pursuant to Section 16-11-440(C)). However, if the statutory presumptions of Section 16-11-440(A) are applicable to the case, “there is no requirement that the defendant prove he believed he was in imminent danger of losing his life or sustaining serious bodily injury[.]”Id. Furthermore, an individual who proves all the required elements of self-defense by a preponderance of the evidence could be entitled to immunity pursuant to the Act in light of the “applicable provision of law” language in Section 16-11-450(A) even if other portions of the Act—such as Section 16-11-440(C)—are not necessarily applicable. See State v. Scott, 424 S.C.

463, 473, 819 S.E.2d 116, 120-121 (2018) (“Self-defense is the classic provision of law that justifies the use of deadly force. It was clearly the Legislature’s intent that if a person seeking immunity under subsection 16-11-450(A) could prove the elements of self-defense in an immunity proceeding, immunity must be granted.”).

To establish a claim of self-defense, the following four elements must be met:

First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Curry, 406 S.C. at 371, n. 4, 752 S.E.2d at 266 (quoting State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984)); see State v. Harvey, 110 S.C. 274, 277, 96 S.E. 399, 400 (1918) (instructing a person may not employ deadly force in self-defense unless there is a reasonable necessity to kill even if the other elements of self-defense are present). Significantly, “[i]t is an axiomatic principle of law that the defense has not been established if any one element is disproven.” State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

Petitioner argues counsel was constitutionally ineffective not presenting any witnesses, including Petitioner himself, at the pre-trial immunity hearing, and asserts this decision crippled his ability to establish a claim of self-defense and resulted in the denial of immunity from prosecution. However, this argument is patently without merit, as the record establishes Petitioner had no *valid* self-defense claim upon which immunity could have been granted. The evidence presented, including Petitioner’s own testimony at the evidentiary hearing, fails to

establish any requisite difficulty. Accordingly, counsel cannot be ineffective.

Despite a lack of any evidence available to establish an objectively reasonable belief of imminent danger, counsel strategically presented the best possible argument he could on Petitioner's behalf—that his subjective belief of imminent danger was reasonable based on his perceptions at the time of the incident (albeit riddled with mental health concerns). At Petitioner's pre-trial immunity hearing, counsel asserted to the court the uncontested (and, in fact, stipulated) evidence established Petitioner believed he was under attack and in imminent danger of losing his life. Counsel argued whether this belief was reasonable must be viewed from Petitioner's vantage:

[U]nder the Castle Doctrine, one who has a legal right to be in a place in his own apartment, he has no duty to retreat, and if he perceives a threat to his life, he has an absolute right to defend himself to include lethal force. Your Honor, I believe that the Court is compelled in this situation to view this from the perspective of the defendant. Whether our victim – his best friend, and by all accounts a wonderful man – whether he made a threat or not. If my client perceived it to be a threat, he's entitled to immunity under the Castle Doctrine, Your Honor.

(App. 7-8). While counsel rightfully conceded there was no evidence of an attack (because none such evidence exists), he nonetheless argued the court should “take the egg-shell-skull theory of law” and consider the matter from the perception of his client. (App. 8). Despite counsel's arguments, the court correctly rejected this argument, finding no evidence established Petitioner was entitled to relief.

The trial court's denial of immunity was not based on counsel's errors or omissions, but rather, based on the facts and circumstances of Petitioner's case. The record before this Court firmly establishes Petitioner believed he was in imminent danger *before* Petitioner came to his residence and that this fear was wholly unrelated to any conduct of the victim. Not only did the victim not bring about the difficulty, there was no difficulty when Petitioner shot his friend.

Counsel cannot be deemed constitutionally deficient for failing to introduce evidence of self-defense when no such evidence exists in this case. Counsel's handling of the pre-trial immunity hearing and decision not to present witnesses was reasonable based on the facts and circumstances of this case.

Petitioner cannot establish it is "reasonably likely" he would have been granted immunity had counsel presented witnesses as he now complains counsel failed to do. Strickland, 466 U.S. at 696. At the evidentiary hearing, Petitioner testified, as well as presented testimony from his mother. He also introduced 911 calls and other evidence in support of his claims. However, none of the evidence presented establishes a valid claim for self-defense or otherwise provides a colorable claim for immunity under the Act. Petitioner testified to his version of events at the evidentiary hearing. Petitioner explained he felt as though people were out to get him, and that after a phone conversation his sister was on the way from the upstate to his home. Petitioner testified he allowed the victim into his residence when the victim arrived after his call with his sister. Petitioner he asked Victim to leave because his sister was on her way to his house, but that victim did not do so. Petitioner testified he told counsel that the victim placed his hand in his crotch area, and that when Petitioner asked the victim to remove his hand, the victim refused. Petitioner testified he did not know he could testify at the pre-trial immunity hearing and he would have wanted to testify if he had known he could do so. Petitioner contended counsel did not explain the Act to him. Petitioner offered contradictory testimony that he told counsel he would not make it through a trial, but perplexingly stated that he was not worried about testifying but only the trial itself.

Despite complaining counsel was ineffective for failing to present him as a witness because he would have established he acted in self-defense, Petitioner's proffered testimony at

the evidentiary hearing does not come close to establishing a reasonable probability that the outcome of the immunity hearing would have been different—there was still no reasonable threat by the victim, only Petitioner’s own subjective perceptions that he was under attack well before he invited the victim into his home. Contrary to Petitioner’s contentions, his perceptions are not dispositive—the key question to the applicability of the Act is whether *a reasonably prudent man of ordinary firmness and courage would have entertained the same belief*. Curry, 406 S.C. at 371, 752 S.E.2d at 266. No man of ordinary firmness and courage is propelled to deadly fear by a person merely keeping his hand in his pants. Even after Petitioner presented his testimony and other evidence at the evidentiary hearing, there is *no evidence* to justify a belief of imminent danger. Petitioner has failed to establish the requisite prejudice for relief, as there is no substantial likelihood the result of the proceeding would have been different had he or other witnesses testified.

