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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO WILLIAMSBURG COUNTY
Court of Common Pleas
The Honorable R. Kirk Griffin., Circuit Court Judge

Appellate Case No. 2024-000178

JOHN ARTHUR JAMES, III,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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I. Did the PCR court err in finding trial counsel was effective even though he failed to request an immunity hearing pursuant to the Protection of Persons and Property Act when petitioner and his mother were threatened in broad daylight and captured on video in the parking lot of a grocery store by a man wielding a large machete forcing petitioner to fire his mother's handgun to neutralize the threat?

II. Did the PCR court err in finding counsel was effective given that he allowed petitioner to stand trial within a month of being appointed and only met with petitioner the day before and morning of trial since counsel believed the case was "on video", so the only burden was to make the proper legal arguments?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES PRESENTED

I. Petitioner's current argument is not properly preserved for appellate review, where Petitioner never argued to the PCR court that Counsel should have argued withdrawal or that Counsel should have requested a jury charge on withdrawal at Petitioner's trial.

II. The PCR Court correctly found Counsel was not ineffective for failing to request a pre-trial immunity hearing pursuant to the Protection of Persons and Property Act, where Counsel articulated a valid reason for not doing so, and Petitioner was not prejudiced by Counsel's decision.

III. The PCR Court correctly found that Counsel properly met with Petitioner prior to trial and was not ineffective for failing to request a continuance despite only being appointed a month prior to trial and that Petitioner failed to prove he was prejudiced.

STATEMENT OF THE CASE

John A. James, III ("Petitioner"), is confined in the South Carolina Department of Corrections. During its January 2018 term, the Williamsburg County Grand Jury indicted Petitioner for assault and battery of a high and aggravated nature and possession of a weapon during the commission of a violent crime (2018-GS-45-00022). Petitioner was represented by Grant B. Smaldone, Esquire. Assistant Solicitor Warren S. Anderson of the Third Circuit Solicitor's Office prosecuted the case.

On May 29, 2018, Petitioner proceeded to trial before the Honorable R. Ferrell Cothran, Jr. and a jury. The jury found Petitioner guilty as indicted. On May 31, 2018, Judge Cothran sentenced Petitioner to twenty (20) years for assault and battery of a high and aggravated nature and five (5) years for possession of a weapon during the commission of a violent crime, with those sentences to be served concurrently.

Petitioner filed a timely notice of appeal. Appellate Defender Joanna K. Delany of the South Carolina Commission on Indigent Defense, Office of Appellate Defense perfected the appeal by filing a brief with the Court of Appeals on the following issue:

> The [trial] court erred in appellant's ABHAN trial where it refused to charge the jury on the lesser offense of second-degree assault and battery, where expert testimony about the complainant's injuries was that he had "a scar" and that most people tolerate the type of surgery undergone by the complainant "without much difficulty," since these facts supported a finding of moderate bodily injury (second-degree assault and battery) rather than great bodily injury (ABHAN), since the court must instruct the jury on a lesser-included offense where there is any evidence of the lesser offense rather than, the greater offense.

Following briefing, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. *State v. John Arthur James, III,* Op. No. 2021-UP-023 (Ct. App. filed Jan. 27, 2021). The remittitur was issued on February 23, 2021.

Petitioner filed an application for post-conviction relief ("PCR") on August 5, 2021. On June 15, 2023, a hearing into the matter was convened before the Honorable R. Kirk Griffin at the Sumter County Courthouse. Petitioner was present and represented by Michael Lifsey, Esquire. Assistant Attorney General T. Cruise Mitchell represented the State. During the hearing, testimony was taken from Petitioner, Grant B. Smaldone ("Counsel"), and Assistant Solicitor Warren S. Anderson ("Solicitor"). On December 27, 2023, Judge Griffin issued an order denying and dismissing the application with prejudice. Petitioner did not file a motion to alter or amend Judge Griffin's order. This appeal follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

I. Petitioner's current argument is not properly preserved for appellate review, where Petitioner never argued to the PCR court that Counsel should have argued withdrawal or that Counsel should have requested a jury charge on withdrawal at Petitioner's trial.

