

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

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DOUGLAS L. YOUNG,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001622

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PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

    The PCR court abused its discretion in denying petitioner’s motion for a continuance where PCR counsel admitted that he had never spoken with petitioner about his case and the PCR judge improperly reasoned that allowing petitioner to testify and “tell us what he thinks the [PCR] issues are” was acceptable where petitioner was only allowed “one bite at the apple” in PCR..... 11

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## **ISSUE PRESENTED**

Whether the PCR court abused its discretion in denying petitioner's motion for a continuance where PCR counsel admitted that he had never spoken with petitioner about his case and the PCR judge improperly reasoned that allowing petitioner to testify and "tell us what he thinks the [PCR] issues are" was acceptable where petitioner was only allowed "one bite at the apple" in PCR?

## STATEMENT OF FACTS

Petitioner was indicted at the February 2018 term of the Charleston County grand jury for the offenses of murder and possession of a weapon during the commission of a violent crime. App. 545-547. His case was called to trial December 2, 2019, before the Honorable R. Edgar W. Dickson and a jury. David Osborne and Shannon Elliott were the assistant solicitors. Nicholas DeAngelo and Benjamin Lewis were the Assistant Public Defenders. App. 1.

### **The trial**

Kathy Brisbane had worked as a beautician in Charleston for the past thirty-five years. She had known petitioner since he was a little boy. Kathy testified at trial that Gerald Young was petitioner's uncle. App. 157, l. 16 – App. 160, l. 5.

Kathy remembered on the morning of the shooting incident “I was headed to work.” Tr. 160, ll. 16-23. It was a Saturday which is always a busy day for Kathy at work. While she was stopped at a stop sign on the way to work: “[I] looked right in front of me. I just saw Douglas [Petitioner] and a young man. Before he [Petitioner] shoot (sic), I tried to blow the horn so that he wouldn't shoot. I tried to distract him, but he still shoots.” Kathy did not see what occurred prior to this moment. App. 162, ll. 19-25; App. 190, ll. 20-21; App. 195, l. 22 – App. 196, l. 9.

As the assistant solicitor led Kathy through her observations that morning, she testified that petitioner was pointing a gun at another man when she “started honking” her horn. The first gun shot went off not long after she honked her horn. App. 164, l. 8 – Tr. 165, l. 22. Kathy recalled that petitioner shot the other man three times in rapid succession. App. 166, l. 18 – App. 167, l. 8. Petitioner, as seen infra, would later testify and explain the context in which the shooting occurred and why it was in self-defense.

Kathy said immediately after the shooting she drove up next to petitioner and he asked her to “take him around the corner.” Petitioner “just directed me where to go” and she dropped him off a short distance later. App. 172, l. 2 – App. 175, l. 21. On cross-examination, Kathy admitted that she did not know why petitioner shot the decedent. App. 190, ll. 20-21; App. 195, l. 22 – App. 196, l. 9.

Gerald Young testified that petitioner was his nephew and that Kathy Brisbane had been his girlfriend at one time. App. 294, l. 12 – App. 295, l. 1. Young was serving a prison term for drugs at the time of his testimony, and he acknowledged that he was a convicted felon. App. 295, ll. 4-11.

Young testified that the night before the shooting, he went to his sister’s house on Line Street in Charleston. App. 296, ll. 2-23. Young remembered seeing the decedent, Chris Mullen, at about 4:30 p.m. that afternoon. App. 297, l. 17 – App. 298, l. 7. When Young went over to his sister’s house after work at about 11:00 p.m. or 12:00 a.m. that evening, he again saw the decedent and another man walking down the road. The decedent appeared to be drinking and he had a can of beer in his hand. The decedent “started talking nasty trash to the young lady sitting with us.” App. 298, ll. 4-23. Young remembered that the decedent appeared to have a gun in his pants under his shirt “[a]s he be (sic) talking trash to us.” App. 299, ll. 4-7. Young said he was sure that the decedent had a gun “on him that night.” App. 299, ll. 12-14.

