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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Clifton Newman, Circuit Court Judge

JOHNNY LEE IRBY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-001262

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Whether the court erred in denying post-conviction relief despite counsel's failure to seek a pretrial immunity hearing, where the court determined Petitioner brought about the difficulty by possessing a gun in his own home, since exercising one's right to bear arms is integral to the Protection of Persons and Property Act, and where a reasonable person would have believed he was in imminent danger under the circumstances, since Petitioner established deficiency and prejudice?

STATEMENT

Procedural history

On November 14, 2012, a Berkeley County Grand Jury indicted Johnny Irby, Petitioner, for murder and attempted murder. App. 766 – 769. Petitioner was tried before the Honorable Roger M. Young, Sr., and a jury, from July 21 – 24, 2014. Petitioner was represented by Chad Shelton and David Schwacke. Anne Williams and Matt Ozment prosecuted the case. App. 12; App. 90. Petitioner was convicted as indicted, and he was sentenced to serve concurrent terms of imprisonment of thirty years for each offense. App. 635, ll. 13-24; App. 645, ll. 5-14.

After his convictions were affirmed on direct appeal, Petitioner timely filed an application for post-conviction relief (PCR), on May 23, 2016. App. 647 – 652. The State made its return, partial motion to dismiss, and motion for a more definite statement on May 15, 2017. App. 653 – 660. On March 22, 2021, Petitioner amended his PCR application. App. 661 – 662. On March 24, 2021, a hearing was held on the matter before the Honorable Clifton Newman. App. 666. The State was represented by Benjamin Limbaugh. Leslie Sarji represented Petitioner. App. 669, l. 1; App. 674, l. 23. On July 23, 2024, the PCR court issued an order of dismissal. App. 753 – 765.

Relevant facts

Shortly after 8:00 p.m. on August 16, 2012, Petitioner's son, Telly Irby (Decedent) was shot and killed on Petitioner's screened porch. Decedent's girlfriend, Michelle Wiggins (Wiggins) was shot in the chest but lived. Decedent, Wiggins, and Wiggins's three children had recently come to South Carolina and were temporarily living with Petitioner and his brother, Eugene Irby, in Petitioner's home on Haynesville Road in Berkeley County. App. 124, l. 4 – 126, l. 1; App. 162, l. 18 – 164, l. 2; App. 177, ll. 17-25; App. 266, l. 15 – 267, l. 16; App. 276, l.

6 – 278, l. 1; App. 323, ll. 6-15. At trial, Petitioner proceeded on the theory of self-defense as to the charge that he murdered Decedent, and on the theory of accident as to the charge that he attempted to murder Wiggins. App. 580, l. 17 – 584, l. 7.

Defense counsel did not seek a pretrial immunity hearing pursuant to the Protection of Persons and Property Act, S.C. Code Ann. §§ 16-11-410 – 450 (Act). Thus, although the court submitted self-defense to the jury, the jury was charged on all four elements of self-defense, including the duty to retreat. App. 621, l. 18 – 624, l. 14. Had counsel sought a pretrial immunity hearing, and had Petitioner established the first three elements of self-defense, the fourth element—the duty to retreat—would have been excused by the Act.

Petitioner was religiously devout. App. 463, l. 20 – 465, l. 5. He testified as follows. The day before the shooting, a church elder had been by to talk to Decedent about the fact that he was living in sin with Wiggins, and to remind him that couples should be married before they began living together. There was also a conversation about not drinking alcohol in the yard. App. 483, l. 4 – 485, l. 3; App. 490, ll. 7-12. Petitioner testified he was thus "ticked off" to find Decedent, Wiggins, and Brother drinking alcohol in the front yard when he came home the following evening. Petitioner told Decedent he would have to move on if he could not abide by the rules. App. 490, l. 13 – 495, l. 6.

Petitioner stated Decedent became angry. Petitioner testified he went on into the house. Petitioner stated he sent Wiggins's children outside to play, but Decedent immediately told them to go back inside. At that point, Petitioner got his pistol from his bedroom and went out on his porch with the gun down by his side. Petitioner had one foot on the threshold of the house and one foot on the porch. He had his hand on the trigger. Petitioner said the girls needed to stay outside. App. 490, l. 20 – 495, l. 20; App. 517, l. 24 – 518, l. 17.

