STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ON WRIT OF CERTIORARI TO SUMTER COUNTY
Court of Common Pleas

The Honorable George M. McFaddin, Jr., Post-Conviction Relief Judge
The Honorable Maite Murphy, Trial Judge

Appellate Case No. 2018-002210

MATTHEW C. DWYER, ...Petitioner,

v.

STATE OF SOUTH CAROLINA, ...Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases:

South Carolina Supreme Court Cases:

Other Cases:

South Carolina Rules:

ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of 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?

Respondent's Counterstatement of Issue Presented

Did the post-conviction relief court properly find trial counsel was not constitutionally ineffective for failing to advise Petitioner to testify in support of his claim of self-defense where trial counsel advised Petitioner of his right to testify; explained it was Petitioner's decision whether to testify or not; and properly advised Petitioner that, if he chose to testify, he would be subject to cross-examination regarding a coded letter he wrote a State's witness attempting to secure an alibi, and where the trial court conducted an extensive colloquy with Petitioner regarding his Fifth Amendment right at the conclusion of which Petitioner knowingly and intelligently informed the court he did not wish to testify in this case?

STATEMENT OF THE CASE

In July of 2015, the Sumter County Grand Jury indicted Petitioner for murder and possession of a weapon during the commission of a violent crime (2015-GS-43-0623). John S. Keffer, Esquire, (Counsel) represented Petitioner. Assistant Solicitor John P. Meadors (Meadors) of the Third Circuit Solicitor's Office prosecuted the case. On October 19, 2015, Petitioner appeared with Counsel before the Honorable Maite Murphy and proceeded to a jury trial. At the conclusion of the five-day trial, the jury found Petitioner guilty as indicted. Judge Murphy sentenced Petitioner to forty-five years' imprisonment for murder and a concurrent term of five years for the weapons charge. Thereafter, Petitioner filed a timely notice of appeal.

Appellate Defender David Alexander of the South Carolina Commission on Indigent Defense perfected Petitioner's appeal. In his brief, Petitioner raised the following issue:

> Whether the trial court erred in refusing to charge self-defense when evidence showed that appellant 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 the appellant was scared?

On December 6, 2017, this Court issued an unpublished opinion affirming Petitioner's conviction and sentence. *State v. Matthew C. Dwyer,* Unpublished Opinion No. 2017-UP-449 (Ct. App. December 6, 2017). The Remittitur was issued on December 27, 2017.

Petitioner then filed his application for post-conviction relief on May 21, 2018, alleging he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
    a. Failure to advise right to testify and closing argument;
    b. Failure to inform of plea offer'
    c. Failure to keep attorney/client privilege;
    d. Failure to prevent Applicant from addressing court;
    e. Failure to call Sheriff as a witness;
    f. Failure to request mistrial;
    g. Failure to present evidence in defense;

h. Failure to request continuance;
i. Failure to object to hearsay

2. State misconduct and presentation of false evidence
    a. Stephen Dwyer was threatened with prosecution if he did not testify;
    b. State failed to disclose exculpatory information;
    c. State used improper procedure to obtain DNA;
    d. State failed to inform jury the victim was a sex offender;
    e. State tampered with evidence;
    f. State presented witness who was victim of prior assault;
    g. State treated the testimony of the witnesses as fact
3. Trial Court erred in refusing to charge self-defense
    a. Evidence clearly showed that Applicant and decedent got into a fight
4. Violation of my 14th amendment/due process
5. Biased jury/ biased testimony; and
6. Hearsay

An evidentiary hearing into the matter convened on November 16, 2018, at the Sumter County Courthouse before the Honorable George M. McFaddin. At the outset of the hearing, Petitioner withdrew his claims of prosecutorial misconduct and due process violations. Petitioner proceeded on the following allegations:

1. Ineffective Assistance of Counsel
    a. Failure to explain the details of a plea offer;
    b. Counsel incorrectly advised Petitioner to not testify;
2. Trial Court Error[1]
    a. Failing to instruct the jury on self-defense.