Petitioner took the stand in his own defense at trial. He had attended Burke High School and then worked various jobs in supermarkets, construction, restaurants, hotels, and janitorial services. He lived in Charleston, and he had three children. App. 304, l. 13 – App. 305, l. 19.

Petitioner explained to the jury that his right arm was virtually useless because his bicep muscle collapsed. He could not lift heavy objects or throw a punch with his right arm. App. 305, l. 17 – App. 307, l. 1.

Petitioner knew the decedent, Chris Mullen. Petitioner said that he had gone drinking with Mullen in the past and had also “sold him coke.” App. 307, ll. 21-25. They were together the night before the shooting. The decedent was “acting wild. Hyped up.” App. 308, ll. 4-21. The decedent was bragging about all the shootings and other acts that he had done at his home in Beaufort the week before. The decedent had a gun with him that night as he bragged about the shootings in Beaufort. App. 308, l. 22 – App. 310, l. 5.

This behavior occurred throughout the night “up until the incident the next morning.” App. 309, ll. 6-14. Petitioner described how the shooting occurred that morning. The decedent pulled his gun out of his waistband and pointed it at petitioner and said: “Give me your coke and your money.” App. 310, l. 11 – App. 312, l. 9. Petitioner remembered the decedent putting a gun in his face. Petitioner described to the jury how he was able to grab the gun from the decedent and “I just started pulling the trigger.” App. 312, l. 10 – App. 314, l. 14.

Petitioner testified that he had no other choice than to shoot the decedent, who was stronger than him, and “I thought he was going to shoot me or kill me.” Petitioner was very scared at the time. App. 314, l. 9 – App. 315, l. 12. Petitioner remembered Kathy Brisbane then honking the horn on her car. “I asked her to take me around to my baby mama (sic) house.” Brisbane dropped him off a short distance away. App. 315, l. 17 – App. 317, l. 9.

Petitioner testified that after the shooting he was scared since he was a convicted felon. He thought he would be unable to present a defense of self-defense because he was a felon in

possession of a firearm. He thought that as a convicted felon “I have no rights” including the right to be protected by the law of self-defense. App. 348, ll. 6-23.

The jury ultimately found petitioner guilty on both counts. App. 442, ll. 20-24. Judge Dickson sentenced petitioner to thirty-five years imprisonment for murder and five years concurrent for possession of a weapon during the commission of a violent crime. App. 451, ll. 6-14.

## **PCR**

Petitioner filed an application for post-conviction relief on January 6, 2023, after his convictions were affirmed on direct appeal pursuant to the Anders v. California, 386 U.S. 738 (1967), procedure. Appellate Defender Adam Ruffin represented petitioner on direct appeal. App. 453-463. Petitioner raised various grounds of ineffective assistance of trial and appellate counsel in his *pro se* post-conviction relief application. App. 463.

The state filed a return and partial motion to dismiss dated May 3, 2023. App. 464-473.

## **The PCR hearing**

An evidentiary hearing was convened on August 22, 2023, before the Honorable Michael G. Nettles. Christopher L. Murphy represented petitioner. Danielle Dixon was the assistant attorney general. App. 474.

The beginning of the PCR hearing, Counsel Murphy offered: “I was appointed on March 22, 2023 (five months before the August 22, 2023, evidentiary hearing) to represent Mr. Young. This was a fairly quick trial, actually it was a very quick trial. It was a shooting case, there were two witnesses, and there was a claim of self-defense. It was a clean trial, and I can tell you I’ve had trouble finding issues to raise during this PCR application.” App. 479, l. 1-9. Counsel Murphy continued:

“I spoke with Mr. Young a few months ago, and his jail cell was flooded. I had to resend him the transcript to go over issues. I tried to get another call to talk with him about any issues he wanted to raise. *And we were supposed to talk yesterday morning, but I was about ten minutes late talking to him, and he was sent back to the cell.* I haven't been able to go over his issues that he would like to raise. *He tells me that he feels uncomfortable going forward today, and he does want a continuance.* I don't know if he wants to get new counsel or not, but he does have some issues that he's handed up to me, or he has here that we can go forward on. It's just a question of how the Court wants to handle it.”

App. 479, ll. 10-24 (emphasis added).