Decedent came at Petitioner. It was undisputed that Decedent grabbed the gun, the two men struggled over the gun, and it went off. App. 494, l. 1 – 496, l. 15; App. 277, ll. 2-10. Petitioner's recollection was that Decedent went down as soon as the gun went off. App. 496, ll. 9-20. Petitioner told law enforcement that Decedent "walked into the gun." App. 402, ll. 17-20. Petitioner stated the gun was his "equalizer" and he only retrieved it to get Decedent to "back off." He stated that when Decedent grabbed for the gun, "I don't know what he wanted to do to me." App. 513, l. 18 – 514, l. 10. Petitioner stated he was in imminent fear of death or serious injury. App. 539, ll. 6-17.

Petitioner admitted he was "foggy" on some of the events that occurred that night. App. 487, ll. 19-24. Petitioner next remembered walking off the porch and firing the gun into the air to empty the clip before tossing the gun down. App. 520, ll. 18-23; App. 496, l. 11 – 497, l. 8. When a law enforcement officer pulled up and began to put on his bulletproof vest, Petitioner called out, "You're not going to need that. I'm not going to shoot anybody else." App. 178, l. 12 – 179, l. 2.

Petitioner's friend Elijah Haynes (Haynes) was also present and witnessed part of the events, although Haynes's view was obscured by the porch screen. Haynes confirmed that when Petitioner came back out on the porch, Decedent went towards him and Haynes heard a "confrontation," and then shots. Haynes then saw Wiggins run up on the porch and when she came out she was wounded. According to Haynes, when Wiggins and the children ran off, Petitioner came out and fired three shots in the air. App. 123, ll. 21-24; App. 127, l. 6 – 130, l. 9; App. 133, l. 15 – 134, l. 14.

Wiggins agreed that Decedent started cursing at Petitioner when he saw the gun, and she agreed Decedent went for the gun and the two men began wrestling over it. Wiggins stated the

gun was down by Petitioner's side when Decedent tried to take it from him. Wiggins stated the two men fell while wrestling for the gun and the gun went off. App. 276, l. 24 – 277, l. 11; App. 292, l. 18 – 293, l. 5. Two of Wiggins's children also testified that Decedent and Petitioner were wrestling over the gun when it went off. App. 358, ll. 7-8; App. 368, ll. 1-12.

However, Wiggins claimed that the Petitioner and Decedent stood back up and Petitioner lifted the gun and shot Decedent. According to Wiggins, she began screaming: "I think you killed your son," and Petitioner pointed the gun at her and shot her. Wiggins claimed Petitioner followed her down the stairs and shot at her again but missed. Wiggins and the children ran next door. App. 277, l. 12 – 279, l. 7; App. 280, l. 18 – 281, l. 3. Two of Wiggins's daughters similarly claimed that when Wiggins ran up and told Petitioner: "you shot your son," Petitioner looked at Wiggins and shot her too. However, one of the girls clarified that Petitioner shot Wiggins when Wiggins tried to grab for the gun. Two of the girls claimed Petitioner continued to shoot at them as they ran next door. App. 358, ll. 7-16; App. 368, l. 13 – 369, l. 14; App. 374, l. 7 – 375, l. 3. Wiggins received prompt medical attention and recovered. App. 162, l. 18 – 170, l. 17; App. 281, l. 19 – 282, l. 1.

At the PCR hearing, trial counsel testified he did not seek an immunity hearing because he believed S.C. Code Ann. § 16-11-440(A) would not apply since Decedent was a resident of the home. However, counsel conceded that he could have proceeded under S.C. Code Ann. § 16-11-440(C) at an immunity hearing to show Petitioner had no duty to retreat. App. 709, l. 20 – 711, l. 18. Counsel noted this could have been helpful because one of the State's arguments at trial was that Appellant should have retreated instead of getting the gun. App. 710, l. 15 – 711, l. 12. Counsel stated he regretted not requesting an immunity hearing. App. 713, ll. 9-21. The court questioned counsel about his opinion on whether a homeowner could eject another resident

at gunpoint or whether he would have to go forward with an eviction and counsel stated he believed an eviction would be needed. App. 726, ll. 4-15.

In its order of dismissal, the PCR court concluded Petitioner had not proved deficiency or prejudice regarding counsel's failure to request an immunity hearing. App. 761 – 764. The PCR court concluded that "counsel properly determined Applicant would not be entitled to immunity if he was at fault in bringing on the difficulty. By his own testimony, Applicant went inside to retrieve the gun when he and Telly began arguing. Based on this, this Court finds Applicant was at fault in bringing on the difficulty, and counsel was not deficient for concluding he would not be entitled to pretrial immunity." App. 763 – 764. The order further concluded Petitioner did not prove prejudice. "[T]his Court had the opportunity to assess Applicant's demeanor at the immunity hearing and finds the testimony of the Applicant that he was afraid of Telly not credible. This Court further finds Applicant retrieved the gun after arguing with his son Telly, and based on his testimony about the evening, a reasonably prudent person would not have believed he was in imminent danger prior to him retrieving the gun." App. 764.