Petitioner was present at the hearing and represented by Timothy Griffith, Esquire. Assistant Attorney General Susannah R. Cole of the South Carolina Attorney General's Office represented Respondent. At the hearing, Petitioner testified on his own behalf. Counsel and Meadors also testified. By order filed November 30, 2018, Judge McFaddin denied and dismissed Petitioner's application for post-conviction relief with prejudice. After initiating his appeal,

[1] This allegation was dismissed with prejudice as post-conviction relief is not a substitute for a direct appeal.

Petitioner filed a petition for a writ of certiorari with the Supreme Court, and the Supreme Court transferred the matter to this Court. Subsequently, on November 1, 2021, this Court granted the petition.

STATEMENT OF THE FACTS

On the morning of January 27, 2015, emergency medical personnel responded to the scene of a crashed vehicle located off S.C. Highway 521 in Sumter County. App. p. 82, l. 7-20. EMS workers found the vehicle in a ditch, with the rear of the car resting against an embankment. App. p. 82, l. 1-3. In the back seat of the vehicle, a dead man was in a seated position. App. p. 82, l. 8-12. The victim's legs were draped across the center console. App. p. 83, l. 19-22. The rear window was broken out, the front passenger window was down, and the driver's window was broken. App. p. 84, l. 19-23. The man had dried blood by his left ear, on his pants near his left ankle, on his pants near the right back pocket, and by the right front pants' pocket. Blood was also on the victim's jacket, passenger side front seat, passenger side front door frame, and on the rear seat. App. p. 84, l. 23- p. 85, l. 3. EMS noted brain matter on the rear seat below the window on the right side of the car and a wound to the back of the man's head. App. p. 85, l. 4-7. The vehicle was in reverse gear. App. p. 83, l. 3-11.

Investigator Michael McCauley, a crime scene investigator with the Sumter County Sheriff's Department, responded to the scene that morning. App. p. 92, l. 13- p. 94, l. 17. The investigating officers were suspicious of the victim's placement inside the car and the blood and bodily fluids surrounding the body. App. p. 95, l. 1-11. The victim's head was resting over the back seat, just before the rear window. App. p. 97, l. 21-24. Blood found on the victim's pants leg and on the passenger side headrest was more consistent with a transfer pattern than with high velocity spatter from an injury to the back of the head during a car crash. App. p. 99, l. 7-23; p. 101, l. 18-24. McCauley also found blood on the outside of the passenger door. App. p. 102, l. 1-5. On the rear floorboard behind the passenger's seat, McCauley found a live round of .380 caliber ammunition. App. p. 112, lines 6-21. The victim's phone was found in the woods behind the ditch

and embankment in which the car was located. App. p. 120, l. 18- p. 121, l. 7. The following day, McCauley attended the autopsy of the victim at the Newberry Pathology Center. App. p. 115, l. 2-10. McCauley examined the victim's clothing he was wearing the night he was killed, as well as the bullet recovered from the victim's skull. App. p. 116, l. 2- p. 117, l. 1. McCauley identified the bullet as a .380 round of ammunition. App. p. 124, l. 21- p. 125, l. 5.

Dr. Janice Ross, the State's pathologist, performed the autopsy on the man identified as Johnny Singleton on January 28, 2015. App. p. 182, l. 13- p. 183, l. 16. Ross found the victim had a gunshot wound to the back of the head and a bruise inside his upper lip but appeared to have no other external injuries. App. p. 185, l. 2-8. The gunshot wound to the back of the victim's head indicated the bulled traveled from the back, right side of the head through the brain and towards the front left of the head into the left sinus cavity. App. p. 186, l. 15- p. 187, l. 9. Dr. Ross opined the gun was at least two feet away from the victim when it was fired. App. p. 189, l. 18-24. The victim's dentures were intact and in place at the time of his death, and his toxicology report was negative. App. p. 188, l. 20-24; p. 191, l. 2.

