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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Sumter County

Honorable George M. McFaddin, Circuit Court Judge

MATHEW C. DWYER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-002210

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel abandoned his trial strategy midtrial and suddenly advised Petitioner not to testify since such advice was due to counsel's misunderstanding of the law on self-defense and the standard to obtain a jury instruction on self-defense, and where Petitioner was prejudiced because there is a reasonable probability the outcome of his trial would have been different if he had testified and presented evidence that he was acting in self-defense during the altercation with the decedent?

STATEMENT OF THE CASE

A Sumter County grand jury indicted Petitioner on July 9, 2015 for murder and possession of a weapon during the commission of a violent crime. App. 620-621. His case was called to trial on October 19, 2015 before the Honorable Maite Murphy, and a jury. App. 1. Assistant Solicitor John P. Meadors represented the state, and John S. Keffer represented Petitioner. App. 1. On October 23, 2015, the jury found Petitioner guilty as indicted. App. 478, l. 21 – 479, l. 14. He was sentenced to forty-five years for murder and five years concurrent for the weapons offense. App. 489, l. 16 – 490, l. 4.

The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Dwyer, 2017-UP-440 (S.C. Ct. App. December 6, 2017); App. 529-530.

On May 21, 2018, Petitioner filed an application for post-conviction relief raising the claim argued in this brief. App. 532-541. The state filed a return to this application dated July 26, 2018. App. 542-554. An evidentiary hearing was convened on November 16, 2018 before the Honorable George M. McFaddin, Jr. App. 555. Assistant Attorney General Susannah Cole represented the state, and Timothy Griffith represented Petitioner. App. 555. By order filed November 30, 2018, Judge McFaddin denied Petitioner relief. App. 606-619.

On July 26, 2019, Petitioner filed a petition for writ of certiorari with the Supreme Court. The state filed a return to this petition on December 9, 2019. By order dated January 7, 2020, the Supreme Court transferred this appeal to the Court of Appeals pursuant to Rule 243(l), SCACR. On November 1, 2021, this Court granted the petition for writ of certiorari and ordered further briefing pursuant to Rule 243(j), SCACR.

This brief of petitioner follows.

STATEMENT OF FACTS

On the night of January 26, 2015, the decedent, Johnny Singleton, was playing cards with friends. App. 152, l. 16 – 153, l. 8. He left between 9:30 and 10:00 pm. App. 153, ll. 9-12. He was alone. App. 153, ll. 9-12. His phone had been ringing throughout the night and Singleton left upset. App. 155, l. 17 – 156, l. 11. One of Singleton's friends remembered seeing Petitioner at her house when Singleton was also present. App. 154, l. 18 – 155, l. 6.

The police found Singleton's car wrecked backwards in a ditch early the next morning. App. 161, l. 1 – 162, l. 8; App. 166, l. 14 – 167, l. 8. Singleton was dead in the car. App. 83, ll. 15-23. The car was in reverse gear. App. 83, ll. 9-11. Singleton's body was "found in the back seat of the vehicle, in a seated position, with his legs across the center console." App. 83, ll. 17-23. The rear window was shattered, the driver's window was broken, and the passenger front window was down. App. 84, ll. 13-23. The police concluded that the car was damaged from "reversing into the ditch." App. 96, ll. 22-25. The next day, from the autopsy, the police learned Singleton had been shot in the back of the head. App. 95, ll. 20-24.

The police found Singleton's phone in the woods behind the car. App. 120, l. 18 – 121, l. 3. After taking the phone into evidence, an investigator began calling the numbers in Singleton's call history. App. 362, l. 17 – 369, l. 14. The police determined that Singleton and Petitioner had called each other that night. App. 362, l. 17 – 369, l. 14. They executed a search warrant at Petitioner's residence and took him into custody. App. 241, l. 7 – 250, l. 14. Petitioner denied knowing anything about Singleton's death. App. 245, l. 10 – 246, l. 4; App. 250, ll. 9-11.

The police summoned Petitioner's brother, Stephen, to the station and interrogated him for over six hours. App. 297, l. 2 – 299, l. 25. They threatened Stephen with prosecution. App. 301,

ll. 14-19. Stephen testified that the police told him that if he did not "say the right thing, I can be charged with accessory." App. 306, l. 6 – 307, l. 2.