As an initial matter, Petitioner raises two issues in this appeal. To support his allegation that Counsel was ineffective for failing to request an immunity hearing, Petitioner argues that Counsel should have argued withdrawal in the context of self-defense. Likewise, to support Petitioner's allegation, Counsel was ineffective for failing to prepare for trial; he argues that had Counsel been more prepared, he would have argued withdrawal at trial and would have requested a jury charge on withdrawal. However, the concept of withdrawal was never even mentioned in the proceedings before the PCR court. Petitioner is attempting to raise an unpreserved issue that was never raised in Petitioner's initial or amended PCR applications or at the evidentiary hearing. Petitioner's argument that Counsel was ineffective for failing to rely on the doctrine of withdrawal is not preserved for appeal.

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. *Gaddy v. Douglass*, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the [circuit] court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Through their enforcement and application, the circuit court is guaranteed a chance "to rule properly after it considered all relevant facts, law, and arguments" so that the appellate court is provided with everything needed to properly review the ruling within the limits of the applicable standard of review. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the circuit court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the circuit court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004). Based on those requirements, an issue cannot ordinarily be raised or considered on appeal unless it was first presented to and ruled upon by the circuit court judge. *State v. Freiburger*, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); *see State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

Likewise, an appellant is precluded from arguing one ground or theory in support of an issue during the circuit court proceedings and then a different ground or theory in support of the issue on appeal. *See State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (holding a defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court); *State v. Thomason*, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

In the present case, Petitioner filed an initial PCR application and two subsequent amendments. Not one of those grounds supporting his arguments included the issue Petitioner now attempts to raise on appeal.

In his initial application, Petitioner alleged he was entitled to relief based on the following grounds:

1. Counsel fail[ed] to make timely objection
2. Counsel fail[ed] to investigate
3. Counsel fail[ed] to request pretrial determination
4. Counsel fail[ed] to preserve issue
5. Appellant was not entitled to immunity

(App'x. p. 367).

The State, in its Return, noted that the allegations articulated in Petitioner's application were so vague that it was "impossible to respond . . . precisely" and moved "pursuant to Rule 12(e), SCRCP, to require [Petitioner], through his appointed counsel, to provide a more definite statement of his allegations by filing an amended application" prior to any hearing. (App'x. pp. 381–82).

Petitioner, through PCR counsel, subsequently amended his application to allege the following:

1. Ineffective Assistance of Counsel for
    a. Failing to adequately prepare for trial, having been appointed only a month prior to the trial date.
    b. Failing to object or offer any opposition whatsoever at a status conference held on April 26, 2018 in front of Judge Clifton Newman, to the plan of the Solicitor to try the case on May 29, 2018, despite the fact that trial counsel was only formally appointed that day.
    c. Failing to request a continuance from the trial judge when the case was called for trial on May 29, 2018 in front of Judge Ferrell Cothran, Jr.
    d. Failing to request an immunity hearing pursuant to the Protection of Persons and Property Act (SC Code Section 16-11-410 *et seq.*).
    e. Failing to object to the trial judge's confusing instructions regarding the charge of Possession of a Weapon During the Commission of a Violent Crime as it related to the charges of Assault and Battery of a High and Aggravated Nature and the lesser included offense of Assault and Battery 1st Degree.

(App'x. pp. 386–87). On October 5, 2022, Petitioner, through PCR counsel, filed a second amended allegation, adding the following additional allegation:

    f. Failing to object to the confusing instruction and commentary by the trial judge when the jury sought clarification on the difference between Assault and Battery of a High and Aggravated Nature and Assault and Battery 1st Degree.

(App'x. p. 451).