Janie Mae Shaw testified she played cards with the victim on a daily basis. App. p. 152, l. 4-8. On the night of January 26, 2015, Johnny Singleton ate some food and took a nap at Ms. Shaw's house before playing cards with four other people. App. p. 152, l. 19- p. 153, l. 8. Singleton left between 9:30 and 10:00 pm that night. App. p. 153, l. 9-16. As was his custom, Singleton hid his cash of approximately $500 from the evening's card game inside his sock. App. p. 153, l. 17- p. 154, l. 5. Singleton was angry as he prepared to leave because someone was calling him repeatedly. App. p. 155, l. 20-23. Ms. Shaw also recognized Petitioner as a visitor to her house, but not the night Singleton died. App. p. 156, l. 17- p. 158, l. 8.

Phone logs from the victim's phone revealed multiple calls made to and received from the victim's phone by Petitioner. When investigators called Petitioner's phone and identified themselves, Petitioner claimed to be Novian Sinclair, a prior roommate of his. App. p. 362, l. 17- p. 366, l. 4. Petitioner maintained he had no information about the death of Johnny Singleton, and he claimed he was not with the victim on the night of his death. Petitioner did not attempt to explain why his cell phone records showed calls from his phone to the victim's. App. p. 340, l. 1-9. The officers executed a search warrant for Petitioner's residence, obtained a DNA sample from Petitioner, and questioned him about the death of the victim. App. p. 214, l. 10- p. 218, l. 14. Petitioner continued to deny having any knowledge or involvement in the victim's death. App. p. 244, l. 16- p. 245, l. 20.

Phone records revealed Petitioner also called his brother, Stephen Dwyer multiple times on the night of the shooting. In his statement to law enforcement officers with the Sumter County Sheriff's Department, Stephen said Petitioner called him to come pick him up around 10:30pm off of highway 321. App. p. 287, l. 2-10. Stephen asked Petitioner what happened, and Petitioner said, I F'd up." App. p. 287, l. 7-8. Stephen, who needed to give a friend a ride to her place of work, agreed to pick up Petitioner along the way. App. p. 287, l. 12-22. Petitioner told Stephen he had been shot and asked him to hurry. App. p. 288, l. 2-4.

When Stephen found Petitioner, he was near a club off Highway 521, walking towards Sumter. App. p. 287, l. 23- p. 288, l. 1. Petitioner's hand was bleeding and was wrapped with something like a shirt. App. p. 288, l. 5-6. Petitioner told Stephen he did not want to go to the hospital. App. p. 288, l. 6-8. After Stephen dropped his friend off at her workplace, he drove Petitioner to his house. Stephen asked Petitioner what happened to his hand, and Petitioner told

him he cut it. App. p. 288, l. 9-14. Petitioner would not give Stephen any details about the victim that night. App. p. 288, l. 14-21.

The day after the shooting, Stephen, who had seen the news that morning, deduced Petitioner was involved in Singleton's death. App. p. 289, l. 6-12. Stephen stopped by Petitioner's house again on his way home from the gym. App. p. 289, l. 6-8. Petitioner told Stephen he and the victim were fighting in the car, and the man was ex-military and knew karate. Petitioner told Stephen he was scared and shot the victim in the head, but he did not mean to shoot him in the head. App. p. 289, l. 12-17; State's Ex. 75. Petitioner told Stephen "that the dude saw the gun. They were in the car when they were tussling. And after he shot him, the car was wrecked and hit a tree." App. p. 289, l. 17-20. Petitioner took the victim's wallet and money and threw the victim's phone into the woods. App. p. 289, l. 21-22. Petitioner told Stephen he hid the gun in the back of a truck at the club off of Highway 521. App. p. 291, l. 7-21. The following day, when Stephen asked Petitioner again if he killed Johnny Singleton, Petitioner told Stephen he did not and claimed he was "just playing" and made up the story he told him earlier. App. p. 290, l. 1-7.[2]

