

IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

Santiagos Rios -- Petitioner,

-vs-

Warden, Perry Corr. Inst. -- Respondent,

On Petition For Writ of Certiorari
To The U.S. Fourth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Santiagos Rios
SCDC# 328137
Perry Corr. Inst.
430 Oaklawn Rd.
Pelzer, SC. 29669

Petitioner, pro-se

QUESTION PRESENTED

I.
CERTIORARI SHOULD ISSUE TO CORRECT THE
FOURTH CIRCUIT'S ERRONEOUS "PREJUDICE"
APPLICATION OF STRICKLAND V. WASHINGTON
466 U.S. 668 (1984) THAT WAS CONTRARY TO
THIS COURT'S RESOLUTION OF AN UNDERLYING
CLAIM OF THE SAME NATURE?

II.

THE FOURTH CIRCUIT ERRED IN IT'S
"PREJUDICE" ANALYSIS OF THE UNDERLYING
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM?

LIST OF PARTIES

All parties appear in the caption if the case on the cover page.

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OTHER AUTHORITIES RELIED ON

28 USC §2254(d)(1)

Fifth Amendment U.S. Const.

Sixth Amendment U.S. Const.

Fourteenth Amendment U.S. Const.

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

This case is on review from a federal court.

This opinion of the Fourth Circuit Court of Appeals appears at Appendix A to the petition and is unpublished.

The Opinion of the United States District Court of South Carolina appears at Appendix B to the petition and is unpublished.

JURISDICTION

This case is on review from a federal court.

The date on which the United States Fourth Circuit Court of Appeals decided my case was October 20, 2017.

A pro-se Petition for Rehearing and Rehearing En Banc to the United States Fourth Circuit Court of Appeals was timely and appears at Appendix (C) to the petition.

The jurisdiction of this Court is invoked under 28 USC §1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime...
...nor be deprived of life, liberty or property, without due process of law..
AMEND.V.

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, and shall enjoy the Effective Assistance of Counsel for his Defense... AMEND.VI.

The Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof... No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law... AMEND.XIV.

STATEMENT OF THE CASE
THE FEDERAL COURT PROCEEDINGS

Santiagos Rios ("Petitioner") filed a pro-se for writ of habeas corpus on April 20, 2015 pursuant to 28 USC §2254. The petition alleged an ineffective assistance of counsel claim that counsel failed to request a self-defense jury instruction.

Respondents filed a motion for summary judgment. Petitioner filed a timely opposition and reply to the dispositive motion. Magistrate Judge Kaymani D. West issued a Report and Recommendation ("R&R") granting Respondent's motion for summary judgment. The U.S. District Judge adopted the Magistrate's R&R granting Respondent's motion and dismissing the habeas petition.

Petitioner filed a Notice of Appeal seeking certificate of appealability ("COA") in the Fourth Circuit Court of Appeals ("Fourth Circuit"). COA was granting and Petitioner was appointed Stephen K. Wirth esquire to represent Petitioner on the appeal.

The Fourth Circuit denied relief and dismissed the appeal in case no. 16-6389 (Appendix A).

Petitioner timely filed a pro-se Petition for Rehearing and Rehearing En Banc which was denied.

UNDERLYING STATE COURT PROCEEDINGS

Petitioner is currently incarcerated in the South Carolina Department of Corrections ("SCDC"). Petitioner was indicted during the 2008 term of the Spartanburg County Grand Jury for murder. (2008-GS-42-0170). Petitioner proceeded to trial by jury May 1, 2008 before the Honorable Roger L. Couch. Petitioner was represented by David Collins and Doug Brannon. The jury ultimately found Petitioner guilty of murder and Judge Couch sentenced Petitioner to thirty 30-years imprisonment.

Petitioner timely appealed. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences in a published opinion on July 14, 2010. On July 30, 2010, the South Carolina Court of Appeals issued the remittitur.

On October 13, 2010 Petitioner filed a pro-se application for post conviction relief ("PCR"). On September 19, 2011 before the Honorable J. Mark Hayes III. Petitioner was present and represented by Susannah C. Ross. Judge Hayes denied the PCR application by way of a written order January 18, 2012.

PCR Counsel filed a Rule 59(e) on February 1, 2012. A hearing was held on the motion June 14, 2012 before Judge Hayes. Judge Hayes denied the motion on October 2, 2012.

A timely notice of appeal was filed and Petitioner filed a petition for writ of certiorari to the South Carolina Supreme Court raising one issue:

Violating Petitioner's rights pursuant to South Carolina Law and the Sixth and Fourteenth Amendments to the United States Constitution, the PCR court erred in denying Petitioner relief from his murder conviction where the PCR Court held trial counsel's deficient performance in failing to request a jury instruction on self-defense, which would have been reversed on direct appeal, was not prejudicial to Petitioner.

Assistant Attorney General filed a Return and on February 4, 2015 the South Carolina Supreme Court denied certiorari and the Remittitur was handed down February 20, 2015.