The state called Stephen as a witness at trial. App. 263, ll. 21-24. On the night of Singleton's death, Stephen got a call from Petitioner. App. 266, ll. 5-11. Petitioner wanted Stephen to pick him up on Highway 521 in Sumter County. App. 266, l. 21 – 268, l. 22. When Stephen picked him up, Petitioner "looked beat up. Like really beat up." App. 268, ll. 23-25. Petitioner "looked like he was in a fight." App. 269, ll. 5-6. Petitioner's hand was bleeding. App. 269, ll. 18-21. Stephen took him home. App. 270, l. 25 – 271, l. 11.

Stephen later saw Singleton's death on the news and asked his brother what happened. App. 273, l. 10 – 274, l. 5. Stephen testified about what Petitioner told him:

> Well he just said, I ain't know if he had been knowing this man or not. But in the car, he said [the] man gave him the wallet. Being that was the type of person he was, I guess the man had – he said the man had gave him the wallet earlier because he wanted favors. **He wanted like sexual favors.** I didn't know why they was going up there, but he wanted sexual favors. Matthew [Petitioner] said that the man gave him the wallet before anything ever went down. **And then on the way, on the way going there, I guess, he wanted Matthew to do some things for him. And Matthew just told me that he ended up pulling over. And that's when they pulled over. And he's probably force himself and they got in a tussle or whatever.**

App. 276, ll. 1-15 (emphasis added). Stephen continued:

> And yeah, he just say that **after they pulled over, the man had really got more aggressive and try to force him to do whatever. And that's how he got into a fight.** And when he say **as they was fighting, he stumbled across a gun**.... I guess **it was in the man's car already. And that's when he just picked it up, and he said he shot him.** He didn't know if he was dead or not. He just got out of the car and then called me.

App. 277, ll. 1-10 (emphasis added).

The solicitor attempted to impeach Stephen with a statement the police typed, Stephen signed, and was entered into evidence at trial. In this statement, Stephen told the police that "Matthew [Petitioner] told me that him and the dude was tussling in the car, and that the dude knew Karate, and had been military. And he got scared and said that he shot him in head." App. 289, ll. 6-20. Petitioner and Singleton "were tussling" in the car and after Singleton got shot, "the car was wrecked and hit a tree." App. 289, ll. 6-20. Stephen's statement also says, "Matthew told me that the dude that got killed was a [fagot], that he used to rape boys." App. 291, ll. 3-5.

On cross-examination, Stephen testified:

Q: . . . [Y]our brother told you that there was a tussle, is that right?

A: That's right.

Q. There was a fight.

A. That's right.

Q. He was scared, is that correct?

A. That's correct.

Q. I mean, that's in your statement. Your brother told you he was scared, is that right?

A. That's right.

Q. He also told you that this individual knew karate. Is that right?

A. That's correct.

App. 302, l. 18 – 303, l. 15.

During the charge conference, trial counsel requested the judge charge the jury on self-defense. App. 415, l. 15 – 417, l. 7. He cited Stephen's testimony and the statements entered into evidence showing Petitioner was scared and that his actions were reasonable. App. 415, l. 15 –

417, l. 7. Counsel asserted that "no matter how small, the evidence is there to at least offer that charge in self-defense." App. 415, l. 15 – 417, l. 7.

The solicitor maintained there was no "evidence of self defense whatsoever." App. 418, ll. 3-25. The trial judge agreed. She ultimately ruled:

> In regards to the self defense issue, Mr. Keffer [trial counsel], the court will respectfully deny your motion. The court finds that **there is no testimony to establish the elements of self defense**; that the defendant was without fault, and the defendant was [in] imminent danger, and that there was no other way to avoid the danger. The testimony did not establish those three elements.

App. 419, ll. 1-8 (emphasis added).

The jury convicted Petitioner of murder. App. 478, l. 21 – 479, l. 17. On appeal, Petitioner challenged the trial judge's refusal to charge self-defense. He argued: "The trial court erred in refusing to charge self-defense when evidence showed [Petitioner] and the decedent, who was ex-military and knew martial arts, got into a fight after a sexual advance in the decedent's moving car and that [Petitioner] was scared." App. 497. This Court affirmed Petitioner's convictions and sentence holding there was no evidence from which it could reasonably be inferred that Petitioner acted in self-defense. Consequently, the Court concluded the trial judge did not err by refusing to charge the jury on self-defense. State v. Dwyer, 2017-UP-440 (S.C. Ct. App. December 6, 2017); App. 529-530.