Petitioner never raised the argument Counsel was ineffective for failing to argue withdrawal at trial or an immunity hearing. Nor did Petitioner argue that Counsel was ineffective

for failing to request a jury charge on withdrawal, another issue that is raised for the first time here. The doctrine of withdrawal was never even mentioned in any of Petitioner's applications or at the evidentiary hearing. Naturally, therefore, the PCR court's order did not include any findings regarding whether Counsel was ineffective for failing to argue withdrawal either at trial or at an immunity hearing or for failing to request a jury charge on withdrawal. Petitioner did not file a Rule 59(e), SCRCP, motion to alter or amend the PCR court's order.

Because Petitioner did not present the argument he has now raised on appeal at any point during the proceedings before the PCR court, the PCR judge was denied a fair opportunity to rule on the merits of this argument. *See State v. Stone*, 376 S.C. 32, 36, 655 S.E.2d 487, 488–89 (2007) ("If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call."); *I'On*, 338 S.C. at 422, 526 S.E.2d at 724 ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."); *see also Queen's Grant*, 368 S.C. at 372-373, 628 S.E.2d at 919 ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." (citations omitted)); *cf. Powers v. City of Aiken*, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970) ("We have searched the record and agree that the trial judge was not given an opportunity to rule upon this issue, and accordingly, the question is not properly before us. This is a court of review."). Therefore, the argument Petitioner now advances on appeal is not properly preserved for appellate review pursuant to well-established South Carolina law. Petitioner's argument cannot appropriately be considered for the first time on appeal. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[E]rror preservation has been a critical part of appellate practice in this State for a long time, serving to ensure . . . that we do not reach issues which were not ruled upon

by the trial court. . . . If our review of the record establishes that an issue is not preserved, then we should not reach it."); *State v. Head*, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (holding an appellate court "cannot address unpreserved errors"); *Plyler v. State*, 309 S.C. 408, 413, 424 S.E.2d 477, 480 (1992) (holding an issue that was neither raised at the PCR hearing nor ruled on by the PCR court is procedurally barred on appeal), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (holding an issue that was not raised in the PCR application or at the PCR hearing is not properly before the appellate court).

Because the issue regarding Counsel's alleged failure to argue withdrawal was never raised to or ruled on by the PCR court, this Court should reject Petitioner's attempt to litigate that issue for the first time on appeal. The Court should deny the Petition for a Writ of Certiorari.

II. The PCR Court correctly found Counsel was not ineffective for failing to request a pre-trial immunity hearing pursuant to the Protection of Persons and Property Act, where Counsel articulated a valid reason for not doing so, and Petitioner was not prejudiced by Counsel's decision.

Petitioner alleges the PCR court erred in finding Counsel was not ineffective for failing to request an immunity hearing pursuant to the Protection of Persons and Property Act. The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668 (1984). Where, as in this case, a PCR applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*: first, the applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

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 at 625. "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. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Strickland*, 466 U.S. at 670. The applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP.

Deficiency

Petitioner has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*). "[W]hen Counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v.* State, 386 S.C. 562, 567, 689 S.E.2d 629,

632 (2010). At the evidentiary hearing, Counsel testified that he believed a pre-trial immunity hearing would be frivolous because the video corroborated the victim's testimony that Petitioner started the fight. (App'x. p. 425). The PCR court found this was a valid reason for Counsel's decision, explicitly finding that "the video of the incident corroborates" the victim's testimony. (App'x. p. 462). This finding is supported by the evidence and entitled to great deference. *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527.

Counsel also explained that, in order to present an argument at an immunity hearing, Petitioner would have to testify. (App'x. p. 425). He further stated he did not want to "show his hand" at the immunity hearing prior to trial. (App'x. p. 430). Solicitor corroborated this testimony by explaining that when defense counsel requests an immunity hearing, it "gives the State a crack at cross-examining the defendant before trial starts so I'd have another statement from Mr. James where he's not gonna - - there's a chance I'd get him tripped up on the video before the trial even starts so there are major pitfalls to be made." (App'x. pp. 439–40). Especially in a case like this, where the chance of prevailing at an immunity hearing is low, this is a valid reason for not requesting an immunity hearing and, instead, arguing self-defense at trial.