The Assistant Attorney General said that the state opposed petitioner being appointed new counsel and opposed his motion for a continuance as well: “We’re ready to proceed. I don’t know - - we’re ready to go forward today.” App. 480, ll. 2-13.

The judge then asked PCR Counsel Murphy if he had a chance to review the transcript. Murphy answered: “I have reviewed the transcript and taken a lot of notes on it, Judge. I have it right here; I got the tab portions of it.” The following then occurred between the PCR judge and Murphy:

THE COURT: Okay. So you feel that you're comfortable with the procedural history, the evidentiary rulings and the jury charge, all objections that were made, and perhaps weren't made?

MR. MURPHY: Yes. Yes, Your Honor. And I could walk Mr. Young through those at trial, if he takes the stand.

THE COURT: All right. I think given those circumstances, Mr. Murphy is a very capable lawyer. I've seen him looking at the trial transcript. He's spent a great deal of time reviewing that, and I think that there -- he indicates he's familiar with it, he's ready to proceed, and we will indeed go forward.

Could you delineate which grounds that you intend -- you, personally, intend to pursue? And then we will delineate what Mr. Young has --

MR. MURPHY: Your Honor, the grounds I would -- this is a hard case because there were no offers made. He -- we had a judge that was trying to get a deal worked out; there was nothing. The solicitor wasn't offering anything. Factually, it was a self-defense issue. So it was whether or not the jury believed him or not. It was a very clean trial. I've spoken with the appellate attorney; I've spoken with the trial attorney. And going through the transcript, I'm at a loss of trying to find anything to even raise, Judge.

THE COURT: Okay. All right.

MR. MURPHY: So that's where -- that's my issue in this case.

App. 480, l. 20 – App. 481, l. 25.

The judge then ruled: “Well, I tell you what we can do. You can call Mr. Young to the stand, and *he can tell us what he thinks the issues are. We'll listen to him, we'll give it some thought and proper research.* And I'll ask you, if you could, come forward and place your left hand on the Bible.” App. 482, ll. 1-7 (emphasis added).

Petitioner requested to ask the judge a question when he was called to the witness stand. The PCR judge granted him permission. Petitioner then asked: “If I don't feel comfortable with him right now, because if he can't find an issue, I want to get another lawyer, really.” App. 483, ll. 2-7.

The PCR judge responded: “You know, one thing that's a beautiful thing about our country is that a person accused of a crime, they're entitled to representation, even if they can't afford it. And this is actually a civil proceeding, but our law recognizes that you're entitled to counsel to represent you in these civil matters post-conviction, but you don't get your choice.

You have the choice of proceeding forward *pro se* or Mr. Murphy; those are your choices.” App. 483, ll. 8-16.

The judge then asked petitioner if he had objections to “Mr. Murphy asking you questions?” App. 483, ll. 21-22. Petitioner told the judge that he had never talked to Counsel Murphy: “We haven’t communicated. So, I mean - - and all the paperwork got messed up, so I don’t understand if he even knows what I’m saying – what I’m - -,” The judge interjected: “This is your cause of action, and it’s incumbent on you to make the preparation for it. You can proceed forward *pro se* and Mr. Murphy can have a seat. Tell me what you think what went wrong.” Petitioner responded, “What went wrong with me and the lawyer right there?” The judge said: “Tell me what - - *why you’re entitled to post-conviction relief, the legal issues.*” Petitioner answered, “Okay. I mean he can ask me that.” The judge then told Murphy to go forward with his questioning of petitioner. App. 484, ll. 3-12.

Petitioner was then questioned about his trial and petitioner said he wanted his trial attorney to call his two cousins as witnesses in his self-defense case as well as a police officer. App. 487, l. 17 - 491, l. 12. In her closing argument discussions at the conclusion of the PCR hearing, the Assistant Attorney General and the PCR judge agreed that the failure to call these individuals as PCR witnesses prevented consideration of the failure to call them as trial witnesses as a PCR issue. App. 526, l. 17 – 530, l. 22.