This Petition for Writ of Certiorari from the Fourth Circuit Court of Appeals follows:

REASONS FOR GRANTING THE WRIT

The denial of this question by the Fourth Circuit is an important federal question that squarely conflicts with relevant decisions of this Court. These conflicts satisfy a "substantial showing of the denial of constitutional Right[s]" under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. This petition raises an important constitutional question of significant National importance to have this Court decide the question and legal principal involved and thus promote the development of the law. See Dobbs v. Zant, 506 U.S. 357, 360 (1993).

The petition does not seek to decide a new question of law, but to simply correct the Fourth Circuit's demonstrably erroneous application of federal law to this constitutional question.

This question concerns the Sixth Amendment guarantee of a criminal defendant's Right to the Effective Assistance of Counsel. Strickland v. Washington, 466 U.S. 668 (1984). Petitioner's claim is that his trial counsel provided ineffective assistance by abandoning a request for a jury instruction on self-defense that unduly prejudiced his right to a fair trial. South Carolina's Post Conviction Relief Judge rejected that claim under Strickland, supra, holding that Petitioner was not prejudiced by counsel's actions because a self-defense instruction was not reasonably likely to result in a different outcome at trial. The district court and U.S. Fourth Circuit Court of Appeals also denied relief.

On direct appeal in the State Court Petitioner argued that the trial court erred in failing to instruct the jury on

self-defense. The State appellate court rejected that claim on the ground that Petitioner had waived appellate review of the issue. Trial counsel "abandoned his request" for a jury charge on self-defense at the charge conference, the state appellate court determined, "when he acquiesced and asked the trial court to charge voluntary manslaughter, accident, and murder[,]" and "an issue conceded in the trial court cannot be argued on appeal." Rios 696 S.E.2d at 612. The court separately noted counsel's subsequent "failure" to object to the instructions given to the jury -- even after the trial court specifically asked whether there were any objections -- which also had the effect of waiving the right to appellate review. Id.

Petitioner then sought post conviction relief ("PCR") arguing in part that trial counsel rendered ineffective assistance when he abandoned the request for a self-defense instruction. At the PCR hearing, trial counsel(s) testified that the accident theory was the heart of their defense, and that they were "most concerned" that the court instruct the jury on accident, rather than self-defense. J.A. 766. However, one of the attorneys testified that the record contained evidence responsive to the trial court's concerns about a self-defense charge that had not been presented to that court during the charge conference. Specifically, Petitioner's mother testified that it was the decedent who pushed Petitioner first.

The PCR Court rejected Petitioner's ineffective assistance of counsel claim under the two-part standard articulated in Strickland v. Washington. To prevail under Strickland the Petitioner must show both deficient performance by counsel and

prejudice to the defense, meaning a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." J.A. 831 (citation omitted). The PCR Court believed Petitioner could show deficient performance under the first prong of Strickland, given counsel's "fail[ure] to articulate to the trial judge when he was originally arguing for a self-defense jury charge [evidence] relate[d] to who pushed first in the argument that evening." J.A. 834; see also J.A. 858, 860. But the PCR Court unreasonably determined that Petitioner could not satisfy Strickland's prejudice prong by showing a reasonable likelihood that the outcome of his trial would have been different had counsel not abandoned his request and a self-defense charge had been given, both because of the insubstantial nature of the evidence supporting self-defense. This finding was in error. There is substantial evidence that the decedent in fact started the fight and that she introduced the gun.

Substantial evidence supports the PCR court's determination that Petitioner was [entitled] to a self-defense instruction under South Carolina law. That evidence amply justifies this Court's deference to the state court's application of it's own state law. Richardson, 668 F.3d at 141.

Trial counsel's decision to abandon the request for a self-defense instruction was not a "reasonable strategic choice[]." Roe v. Flores-Prtega, 528 U.S. 470, 481 (2000). It was an unjustifiable error based on a misunderstanding of the law and of the facts. The PCR Court thus reasonably applied Strickland to

hold that counsel's performance amounted to "clear deficient performance." J.A. 860, and that correct determination is owed deference under 28 USC §2254(d)(1); see Williams, 494 F.3d at 484. The State, PCR Court, District Court and Fourth Circuit Court of Appeals do not dispute that trial counsel labored under a misunderstanding of the law of self-defense. Mr. Collins testified that, at the time of trial, he thought that "there had to be an acknowledged shooting" for a defendant to raise self-defense. J.A. 808. This belief was in error.

The Fourth Circuit does not deny that counsel failed to identify for the trial court that the decedent was the initial aggressor, in particular Petitioner's mother's testimony. Mr. Brannon (counsel) admitted as much from the stand during the PCR hearing. He agreed that there was "some testimony" that Petitioner did not actually bring on the altercation," and he conceded he "[misspoke]" when he said otherwise. J.A. 770. He further acknowledged that "self-defense was an appropriate charge" based on the record. J.A. 771.