During his PCR hearing, Petitioner testified that his defense at trial was self-defense. App. 567, l. 22 – 568, l. 4. This was the only defense he and trial counsel had discussed. App. 568, ll. 2-3. The plan before trial was for Petitioner to testify and tell his "side of the story." App. 564, ll. 16-22. Petitioner explained, "The whole week [of trial] me and him [trial counsel] agreed that I was going to testify." App. 565, ll. 9-12. However, all of a sudden on the fourth day of trial after eleven witnesses had testified for the state, including Petitioner's brother, trial counsel told

Petitioner "it would be a bad idea for [him] to testify." App. 565, ll. 12-15. Counsel told Petitioner it was not necessary for him to testify because his brother, Stephen Dwyer, "testified in [Petitioner's] favor." App. 565, ll. 12-15. Consequently, based on counsel's advice, Petitioner did not testify at trial. App. 565, ll. 9-10.

At the hearing, Petitioner made clear, "I wanted to testify. This was a self-defense case. Without my testimony, the jury . . . wouldn't know what happened in the vehicle because me and the deceased was the only two involved and they [the jurors] never got the opportunity to hear my side of the story." App. 564, ll. 17-22. He asserted the outcome of his trial would have been different if he had testified. App. 564, l. 23 – 565, l. 1.

Petitioner's testimony at the evidentiary hearing that his defense at trial was self-defense and that he had always planned to testify was corroborated by trial counsel's opening statement to the jury. Counsel told the jury:

> Mr. Dwyer [Petitioner] comes to this courtroom with the presumption of innocence. And that's the foundation of our law. . .
>
> Now Mr. Meador's [the solicitor] job is to start taking off that cloak of the presumption of innocence. And he laid out certain facts, which are not in dispute. Mr. Dwyer [Petitioner] knew Mr. Singleton. [They] were together that night. We know that there [were] conversations that day. We know from cell phone records they knew each [other] and they spoke. The rest of it is pure speculation. Because the reality of it is, Mr. Singleton picked up Mr. Dwyer about 9:30, 10:00 o'clock.
>
> Mr. Singleton is actually from Camden. Which is why they were on [Highway] 521. And they were driving on 521. And **we believe the evidence is going to show that Mr. Dwyer asked to get out of the car; that he felt uncomfortable; that he asked several times for Mr. Singleton to stop the car. And the car did stop. And Mr. Singleton was driving, and there was a fight and there was an altercation.** And that is something the State didn't present to you, because they don't want [you] to consider that. But that's the reality and that's what happened.
>
> We're not going to spend 2 or 3 days worrying about who called who, when and where. Because **we know that they spoke**. And **we know that they're together**, and you're going to hear that. What we will discuss, and what I will

> proffer; is that, **this is a case of self-defense. There was a fight, and there was a disagreement and there was an altercation.** And that is not in dispute. What's also not in dispute is Mr. Singleton's death. He died January 26th. He died of a bullet hole. **Mr. Dwyer [Petitioner] is not going to get up there and say that didn't [happen].** ***He is going to get up there and explain why it happened.*** **What were the facts and circumstances behind that. Why were they there? Why was he in the car? What was his relationship with Mr. Singleton? Did they know each other before? They were not strangers. They knew each other before.**
>
> . . .
>
> **What is in dispute is what happened to these two people in that car. Why did the car stop? Why was it found the way it was found? Why was the cell phone where it was found? What exactly happened?** ***We believe that the evidence is going to suggest, is going to show this is a case of self-defense.*** **That is not murder.**
>
> ***Mr. Dwyer is not going to say this didn't happen. He's going to explain why it happened.***

App. 76, l. 5 – 78, l. 25 (emphasis added).

Petitioner's testimony was further corroborated by trial counsel, John Keffer. Keffer explained at the evidentiary hearing that during his first meeting with Petitioner, Petitioner "had claimed it was in self-defense, that the victim in the case was an alleged sexual offender, that he had known the victim, that the victim had tried to assault him, and he was defending himself and he had maintained that pretty much from day one." App. 574, ll. 3-10. Keffer said he "vigorously pursued" self-defense and his intent was to present evidence to support that Petitioner was acting in self-defense during the altercation with Singleton. App. 575, ll. 8-22. Keffer later clarified that the only evidence he intended to present was Petitioner's testimony. He explained the "whole self-defense" case was "based on what he [Petitioner] would testify to." App. 589, ll. 20-22. Keffer repeated several times throughout his testimony that Petitioner intended to testify in his defense. App. 588, ll. 11-16; App. 589, ll. 19-23; App. 591, ll. 15-20.