This petition for writ of certiorari follows.

ARGUMENT

The court erred in denying post-conviction relief despite counsel's failure to seek a pretrial immunity hearing, where the court determined Petitioner brought about the difficulty by possessing a gun in his own home, since exercising one's right to bear arms is integral to the Protection of Persons and Property Act, and where a reasonable person would have believed he was in imminent danger under the circumstances, since Petitioner established deficiency and prejudice.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687. "To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "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).

S.C. Code Ann. §§ 16-11-410 – 16-11-450, the Act, codified the common law Castle Doctrine and extended its reach. *State v. Glenn*, 429 S.C. 108, 117, 838 S.E.2d 491, 495 (2019); *State v. Curry*, 406 S.C. 364, 369, 752 S.E.2d 263, 265 (2013). "Under the Castle Doctrine, '[o]ne attacked, without fault on his part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential

element of that defense.'" *State v. Jones*, 416 S.C. 283, 291, 786 S.E.2d 132, 136 (2016) (quoting *State v. Gordon*, 128 S.C. 422, 425, 122 S.E. 501, 502 (1924)).

"Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed." S.C. Code Ann. § 16-11-420(C). "A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60." S.C. Code Ann. § 16-11-440(C). The "phrase 'another place' in subsection (C) encompasses a residence." *State v. Jones*, 416 S.C. at 295, 786 S.E.2d at 138. Porches are included within the definition of "dwelling." S.C. Code Ann. § 16-11-430(1). The term "residence" includes the term "dwelling," so a porch is part of a dwelling under the Act. S.C. Code Ann. § 16-11-430(3).

A person who is attacked in his home by a cohabitant may invoke the protections of the Act. An accused who is charged with a violent crime against a cohabitant that occurs in their residence may "invoke the doctrine and seek immunity from prosecution," but the accused must establish his "reasonable fear of the attacker." *Jones*, 416 S.C. at 299-300, 786 S.E.2d at 140-41.

"A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force[.]" S.C. Code Ann. § 16-11-450(A). "'[A]nother applicable provision of law' includes the common law of self-defense." *State v. Glenn*, 429 S.C. at 117–18, 838 S.E.2d at 496 (citing *State v. Scott*, 424 S.C. 463, 473, 819 S.E.2d 116, 120 (2018); *State v. Jones*, 416 S.C. at 300 n. 8, 786 S.E.2d at 141 n. 8). "This

means a defendant may seek immunity from prosecution under the Act by 'demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence.'" *State v. Glenn*, 429 S.C. at 118, 838 S.E.2d at 496 (quoting *Curry*, 406 S.C. at 372, 752 S.E.2d at 267). A "defendant seeking immunity under the Act must prove he was acting in self-defense by showing: (1) he was without fault in bringing on the difficulty; (2) he was in imminent danger of death or serious bodily injury or believed he was in such danger; and (3) if the defense is based on an actual belief of imminent danger, a reasonably prudent person of ordinary firmness and courage would have held the same belief." *State v. Rosenbaum*, 438 S.C. 91, 103, 882 S.E.2d 180, 186 (Ct. App. 2022).

"Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) (citing 40 Am.Jur.2d Homicide § 149 (1999)). However, "[o]ne who merely does an action that affords an opportunity for conflict is not thereby precluded from claiming self-defense. Fault implies misconduct, not lack of judgment." *State v. Douglas*, 411 S.C. 307, 321, 768 S.E.2d 232, 240 (Ct. App. 2014) (cleaned up). *Cf. State v. Williams*, 427 S.C. 246, 250–51, 830 S.E.2d 904, 906 (2019) ("Williams' act of intentionally bringing a loaded, unlawfully-possessed pistol to an illegal drug transaction was a violation of law that was reasonably calculated to produce violence.") (cleaned up); *State v. Slater*, 373 S.C. 66, 71, 644 S.E.2d 50, 53 (2007) (defendant was not entitled to a charge on self-defense where he carried an unlawfully possessed, cocked weapon, in open view, into an already violent attack in which he had no prior involvement but that he went to investigate).