### **Renewed motion for a continuance**

The following occurred between the Assistant Attorney General and petitioner:

“Q. All right. Is there anything else, or can we or are those the claims that you’re doing today?”

A. Those claims are what I want to put today.

Q. Okay, okay. So nothing against your appellate

counsel?

A. No. Well, he's not prepared either.

Q. Okay.

A. I never got a chance to talk to him like that. So these now that I'm coming up with, I'm just not -- I just don't really feel comfortable because we never really speak, and I don't know everything.

Q. Do you feel like you need more time to talk to him?

A. *That's why I was asking for the continuance, like, to get another attorney, give me some more time.*

THE COURT: You want more time to speak to who?

THE WITNESS: *If I can't get in touch with him in time like the way I want to, I would have to get me -- find me a lawyer, pay for a state attorney a paid lawyer.*

THE COURT: *We -- I'm going to deny the motion for a continuance. We will proceed.*

MS. DIXON: All right. I don't have anything else. Thank you.”

App. 505, l. 23 – App. 506, l. 20 (emphasis added).

On a very brief re-direct examination, petitioner acknowledged that his appellate counsel, Adam Ruffin, filed an Anders brief during his direct appeal, and that he filed his own brief with the Court of Appeals. App. 507, ll. 2-24.

The PCR judge denied relief at the conclusion of the hearing noting that petitioner failed to proffer the testimony of the [three] witnesses he asserted would have aided his self-defense case at trial – which was a prerequisite to him asserting prejudice. In addition, petitioner could not prove prejudice from the search of his cell phone, and that his attorney could not force the solicitor to make a plea offer to petitioner. Finally, the self-defense instruction at trial was

adequate since it conveyed to the jury that petitioner had the right to act on appearances.<sup>1</sup> App. 530, l. 14 – 531, l. 25.

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<sup>1</sup> Former Appellate Defender Adam Ruffin testified during the PCR hearing that he filed an Anders brief on petitioner's behalf on direct appeal because he did not locate any meritorious preserved appellate issues to argue. App. 521, l. 4 – 526, l. 5.

## ARGUMENT

The PCR court abused its discretion in denying petitioner's motion for a continuance where PCR counsel admitted that he had never spoken with petitioner about his case and the PCR judge improperly reasoned that allowing petitioner to testify and "tell us what he thinks the [PCR] issues are" was acceptable where petitioner was only allowed "one bite at the apple" in PCR.

As seen, PCR counsel did not have the opportunity to talk to petitioner about the merits of his PCR case prior to him testifying during the evidentiary hearing. Petitioner's cell at the correctional institution had gotten flooded, and PCR counsel provided petitioner with another copy of his trial transcript. However, PCR counsel was unable to talk to petitioner because counsel was late for their appointment. Prison authorities apparently therefore refused to make arrangements for PCR counsel to converse with petitioner at that time. In short, they spoke for the first time about the case while petitioner was testifying during the PCR hearing.

At the beginning of the PCR hearing, PCR counsel frankly advised the PCR judge that he had not had the opportunity to talk to petitioner about his PCR case, but that counsel had read the trial transcript. Counsel advised the judge that he thought petitioner had a "clean trial." This was an ambiguous assertion, but it seemed to imply PCR did not spot any obvious legal irregularities during petitioner's trial. However, that was largely meaningless in the context of this record since appellate counsel, Adam Ruffin, filed an Anders Brief on direct appeal and Ruff testified at the PCR hearing that he did not find any meritorious preserved appellate issues for review on direct appeal. Further, PCR issues are often what did not occur during the trial. That was certainly true here where petitioner asserted three witnesses should have been subpoenaed to testify in his defense at trial.

Petitioner moved for a continuance through PCR counsel prior to the evidentiary hearing. The PCR judge reasoned that PCR counsel could call petitioner to the witness stand and petitioner, a lay person, with no apparent legal training, could tell the PCR court and PCR counsel what he thought the PCR legal issues were in his case.

As explained more infra, this was not an acceptable alternative to the granting of a continuance since this Court has repeatedly stated that a PCR applicant is only entitled to “one bite at the apple” in PCR. This means it is imperative that PCR applicants raise all known PCR issues at the time of their evidentiary hearing because they will not be granted a second in time or successive PCR if the issue could have been raised during the first PCR hearing. See Love v. State, 428 S.C. 231, 238, 834 S.E.2d 196, 199 (2019); Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999).