Keffer ultimately advised Petitioner not to testify because of a letter Petitioner wrote to Demetrius Cooper in March 2015 asking Cooper to create an alibi for Petitioner for the night the

decedent died and to explain how Petitioner injured his hand that evening. Keffer said he learned of this letter "either on the eve of trial or shortly after a jury was impaneled." App. 577, ll. 1-21. He maintained the letter "completely, completely changed the case." App. 578, ll. 16-20. It "fundamentally changed everything." App. 583, ll. 13-14. The case went from Petitioner was acting in self-defense "to now he's searching for an alibi." App. 578, ll. 16-20. Keffer claimed, "[Y]ou can't go forward with a self-defense when at the same time you're asking for an alibi." App. 583, ll. 14-17.

After learning of the letter, Keffer told Petitioner "he would be subject to cross-examination on that letter." App. 578, ll. 11-14. He asserted, "I sat down and talked to him [Petitioner]. I said, you're gonna have to explain this letter, you're gonna [have to] explain why you wrote this letter." App. 579, ll. 11-14. According to Keffer, the letter is why Petitioner did not testify. App. 578, ll. 16-23; App. 591, ll. 15-20. Keffer refused to acknowledge that Petitioner may have written the letter to Cooper out of fear since he was facing life without parole, and to do whatever he could to avoid a trial and conviction. App. 583, l. 23 – 585, l. 19.

The state called Demetrius Cooper as a witness during Petitioner's trial. Cooper testified that he received a letter from Petitioner in the mail. App. 196, l. 23 – 197, l. 10. The letter was dated March 9, 2015. App. 200, ll. 24 – 201, l. 3. Included in the envelope with the letter was a "key code" to decipher the contents of the letter, parts of which were written in "code." App. 198, ll. 8-14. Cooper used the "key code" to interpret what the letter said. App. 198, ll. 15-24. Petitioner told Cooper in the letter that he needed an alibi for January 26, 2015, the night of the shooting. App. 202, l. 11 – 203, l. 5. After being deciphered, the letter, which was published to the jury, read:

> Coop, What's up big bro. What's good with you. I hope everything is all good. Tell Ronnie I said hello. I just want you to know how much I really appreciate

> everything you are doing for me. I can't say thank you enough. I love you bro. Real shit. It ain't too many real people like you out there no more. But shit my baby's mama stupid ass probably ain't gone [write] back on Facebook. But her grandma's number is 803-305-1740. If you do call that number, do not tell them you called them on my behalf. But anyway, the rest of this letter . . . **I need an alibi for January 26. My story is that from around 6:00 pm until about 8:15 pm, I was with you. We were drinking and chilling in [Poplar] Square. All you know is that when you pulled up, I was already there. I was drunk so I was talking cash shit. Me and a N word you didn't know started fighting. I was getting off on the N so his home boy jumped in and tried to hit me with a bottle. But I busted it, and it busted on my head [sic]. That's when you jumped in and broke it up. My thump [sic] was bleeding real bad, so I said I was going to my baby's grandma's house to clean and wrap my thump [sic] up. You knew that she lived in Gamecock, so you went ahead and left too after I started talking. So if you don't mind me using your name, that's what I am going to say. So just in case anybody contacts you then you will know what to say and our stories will match.** Let me know if that is all right with you. It's a shame I can't depend on my own brother to get the job done. Also see if you can get in contact with Devon Kerley on Facebook, and tell him to write me ASAP. I appreciate everything bro. Take care . . .

App. 200, l. 19 – 208, l. 13 (emphasis added). The letter was purportedly signed by Petitioner. App. 208, l. 13.