[2] While investigating this case, one day in March of 2015, a security guard at the Sumter Mall was approached by a woman he did not know and asked if he was a real cop. App. p. 144, l. 1-21. The woman wanted to remain anonymous, but told the guard she had information that may help a case. App. p. 144, l. 24- 145, l. 2. The woman handed him a letter and asked him to give it to the police. App. p. 141, l. 12- p. 142, l. 3; p. 145, l. 2-4. The letter said "Matthew Dwyer" on the top of the envelope. App. p. 147, l. 17-19, and it was addressed to Demetrius Cooper. The guard handed the letter over to Detective Mathew Yates with the Sumter Police Department. App. p. 142, l. 3-20. The Sumter Police Department, determined the subject of the letter was unrelated to a city case, but discovered the county had a pending case to which the letter was relevant. App. p. 174, l. 17- p. 176, l. 21. Demetrius Cooper who was Matthew Dwyer's friend, testified for the State. App. p. 196. L. 7-16. Cooper said he received an encoded letter from Dwyer. However, the letter also contained a key code so that Cooper could decipher its contents. App. p. 198, l. 1-17. In the letter, Dwyer thanked Cooper for "everything you are doing for me." App. p. 201, l. 12-18. Dwyer also told Cooper he needed an alibi for January 26. App. p. 202, l. 15- p. 203, l. 5. Dwyer told Cooper the story he wanted Cooper to fabricate about his activities that night if anyone asked him. App. p. 202, l. 1- p. 209, l. 14. Cooper forgot about the letter, but he was later surprised that the letter fell into the hands of law enforcement. App. p. 210, l. 10-21.

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give[] great deference to the PCR court's findings of fact and conclusions of law", *Dempsey v. State,* 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id*. Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State,* 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a *de novo* review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. at 109, 525 S.E.2d at 517; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813. When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decision in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642,

S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. 668, 679 (1984). 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. *Id.* if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.*

ARGUMENT

The post-conviction relief court properly found trial counsel was not constitutionally ineffective for failing to advise Petitioner to testify in support of his claim of self-defense where trial counsel advised Petitioner of his right to testify; explained it was Petitioner's decision whether to testify or not; and properly advised Petitioner that, if he chose to testify, he would be subject to cross-examination regarding a coded letter he wrote a State's witness attempting to secure an alibi, and where the trial court conducted an extensive colloquy with Petitioner regarding his Fifth Amendment right at the conclusion of which Petitioner knowingly and intelligently informed the court he did not wish to testify in his case.

Petitioner alleges the post-conviction relief court erred in refusing to find Counsel ineffective for advising Petitioner not to testify in support of his self-defense claim at trial. In support of that contention, Petitioner alleges he 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.

To the contrary, the post-conviction relief court committed no error whatsoever by concluding trial counsel was not constitutionally ineffective for advising Petitioner not to testify where Counsel articulated a valid reason why his trial strategy changed at the beginning of trial. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). In light of the change in circumstances, Counsel's advice to Petitioner not to testify fell well "within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, and Petitioner failed to establish that such an approach was one "that *no competent lawyer would have chosen*." *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021). The post-conviction relief court's conclusion is supported by the record, which shows that the trial court engaged in a thorough colloquy with Petitioner regarding his right to testify and Petitioner maintained his decision not to testify. Further, Applicant's own testimony from the evidentiary hearing establishes that Petitioner was aware of his right to testify, that the decision was his to make, and of the risks associated with testifying at

the time he elected not to testify in support of his self-defense claim. As these findings are supported by probative evidence and do not constitute an error of law, this Court should affirm the PCR court's denial of relief.