There are also no grounds of “ineffective assistance of PCR counsel” in our state. See Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (ineffective assistance of prior PCR counsel is not a “sufficient reason” for allowing a successive PCR application under S.C. Code § 17-27-90). In Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980), supra, this Court held that prior PCR counsel’s “inadequate performance” was not a sufficient reason to warrant a successive PCR application.

In short, this evidentiary PCR hearing was petitioner’s “one bite at the apple.” While the right to counsel in PCR in South Carolina is statutory, and not constitutionally mandated, the “one bite at the apple” and the finality that follows the order of dismissal in PCR, underscore respectfully -- that the one PCR hearing petitioner was provided pursuant to the statute should have been a full and fair hearing. The evidentiary hearing petitioner was provided in this case –

having never spoken with PCR counsel about the merits of his case in advance of his taking the stand during the evidentiary hearing -- was not even minimally adequate.

Petitioner here renewed his motion for a continuance while testifying when it became apparent that PCR counsel's questioning him blindly about what petitioner thought his PCR issues were was not a substitute for having the guidance of prepared counsel so he could have a meaningful PCR hearing. However, even in this environment petitioner did raise the fact that two of his cousins and a police officer familiar with the decedent were not called as witnesses during his trial in support of his self-defense case because trial counsel did not subpoena these witnesses.

The cousins would have testified that that the decedent was acting in an "aggressive" manner towards petitioner before the shooting, and that the decedent had a gun. See State v. Fuller, 297 S.C. 440, 444-44,377 S.E.2d 328, 331 (1989) (A defendant has the right to "act on appearances," words accompanied by hostile acts can establish a claim of self-defense, and a defendant has no duty to retreat if retreating would increase his danger of being badly injured or killed). This would have strongly corroborated petitioner's self-defense case.

In addition, the police officer familiar with the decedent, could have testified regarding the decedent's character and his reputation as a violent man. App. 487-491; App. 514-515. See Rule 405, SCRE; Collins, South Carolina Evidence (2d ed. 2000) §10.9 (D)(1) *Reputation in the Community* at pp. 306-309. Defense counsel D'Angelo confirmed that it was a fair assumption that the decedent was "a bad dude," but counsel was unable to get these necessary witness witnesses under subpoena to show that to the jury. App. 514-515.

The PCR judge ruled at the conclusion of the PCR hearing that since PCR counsel did not call petitioner's two cousins and the police officer as PCR witnesses, that petitioner had not

established the evidentiary predicate necessary to argue that he was prejudiced by trial counsel's deficient performance. See Strickland v. Washington, 466 U.S. 668 (1984).

In State v. Covington, 845 S.W.2d 784 (Tenn. Crim. App. 1992), the court held that the trial judge abused his discretion in denying a motion for a continuance where defense counsel failed to contact the defendant prior to trial. Defense counsel also did not interview the defendant or the trial witnesses until the day before trial, when a one-day continuance was granted. The defendant informed defense counsel of two witnesses, one of which was an eyewitness, but that eyewitness was out of town. The court of appeals found the denial of the continuance motion under these circumstances was an abuse of discretion as the defendant was prejudiced as he was forced to go to trial with an unprepared defense counsel and without an eyewitness.

In Mills v. Commonwealth, 24 Va. App. 95, 480 S.E.2d 746 (1997), the court held the trial judge abused his discretion by denying the defendant's motion to discharge retained counsel, who was not prepared for trial and had not communicated with the defendant.

The court in Mills v. Commonwealth noted that in the case of Fegley v. Commonwealth, 16 Va. App. 17, 432 S.E.2d 520 (1993), where a defendant's attorney was unprepared for a trial, had not conducted an adequate investigation and had generally not communicated with his client, that the failure to grant a continuance for the defendant to hire new counsel may be an abuse of discretion. The court noted in Mills that the trial court's questioning of trial counsel made it clear that counsel did little, if any, pretrial preparation. At best, he neglected his client's interest in not at least contacting witnesses that he admitted were material.