Prejudice

Even supposing Counsel was deficient for failing to request an immunity hearing, Petitioner has suffered no prejudice. The evidence presented at trial clearly demonstrates Petitioner would not have prevailed at an immunity hearing. Traditionally, four elements are required to establish a case of self-defense: (1) the defendant must have been without fault in bringing on the difficulty; (2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or actually have been in such imminent danger; (3) a reasonably prudent man of ordinary firmness and courage would have entertained the same belief

or circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. *See*, *e.g.*, *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013). Subsection 16-11-440(C) of the South Carolina Code provides in pertinent part:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be . . . 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 . . . .

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard . . . ." *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). Petitioner, in supporting his argument Counsel was ineffective for failing to raise an immunity hearing, argues there is a reasonable probability Petitioner would have prevailed at an immunity hearing because there is no duty to retreat. However, Respondent submits Petitioner is unable to demonstrate a reasonable probability he would have been able to meet any of the elements entitling him to immunity, especially when a jury found him guilty following a trial in which Petitioner argued self-defense.

Here, Petitioner argues that even if he was at fault in bringing on the difficulty, he withdrew from the conflict; thus, his right to self-defense was restored. As noted earlier, this issue is unpreserved for appeal. Regardless, the evidence clearly showed Petitioner was at fault in bringing on the difficulty and he did not withdraw from the conflict. "If the defendant provokes or initiates an assault, he cannot invoke self-defense; however, he may restore his right to self-defense if he withdraws from the conflict and communicates that decision to his adversary." *State v. Santiago*, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006). The relevant inquiry in deciding a claim of immunity

under the Protection of Persons and Property Act is not merely whether there is a conflict in the evidence but, instead, whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence. S.C. Code Ann. §§ 16-11-410, 16-11-450(A). *State v. McCarty*, 437 S.C. 355, 878 S.E.2d 902 (2022). It is true that an aggressor's right to self-defense can be restored if the aggressor "withdraws in good faith from the conflict" and announces his intent to withdraw "by word or act." *State v. Kaisk*, No. 2022-000181, 2024 WL 3595503, at *1 (S.C. Ct. App. July 31, 2024).

Victim testified to the following at Petitioner's trial:

> I pulled over to park right - - 'cause when I park I'm gonna get me something to eat and come back and talk to my deacon. Like, when I pulled in the parking lot I went to open my door. As soon as I open my door I got attacked. I got punched in the face three times by John James.

(App'x. p. 47).

> Well, when he ran he ran away from me, came back around, right, 'cause I was far, I couldn't run to catch him, you know. He ran around, came back and start to jump me and kick my door and when kicked my door he fell down, right. He got up and took off and ran over to his mother's car and told her give me the gun, you know, give me that damn thing out the box.

(App'x. pp. 50–51).

Victim further testified that it was at this point that he grabbed the machete—still in its sheath—and told James that he was going to call the police. (App'x. pp. 49–50). Victim began walking away from Petitioner when "[Petitioner] got out the car and came with the gun, you know, following me…When I got around the corner [Petitioner] shot twice, bam, bam." (App'x. p. 51).

Here, Petitioner clearly did not withdraw in good faith, either by words or act. While it is true Petitioner ran away from the vehicle after punching the victim in the face; he did so to retrieve a firearm from his mother's car. This is not only clearly not a withdrawal but rather an escalation of the conflict. Had Petitioner "truly intended to withdraw he could have easily left the open

parking lot." *State v. Bryant*, 336 S.C. 340, 346, 520 S.E.2d 319, 322 (1999). Based upon the testimony and evidence presented at trial, Petitioner clearly was at fault in bringing on the difficulty and did not withdraw in good faith. Petitioner was not prejudiced by Counsel failing to argue withdrawal at either at a pre-trial immunity hearing or at trial.