"Under *Strickland*, in order to provide ineffective assistance of counsel based on [a] claim that trial counsel prevented the defendant from exercising his right to testify at [trial], [the defendant] must show both that his attorney violated his right to testify and that this testimony had a 'reasonable probability' of changing the outcome." *United States v. Rashaad*, 249 F. App'x 972, 973 (4th Cir. 2007)(citing *Strickland*, 466 U.S. at 694.) Here Petitioner cannot establish Counsel violated his right to testify or that his testimony would have a reasonable probability of changing the outcome of his trial.

1. Advised of Right to Testify

As an initial matter, it is evident from the record and Petitioner's testimony that Petitioner was aware of his right to testify at his trial, and aware that the decision as to whether to testify or not was up to him. Petitioner testified he and Counsel agreed he would testify at trial initially. App. p. 565. Petitioner testified he changed his mind based on Counsel's advice and it was his decision not to testify. App. p. 565. Further, the trial court conducted a thorough colloquy with Petitioner where the trial court reiterated Petitioner's right to testify, the decision to testify was his to make, and only Petitioner could waive his right to testify. App. p. 408-410. Petitioner was afforded an opportunity to speak with Counsel prior to making his decision, after which, Petitioner told Judge Murphy he understood his right and would not be testifying. App. p. 410.

"A defendant's knowing and voluntary waiver of a statutory or constitutional right must be established by a complete record; and may be accomplished by colloquy between the court and the defendant, between the court and defendant's counsel, or both." *State v. Ray*, 310 S.C. 431,

437, 427 S.E.2d 171, 174 (1993). Here, not only is the record complete with a thorough colloquy between Petitioner and the trial judge, but Petitioner's own testimony establishes he was aware of his right to testify and knew it was his own decision as to whether or not to testify. Further, Counsel testified he advised Petitioner of his right to testify, that he was the one who would have to make that decision, and that if he testified he would be subject to cross-examination regarding the letter to Cooper. App. p. 578, l. 11-15. Ultimately, Petitioner informed Counsel and the trial court that he made the decision not to testify, despite knowing he had the right to do so.

2. Counsel's Reevaluation of Petitioner's Case

Petitioner nonetheless claims he did not testify based on the erroneous advice of Counsel. At the PCR hearing, Counsel testified he was prepared to present Petitioner's self-defense claim at trial and filed notice of that defense with the court. App. p. 575. However, Counsel testified his evaluation of Petitioner's case changed upon receiving a letter from the State that was written in code by Petitioner, which, in Counsel's assessment, "completely changed the case." App. p. 578. Counsel testified the letter sent to Cooper was written in a code and, once decoded, it revealed Petitioner was asking Cooper to be an alibi witness for him. App. p. 577. Petitioner also asked Cooper to say that Petitioner got in a fight so he could explain the injury he sustained to his hand. App. p. 577. Petitioner admitted to writing the letter during the evidentiary hearing, however, he never told Counsel about the letter prior to trial. App. p. 568-569, p. 577, p. 578. After receiving the letter, Counsel met with Cooper, who confirmed he received the letter from Petitioner and had no intention of providing Petitioner with an alibi. App. p. 578. As a result of the letter, Counsel testified, "Petitioner and I had several conversations about him testifying, and I told him that he would be subject to cross-examination based on that letter, if he wanted to testify that was up to him." App. p. 578. Counsel testified his assessment of Petitioner's case went from "self-defense

to not he's searching for an alibi." App. 578. Counsel testified the plan for Petitioner to testify took a turn after he received that letter. App. p. 579.

Petitioner cites *Foye v. State*, 335 S.C. 586, 518 S.E.2d 264 (1999), in support of his position that Counsel was deficient, claiming "he abandoned his trial strategy midtrial and failed to utilize his discretion when he advised Petitioner not to testify." BOP. P. 14. However, in *Foye*, counsel's initial trial strategy was for Foye *not to testify*. *Foye*, 335 S.C. at 591, 518 S.E.2d at 268. However, after Foye's co-defendant provided damaging testimony, counsel admitted he did not reevaluate his position on whether Foye should testify. *Id.* at 592, 518 S.E.2d at 269. Our Supreme Court found Foye's failure to use "his discretion in employing an appropriate trial strategy in light of the unexpected testimony" constituted deficient performance. *Foye*, 335 S.C. at 592, 518 S.E.2d at 268.