The PCR judge ultimately denied Petitioner relief finding Petitioner failed to prove trial counsel was deficient. App. 606-619. The judge found counsel's advice to Petitioner not to testify because counsel believed Stephen Dwyer's testimony and statements concerning what Petitioner told him after the altercation "were enough to request a self-defense charge" was not deficient. App. 618. The judge further found that counsel's advice to Petitioner that it "was too risky" for Petitioner to take the stand and explain why he wrote the letter to Demetrius Cooper asking Cooper to create an alibi for him was reasonable. App. 616-617. The judge concluded that trial counsel articulated a valid strategic reason for advising Petitioner not to testify in his defense. App. 617. As far as prejudice, the judge determined since Petitioner would have to admit to the jury that he "attempted to commit a fraud upon the court" by seeking an alibi from Cooper, "he cannot show how the outcome of the trial would have been different had he elected to testify." App. 618.

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). The Court reviews questions of law de novo, with no deference to trial courts. Id. at 180-181, 810 S.E.2d at 839-840 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel abandoned his trial strategy midtrial and suddenly advised Petitioner not to testify since such advice was due to counsel's misunderstanding of the law on self-defense and the standard to obtain a jury instruction on self-defense, and where Petitioner was prejudiced because there is a reasonable probability the outcome of his trial would have been different if he had testified and presented evidence that he was acting in self-defense during the altercation with the decedent.

Petitioner had consistently maintained his desire to testify in his defense at trial. Trial counsel admitted the strategy before trial was that Petitioner was going to testify. Counsel even informed the jury during his opening statement that Petitioner would testify and explain what happened in the car that led to the alteration and ultimate death of the decedent. Counsel insisted the evidence would show Petitioner was acting in self-defense.

Nevertheless, in the middle of trial, after learning of a letter Petitioner had written to Demetrius Cooper requesting Cooper create an alibi for Petitioner for the night of the altercation, counsel suddenly advised Petitioner that he should not testify. Counsel's advice was based largely on the fact that Petitioner would be subject to cross-examination about the contents of the letter. However, Cooper had already testified about his receipt of the letter and published its contents to the jury. Therefore, the jury was aware that Petitioner had written to Cooper requesting an alibi. Moreover, counsel erroneously believed there was sufficient evidence presented during the state's case in chief for Petitioner to obtain an instruction on self-defense.

Counsel's advice constituted deficient performance because, in advising Petitioner not to testify, counsel demonstrated his misunderstanding of the law of self-defense and the requirements needed to obtain a jury instruction on self-defense. 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 physical altercation with the decedent without Petitioner's testimony. Counsel also should have known that the trial judge was going to refuse to charge self-defense based only on the evidence presented during the state's case in chief. Moreover, if anything, the admission of the letter should have been an additional reason in favor of Petitioner testifying so that Petitioner could explain to the jury why he sought an alibi despite his position that he was acting in self-defense when he shot the decedent that night.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if Petitioner had testified in his defense and explained why he sought an alibi from Cooper, and presented evidence that he was acting in self-defense during the altercation with the decedent.

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), our Supreme 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.

The 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 he abandoned his trial strategy midtrial and failed to utilize his discretion when he advised Petitioner not to testify. His advice was also based on a misunderstanding of the law of self-defense. It is undisputed that Petitioner's trial strategy was to argue self-defense and that he intended to testify. Counsel informed the jury during his opening statement that Petitioner was going to testify and that he was acting in self-defense during the altercation. See App. 76, l. 5 – 78, l. 25. However, because of a letter Petitioner wrote to a friend requesting he create an alibi for Petitioner, counsel threw his strategy out the window, and advised Petitioner not to testify. This advice was based on counsel incorrect belief that the trial judge would charge self-defense based on Petitioner's brother's testimony alone. Moreover, Petitioner could have easily explained to the jury why he wrote the letter to Demetrius Cooper, despite asserting he was acting in self-defense during the altercation. Petitioner was facing a murder charge, which carries up to life without parole, and was desperate to avoid a trial and conviction.

Petitioner was prejudiced by trial counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if Petitioner would have testified that he was acting in self-defense during the altercation with Singleton, which Petitioner had maintained since "day one." App. 574, ll. 3-10. Because of counsel's faulty advice, Petitioner ultimately did not testify, and counsel was forced to argue lack of malice and voluntary

manslaughter in closing, which completely contradicted what counsel told the jury during his opening statement.

Respectfully, this Court should hold the PCR judge erred by finding counsel was not ineffective, reverse Petitioner's convictions and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy_____________
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of December, 2021.