Petitioner did not meet his burden establishing 1) he believed he was in imminent danger of losing his life and 2) a reasonably prudent man in the same circumstances would have entertained the same belief. According to the testimony from Petitioner and Victim, they knew each other prior to this incident. Victim is a large, disabled man who is admittedly much slower than Petitioner. (App'x. pp. 60–61). Petitioner's prior familiarity with Victim demonstrates he was almost certainly aware of these characteristics. Thus, a reasonably prudent man would not believe their life was in imminent danger from a large, disabled man they know walking slowly toward them in a parking lot with a machete in a sheath. Furthermore, an eyewitness, David Gamble, testified that "[Petitioner] went around to the car…I guess he got the gun." Gamble continued testifying to the following:

> Q. What was Mr. Singletary doing when he got shot?
>
> A. Before he got shot, when he saw the gun he turned with the machete in front of him, he turned. And when he turned, he turned away from him.
>
> Q. He turned away from the little fella?
>
> A. Yeah, he turned away from him.
>
> Q. And what happens next?
>
> A. And then he, that was, he fired that first shot after he turned. And he said, I done warn you, he said now I'm gonna shoot you.
>
> Q. And what'd he do after, what did Mr. Singletary do after he said about the warning? What did Mr. Singletary do?
>
> A. He was, he freezed.

Q. Was he threatening him in any way?

A. No, he…Singletary froze. He didn't do anything. He didn't move. When he got the first shot he did not, he just turned. I was looking for him to fall whenever he shot him the first time, and then he, pow, shoot him again and I'm assuming it was in his leg and then that's when he fell on the pavement.

(App'x. pp. 88–89).

Based on the testimony of Gamble and the video, when Mr. Singletary was shot, he was not acting threateningly and was not moving towards Petitioner. This is further evidence that Petitioner lacked both a subjective and objective belief his life was in danger. Especially where Petitioner testified at trial that he was "not scared of a machete." (App'x. p. 174). The State presented evidence negating each of these elements at trial. A jury heard these arguments and found Petitioner guilty.

Accordingly, this Petition should be denied.

III. The PCR Court correctly found that Counsel properly met with Petitioner prior to trial and was not ineffective for failing to request a continuance despite only being appointed a month prior to trial and that Petitioner failed to prove he was prejudiced.

Petitioner alleges Counsel was ineffective given that he allowed petitioner to stand trial within a month of being appointed and only met with petitioner the day before and morning of trial since Counsel believed the case was "on video," so the only burden was to make the proper legal arguments. This is without merit. There is no established "minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel." *United States v. Olson*, 846 F.2d 1103, 1108 (7th Cir.1988) (there is no constitutional minimum number of meetings between attorney and client); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Campbell v. Polk*, 447 F.3d 270, 279, n.2 (4th Cir. 2006) ("we cannot conclude that the fact that Campbell's counsel only met with him five times before trial made them

ineffective."). "'[B]revity of consultation time between a defendant and his counsel, alone,' 'cannot support a claim of ineffective assistance of counsel.'" *Davis v. State*, 44 So. 3d 1118, 1130 (Ala. Crim. App. 2009) (quoting *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984)); *White v. Godinez*, 301 F.3d 796, 800 (7th Cir. 2002) ("A brief consultation does not by itself establish that counsel's performance was inadequate."); *Chavez v. Pulley*, 623 F. Supp. 672, 685 (E.D. Cal. 1985) ("brevity of consultation time between a defendant and his counsel alone cannot support a claim of ineffective assistance of counsel," especially where the defendant "fails to allege what purpose further consultation with his attorney would have served and fails to demonstrate how further consultation with his attorney would have produced a different result").

As noted earlier, Petitioner argues had Counsel been more prepared he would have argued withdrawal at trial and requested a jury charge on withdrawal. First, these issues are unpreserved. Second, as explained in more detail in the previous section, even if Counsel had made this argument at trial, there is no reasonable probability the outcome would have been different based on the evidence presented.

Accordingly, this Petition should be denied.

|CONCLUSION PAGE FOLLOWS|

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari, as the post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully Submitted,

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This 26th day of March, 2025.