Here, unlike *Foye*, Counsel reevaluated his position on whether Petitioner should testify after he received the letter Petitioner wrote to Cooper "searching for an alibi." App. p. 578. Counsel credibly testified that the "shocking" letter "completely changed the case" and required him to reassess his trial strategy regarding Petitioner's testimony given that the letter directly contradicted Petitioner's self-defense claim. App. p. 578; p. 584.At the PCR hearing, Counsel testified, "… our whole case was built on what Petitioner had told me and it turned out what he had told me wasn't necessarily the truth." App. p. 584. Counsel further testified, "… the letter fundamentally changed everything. You can't go forward with a self-defense when at the same time you're asking for an alibi that no one knows about." App. p. 583. Counsel also testified he and Petitioner had "several conversations about Petitioner testifying, and I told him that he would be subject to cross-examination based on that letter, if he wanted to testify that was up to him." App. p. 578.

Notably, although Petitioner admitted to writing the letter, Counsel testified, "Petitioner didn't tell me about the letter when he wrote it; and despite the fact that I met with him, as he said, five, six, seven, eight times, not one time did he discuss that letter with me" App. p. 585. Here, unlike the defendant in *Foye*, Petitioner created the situation he now complains of by putting Counsel in a position to be surprised by his letter, which ultimately led to Counsel having to reevaluate the trial strategy at the outset of the trial. Counsel would have had more time to formulate a new trial strategy had Petitioner informed Counsel about the letter he authored and sent to Cooper in an attempt to secure an alibi. Although Petitioner claims Counsel "abandoned his trial strategy," Petitioner's own conduct was the reason Counsel had to alter his trial strategy and advise Petitioner of the risk of testifying. *See Strickland*, 466 U.S. at 688–89 (noting the importance of the "heavy deference" afforded to trial counsel because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant").

Further, Petitioner improperly claims Counsel's change in strategy occurred midtrial. Rather, Counsel testified he received the letter "on the eve of trial or shortly after a jury was impaneled." App. p. 577. Although Counsel testified, "I didn't know if he was going to testify or not when we received that letter," Petitioner was aware the trial strategy had changed when Counsel received the letter, which was earlier than "midtrial." App. p. 589.

Petitioner further failed to establish how Counsel's reassessment of his trial strategy upon receipt of the coded letter "fell below an objective standard of reasonableness" as required as measured by "prevailing professional norms." *Strickland*, 466 U.S. at 688. Our Supreme Court found counsel in *Foye* to be deficient for failing to reassess Foye's need to testify based on changes

in his case. Here, Counsel did precisely what our Supreme Court in *Foye* found defense counsel deficient for *not* doing. Here, Counsel properly reassessed Petitioner's case based on the letter and made a reasonably strategic decision to change his trial strategy accordingly by advising Petitioner of the risk he would be taking by subjecting himself to cross-examination. *See Strickland*, 466 U.S. at 688 (requiring that trial counsel be given leeway to make reasonably strategic decisions); *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." (Citations omitted)); As such, the post-conviction relief court properly concluded Petitioner failed to rebut the "strong presumption" that Counsel's performance was constitutionally deficient in this regard.

3. Petitioner Failed to Show Prejudice

Petitioner further failed to establish any resulting prejudice from Counsel's alleged deficiency. While Petitioner claims "there is a reasonable probability the outcome of his trial would have been different if Petitioner would have testified he was acting in self-defense during the altercation with the victim, the PCR court correctly found "Given Applicant would have admitted to the jury he attempted to commit a fraud upon the court, he cannot show how the outcome of the trial would have been different had he elected to testify." App. p. 618. Further, the record reflects that Counsel properly advised Petitioner that he would be subject to cross-examination by the State regarding the letter. App. p. 578. Specifically, Counsel testified

> I said you're gonna have to explain this letter, you're gonna have to explain why you wrote this letter… he had no answer for that." App. p. 579. Counsel testified,… if what you're getting at is that somehow [Petitioner] was justified [in] writing that letter with a code and asking for an alibi, I'm not sure I'm gonna go to that extent because… I've never seen that in 18 years.