Here, PCR counsel could not have petitioner's two cousins and the police officer present to testify at the PCR hearing because he was unfortunately not prepared for the PCR hearing, and

he only heard about this during petitioner's PCR testimony which highlighted why this procedure was a wholly inadequate substitute for PCR counsel having talked to petitioner about the merits of his case prior to the PCR hearing. Counsel did not -- or had been unable to -- talk to petitioner before the PCR hearing about his proposed PCR issues and could therefore was in no position to subpoena, call, or "proffer" the testimony of these three witnesses. Therefore, petitioner could not prove trial counsel's deficiencies in not calling them as trial witnesses prejudiced him because PCR counsel did not call these three witnesses as PCR witnesses.

In Brown v. State, 395 So. 2d 121 (Ala. Crim. App. 1980), the court held that it was an abuse of discretion to deny a continuance where counsel was appointed thirty minutes prior to trial, and the defendant informed newly appointed counsel of potential witnesses. The continuance motion was denied based on the defendant's failure to notify the court he did not have counsel. On appeal, the court held the denial of the continuance motion was an abuse of discretion as it unconstitutionally deprived the defendant of effective counsel.

In State v. Johnson, 379 N.C. 629, 630, 866 S.E.2d 725, 726-27 (2021), North Carolina Supreme Court held that the time allowed for the preparation for a defense was constitutionally inadequate in that case, and a continuance should have been granted. The motion for a continuance was based on the state's disclosure that on the eve of trial that it planned to admit "select phone calls" from over eight hundred recorded calls made by the defendant from jail. The court noted that the calls were admitted as rebuttal evidence to the defendant's evidence of lack of specific intent. However, since assault with a firearm on a government official was a general-intent crime in North Carolina, there could be no possible prejudice to the defendant as to that conviction. The court, however, ordered a new trial on the specific-intent crimes -- including robbery with a dangerous weapon.

Here, petitioner's defense was self-defense. That defense is always very fact intensive, and what particular piece of evidence may be the difference between an acquittal and a guilty verdict can be difficult to gauge in advance particularly since the state has the burden to disprove self-defense once it is raised by the defense. See State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-93 (1998). Consequently, this was not – and cannot be an “overwhelming evidence of guilt” case where it can be confidently held that the failure to secure the presence of these three witnesses at trial was harmless.

In State v. Vaughn, 268 S.C. 119, 123, 232 S.E.2d 328, 329 (1977), this Court found no reversible error in the denial of a continuance motion where defense counsel failed to identify evidence that would have been produced but for the denial of the continuance. In this case, petitioner identified the testimony of his two cousins that would have been helpful on his self-defense case as outline above, and the testimony of a police officer that could have testified as to the decedent's reputation for violence in the community.

Again, this self-defense evidence was not considered by the post-conviction relief judge because these witnesses did not testify during the PCR hearing. PCR counsel here did not talk to petitioner about the merits of his case prior to the evidentiary hearing. Petitioner correctly felt uncomfortable going forward with unprepared PCR counsel, and he therefore moved for a continuance twice. During the testimony of petitioner, he again moved for a continuance because he continued to feel uncomfortable - - for good reason respectfully - - with his unprepared PCR counsel.

As to prejudice, petitioner pointed to the fact that his trial counsel did not subpoena the testimony of his cousins and the police officer. PCR counsel did not call or subpoena these witnesses for the PCR hearing and the PCR judge therefore refused to consider their testimony as

to prejudice. Petitioner only receives “one bite at the apple” in post-conviction relief. Petitioner cannot later claim ineffective assistance of counsel given this court’s precedent of Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991). This is one of the rare continuance cases where the record discloses that petitioner will be denied his one bite at the apple in PCR through no fault of his own absent this Court’s intervention. Petitioner should respectfully be granted a new evidentiary PCR hearing.

**CONCLUSION**

By reason of the foregoing argument, petitioner should respectfully be granted a new post-conviction relief hearing in the Charleston County Court of Common Pleas.



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Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of April, 2024.