It is particularly unbelievable that trial counsel strategically abandoned self-defense when trial counsel initially requested the instruction and [both] trial counsel and the State argued self-defense in their closing statements. A decision to forfeit valuable rights that is based on a misunderstanding of the law and the facts is not strategic in any sense of the word. It is as the PCR Court found "deficient performance." The PCR Court thus reasonably applied Strickland to determined that counsel's decision to abandon the self-defense instruction was not a reasonable strategic choice. See Williams, 494 F.3d at 484;

28 USC §2254(d)(1).

The Fourth Circuit concluded that the scope of their inquiry here [is] narrower, in that Petitioner is entitled to relief [only] if the PCR Court's prejudice determination is contrary to or unreasonably applied Supreme Court precedent. Id.

The Fourth Circuit erred in adopting the PCR Court's "prejudice" determination that has resulted in unreasonably applying the Strickland prejudice prong. Though the State PCR Court properly determined that Petitioner's counsel performed deficiently, the court(s) have unreasonably applied Strickland to conclude that Petitioner has suffered not prejudice. Had the trial court instructed the jury on self-defense, "the State" would have had to prove beyond a reasonable doubt that Petitioner did not act in self-defense. And in light of the abundant trial evidence tending to show self-defense, there is at least "a reasonable probability that [one] or more jurors would have changed their minds had they know and applied the law of self-defense. See Lee v. Clarke, 781 F.3d 114, 125 (4th Cir.2015).

In essence Petitioner was convicted on jury instructions that omitted an essential element that the State had to prove beyond a reasonable doubt. (emphasis). The law in this area is clear, the court "must instruct" the jury on "every element" that the state must prove beyond a reasonable doubt, United States v. Muse, 83 F.3d 672, 679 (4th Cir.1996), see also In re Winship, 397 U.S. 358, 361-63 (1970), and jury instructions which shift the State's burden of proof to the defendant violate due process. Sandstrom v. Montana, 442 U.S. 510 (1979); Mullaney v. Wilbur, 421 U.S.

684, 703 (1975). It thus follows that shifting the State's burden to disprove self-defense violates due process. See Guthrie v. Warden, 683 F.2d 820, 824-26 (4th Cir.1982)(granting writ of habeas corpus). And where that error is caused by counsel's deficient performance, it will often be [prejudicial] because it "undermines the fundamental fairness of the trial and contributes to a miscarriage of justice. Virgin Islands v. Smith, 949 F.2d 677, 680 (3rd Cir.1991)(quoting United States v. Young, 470 U.S. 1, 16 (1985)).

Petitioner assertion is that the PCR Court's determination that he could not show a reasonable likelihood of a different outcome at trial was an "unreasonable application" of Strickland under §2254(d)(1). The Fourth Circuit concluded otherwise finding the PCR Court rested in part on an evaluation of evidence in support of self-defense, finding that it was not sufficient to give rise to a reasonable likelihood that a self-defense instruction would have led to a different verdict. The Fourth Circuit found particularly in light of Petitioner's own statement, introduced by the government at trial, indicating that Petitioner was the first physical aggressor in the altercation, which if accepted by the jury would preclude a finding of self-defense and in so finding concluded the PCR Court's assessment was not objectively unreasonable. Id.

Petitioner submits the Fourth Circuit's strength of the evidence analysis is irrelevant to whether a self-defense instruction is warranted, "[i]f there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to

instructions on that defense. See *State v. Slater*, 644 S.E.2d 50, 52 (S.C.2007). Under that standard, even slight or inconsistent evidence of self-defense must be put to the jury. *State v. Jackson*, 681 S.E.2d 17, 21 (S.C.Ct.App.2009). In *State v. Jackson*, for example the court of appeals held that it was error for the trial court to deny the defendant's request for an instruction on self-defense where there was "conflicting evidence about who threw the first punch." 681 S.E.2d at 21.

Deficient performance of trial counsel that results in a due process violation is not per se prejudicial. Strickland's prejudice prong is case specific and fact dependent. See Strickland, 466 U.S. at 695 "([A] court hearing an ineffective assistance of counsel claim must consider the totality of the evidence before the judge or jury).

In the instant matter there were no eye witnesses, most of the facts were undisputed, and the defense put on no evidence. The central question at trial was what happened after the fight moved from the living room to the bedroom. Nobody was in the room, aside from Petitioner and the decedent, and there was substantial testimonial and physical evidence that the decedent attacked Petitioner.

In light of the evidence, it is highly probable that at least one juror would have struck a different balance had the jury been instructed on the State's burden to disprove self-defense beyond a reasonable doubt. The State PCR Court and Fourth Circuit's failure to recognize the obviously prejudicial effect of lowering the State's burden of proof amounts to an unreasonable application of Strickland.

CONCLUSION

Based on the foregoing reasons certiorari should issue and full briefing should be ordered, or in the alternative this Court affix the relief deemed just and appropriate in the instant matter.

Respectfully Submitted,

/s/ Santiago Rios

Santiagos Rios

Petitioner, pro-se