App. p. 584.

According to Counsel, the "shocking" letter that "changed everything" would have been severely damaging to Petitioner's credibility. Cooper testified at trial about the decoded letter, which stated in part:

> I need an alibi for January 26th. My 'story' is that from 6:00 p.m. until about 8:15 p.m., I was with you. We were drinking and chilling in Populars Square. All you know is when you pulled up, I was already there.

App. p. 202-204.

Cooper went on to explain the contents of the letter indicated Cooper should say that he saw Petitioner get into a fight and Cooper broke it up and that is how Petitioner's thumb was injured. App. p. 204-206. Petitioner ended his letter with this:

> So just in case anybody contacts you, and 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 [Stephen] 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.[3]

App. p. 289.

Petitioner also told Stephen he hid the gun in the back of a truck at the club off of Highway 521. App. p. 291. Unfortunately for Petitioner, the physical evidence presented in his case supports Stephen's version of events rather than Petitioner's self-defense theory. Meadors testified,

> There was [Petitioner's] blood… on the sock of the victim, and the testimony of the victim had come from a poker game and he always put his money in his socks and so we believe that [Petitioner] hurt his hand and was bleeding from the gun and that's where the blood came from his hand to the sock of the victim.
>
> App. p. 597.

[3] There was a "p.s." to Petitioner's letter requesting Cooper contact yet another individual so Cooper could call him three-way with Petitioner. Petitioner requested Cooper let the individual "know what is going on with me." App. p. 208-209. This testimony made it clear Cooper was not the only person Petitioner was reaching out to for an alibi.

Petitioner's credibility is also challenged because Petitioner initially told Counsel there were two other witnesses in the vehicle with him and the victim. App. p. 590. Further, at Petitioner's PCR hearing, the court found "Applicant's testimony and assertions lack credibility." App. p. 613. Counsel testified he attempted to locate these two people through his investigation, but he was unable to locate them. App. p. 590. Counsel testified Petitioner told him he was scared of these unknown subjects and believed they would pull a gun on him. App. p. 591. Counsel testified he believes the unknown subjects do not exist as the State was also unable to produce any witnesses that were in the vehicle. App. p. 590. Counsel's advice to Petitioner regarding the risk he was taking if he chose to testify was very reasonable considering Petitioner's testimony regarding his claim of self-defense would have provided yet another version of his "story" to the jurors. Petitioner's attempt to manufacture an alibi and the fact the he provided inconsistent versions of his story to numerous people, it is unreasonable to believe Petitioner's testimony would have been considered credible by the jury and would have changed the outcome of his trial.

Ultimately, the PCR court correctly concluded Petitioner failed to demonstrate that trial counsel's advice regarding the risk of Petitioner testifying prior to the start of trial "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. *See also Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("[W]hile in some instances even an isolated error can support an ineffective assistance claim if it is sufficiently egregious and prejudicial, it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." (Citation omitted)). Here, Petitioner was advised of his right to testify, along with the adherent risk of testifying, and made the decision to not testify based on his assessment of the case, and his assessment of Counsel's advice. As Counsel discovered during his representation, Petitioner was untruthful and,

based on the evidence presented against him at trial, it would be readily apparent to a reasonable jury that Petitioner was not credible. Accordingly, the PCR court correctly found Petitioner failed to demonstrate a reasonable probability that, but for trial counsel's failure to object to the inferred malice instruction, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. This Court should affirm.

CONCLUSION

For the forgoing reasons, this Court should deny relief and affirm the PCR court's findings that Petitioner had effective assistance of counsel.

Respectfully submitted,

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