Additionally, Counsel made a strategic decision not to present Petitioner or his sister as witnesses after consulting with Petitioner and his family. This decision was reasonable based on the facts and circumstances of petitioner’s case. At the evidentiary hearing, counsel testified multiple times as to his discussions with Petitioner and his family as to whether he would not be able to withstand a trial or be able to testify and the resounding response from Petitioner and his family was that Petitioner would not be able to withstand testifying. Counsel explained while Petitioner could have possibly provided facts helpful to meeting the burden of proof for immunity under the Act, he also could have brought out harmful facts, such as his significant drug use before the incident and Petitioner’s acknowledgment that the victim did not make any threats towards him, but rather, merely had his hand down his pants and refused to remove his hand upon Petitioner’s request. When questioned about the purpose of the hearing without the

benefit of Petitioner's testimony, Counsel noted he was able to submit Dr. Diehl's mental health evaluation to the court and stipulate facts with the State, including that Petitioner called his sister to report his fear of imminent danger immediately prior to the shooting. Counsel reasonably relied upon Petitioner's mental health and perception at the time of the killing in tandem with the stipulated facts instead of presenting testimony from Petitioner, who reported he did not believe he would be able to withstand a trial or testifying. Counsel recalled he explained the right to testify to Petitioner, but Petitioner, his sister, and his mother all did not believe Petitioner would be able to successfully testify. Based on the facts and circumstances of Petitioner's case, counsel made a reasonable strategic decision to present evidence through the report of a mental health professional and argue why Petitioner was entitled to immunity based on Petitioner's perceptions at the time of the incident. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) ("When counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel.") (internal citations and omission omitted). Counsel's reliance on a valid and reasonable trial strategy is not deficient performance.

The post-conviction relief court properly denied relief, and this Court should deny certiorari.

II. The post-conviction relief court properly found Petitioner failed to establish any constitutional ineffectiveness of counsel regarding his handling of Petitioner's request for credit for time served while on home detention prior to his guilty plea pursuant to S.C. Code Ann. §24-13-40, where counsel properly requested such credit and the plea court indicated its intent to sentence Petitioner to as much time as possible while still honoring the plea agreement entered into between Petitioner and the State.

Petitioner also asserts counsel was constitutionally ineffective in his handling of Petitioner's request for discretionary credit for the time he served on home detention following his release on bond. Specifically, Petitioner asserts that while the post-conviction relief court

properly found counsel was deficiency for failing to pursue “clarification or specific determination” from the circuit court as to whether Petitioner was entitled to this discretionary credit for time served, the post-conviction relief court improperly found the claim failed because Petitioner could not establish prejudice. However, the post-conviction relief court properly denied relief, finding there was “credible evidence” in the record that the sentencing judge indicated to counsel he would impose the maximum term of incarceration possible while still abiding by the plea agreement for a recommended term of imprisonment of no more than twenty years. (App. 388). There is ample probative evidence in the record to support the denial of relief. This Court should deny certiorari.

A sentencing court *may* award a defendant credit for time served pretrial while released on bond under “monitored house arrest.” S.C. Code Ann. § 24-13-40 (Supp. 2019) (“In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest.”); State v. Field, 429 S.C. 578, 580, 840 S.E.2d 548, 549 (2020).

Petitioner began his home detention on February 28, 2011. At the sentencing proceeding, the sentencing judge indicated Petitioner would be given some credit for time served, but expressed some confusion in an exchange with Counsel:

THE COURT: So I’m gonna sentence you to 20 years in the Department of Corrections. You’ll be given credit for the time that they’ll – the state law allows. Mr. Brannon, I don’t know that I can give him anymore time than that because – under what 24-13-40 allows.

MR. BRANNON: Your Honor, that statute was just amended, and, and you, you now have authority to sentence – to include time on house arrest if you choose to do so.

THE COURT: Well, I don’t know if it has a retroactive effect or what.

MR. BRANNON: Well, it would of become law before today.

THE COURT: I am gonna allow whatever the Department of Corrections deems appropriate and give it to him.

(App. 81-82). Counsel did not further protest and did not file a motion to reconsider the sentence.

At the evidentiary hearing, Counsel testified he informed the sentencing judge of the recent amendment to Section 24-13-40 to allow a court, in its discretion, to give a defendant credit for time spent on monitored house arrest pre-trial. He also acknowledged the sentencing judge declined to use this discretion, instead noting the Department of Corrections would award whatever credit it deemed appropriate. Counsel acknowledged he did not file an appeal, a post-trial motion, or otherwise protest the sentencing judge's decision not to utilize his discretionary authority. However, crucially, counsel testified he engaged in three conferences with the sentencing judge and the solicitor before the sentencing hearing, and everybody (including Petitioner) knew the sentencing court intended to sentence Petitioner to twenty years of *active* imprisonment. (App. 147-160, 177-179).

There is evidence of probative value to support the post-conviction relief court's determination that the result of the proceeding would not have been different had counsel handled his request that Petitioner be awarded this discretionary credit for time served in a different manner, or pursued a post-hearing motion or appeal on this issue. Accordingly, this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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