An individual has the right to act on appearances. *State v. Starnes*, 340 S.C. 312, 320, 531 S.E.2d 907, 912 (2000). He "doesn't have to wait until his assailant gets the drop on him," he may act in self-defense and prevent his assailant from getting the drop on him. *Id.*, 340 S.C. at 322, 531 S.E.2d at 913. "A defendant must show that he believed he was in imminent danger, not that he was actually in such danger, because he had the right to act on appearances, and under the circumstances as they appeared to him, he believed he was in such danger and a reasonable prudent man of ordinary firmness and courage would have entertained the same belief." *State v. Fuller*, 297 S.C. 440, 443–44, 377 S.E.2d 328, 331 (1989) (citing *State v. Jackson*, 277 S.C. 271, 87 S.E.2d 681, 684-85 (1955)). Words accompanied by hostile acts may establish a plea of self-defense. *State v. Mason*, 115 S.C. 214, 105 S.E. 286, 286 (1920). Additionally, "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." *State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978).

Petitioner was in a place he had the right to be, his home, and he was not engaged in unlawful activity. He had the right to bear arms in his home. He had no duty to retreat, and he had the right to stand his ground and meet force with force. S.C. Const. art. I, § 20; S.C. Code Ann. § 16-11-440(C). The Act specifically states: "The General Assembly finds that Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed." S.C. Code Ann. § 16-11-420(C).

The PCR court's conclusion that "counsel properly determined Applicant would not be entitled to immunity if he was at fault in bringing on the difficulty. By his own testimony, Applicant went inside to retrieve the gun when he and Telly began arguing. Based on this, this Court finds Applicant was at fault in bringing on the difficulty, and counsel was not deficient for

concluding he would not be entitled to pretrial immunity," was not supported by the facts. App. 763 – 764. Counsel did not testify to that. Counsel testified he thought Decedent's status as a resident precluded him from proceeding under § 16-11-440(A). He was not precluded from proceeding under § 16-11-440(C). Counsel chose to try the case before the jury on the theory of self-defense, which also required a showing the accused did not bring about the difficulty.

Petitioner did not bring about the difficulty by having the gun. This was not a case like *Williams*, 427 S.C. at 250–51, 830 S.E.2d at 906, where the defendant brought a gun to an illegal drug deal, or like *Slater*, 373 S.C. at 71, 644 S.E.2d at 53, where the defendant carried an unlawfully-possessed weapon into an existing argument of which he was not a part. Petitioner had the gun in his own home. The finding that Petitioner's possession of a gun, in his own home, brought about the difficulty, contravenes the express intent of the General Assembly regarding the right to bear arms. This was legal error. The gun merely afforded an opportunity for conflict. *Douglas*, 411 S.C. at 321, 768 S.E.2d at 240. Decedent, not Petitioner, brought about the difficulty by drinking in the yard, and by grabbing for Petitioner's gun, which Petitioner had by his side, and wrestling with Petitioner over it.

When Decedent tried to wrest the gun away from Petitioner, Petitioner was entitled to act on the appearance that Decedent would use the gun against Petitioner if he gained control of it. *Starnes*, 340 S.C. at 320, 531 S.E.2d 912. Decedent did not remain on the ground or break away from the conflict after the gun went off the first time. Therefore, Petitioner was justified in continuing to shoot until the apparent danger had ceased, i.e., he was justified in firing the second shot. *Hendrix*, 270 S.C. at 661, 244 S.E.2d at 507. The court's finding that Petitioner's fear was not credible was unsupported by the facts. It was undisputed Decedent was wrestling with Petitioner for the gun. The court's finding that a "reasonably prudent person would not

have believed he was in imminent danger prior to him retrieving the gun" was an error of law. Petitioner did not have to be in fear when he armed himself. He was entitled to arm himself if he chose since he was in his own home. The proper question was whether Petitioner was in fear when he used the gun. He was. *See State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993) (where victim jumped defendant from behind and began wrestling for the weapon, "the struggle alone was some evidence that [defendant] was in fear or imminent danger of losing her life or sustaining serious bodily injury").

Petitioner's conduct would have been found immune from prosecution had counsel moved for an immunity hearing. S.C. Code Ann. § 16-11-450(A). He established deficiency and prejudice. *Strickland v. Washington*, 466 U.S. at 687.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on this issue.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of March, 2025.

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JOHNNY LEE IRBY,

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RESPONDENT

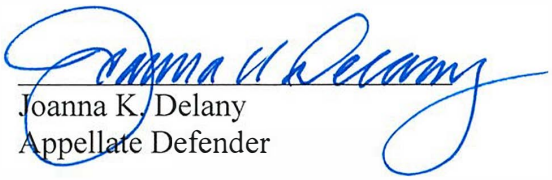
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Johnny Lee Irby states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Clifton Newman, which was held on March 24, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Johnny Lee Irby.

Respectfully Submitted,



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of March, 2025.

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S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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ATTORNEY FOR PETITIONER

This 12th day of March, 2025.