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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Thomas William McGee, III, Circuit Court Judge

DERRICK L. PORTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-002578

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred by finding that trial counsel was not ineffective for failing to request a complete charge on "the right to act on appearances," particularly where the PCR court's holding is grounded in the erroneous conclusion that Petitioner was not entitled to any self-defense charge?

STATEMENT

On April 16, 2016, Petitioner shot Fitzgerald Byas outside of a gas station. After turning himself into police, Petitioner said that he shot Byas in self-defense because Petitioner saw Byas reaching for a gun. App. 191, ll. 19-24. Petitioner also believed Byas to have been involved in the murder of Petitioner's cousin. App. 192, ll. 7-10. Byas threatened to kill Petitioner. App. 195, ll. 23-25. During his statement to police, Petitioner was able to correctly identify the brand and caliber of Byas's gun, which was found on Byas's person after the shooting. App. 203, ll. 6-8.

The incident was captured on surveillance video footage from a nearby beauty store. The best description of this video comes from the Court of Appeals' opinion on Petitioner's direct appeal.

> State's Exhibit 16, the surveillance video footage from a nearby beauty store, primarily shows [Petitioner] and Byas shaking hands and talking. The entire video is approximately seven minutes long. About one minute and thirty seconds into the video, [Petitioner] pulls into the parking lot, and Byas pulls up about one minute later. Around the three-minute mark, [Petitioner] exits the store and waits for Byas. When Byas exits the store, the men approach each other, grasp hands, and begin talking. [Petitioner] then follows Byas to his car and the two continue to talk; Byas leaves his driver's door open during this exchange.

App. 377. Petitioner leaned on the door of Byas's car, and the two continued talking. State's Exhibit 16 (Video- Beauty Shop) (On file with this Court). Then, suddenly, Petitioner draws a pistol and shoots Byas in the head. *Id.*

Trial

The case was tried on April 11 and 12, 2018, before the Honorable R. Markley Dennis. App. 1. Grant Smaldone represented Petitioner; Benjamin C. Simpson and Daniel Cooper represented the state. App. 1.

Petitioner raised self-defense at trial. During the charge conference, the trial court agreed to instruct the jury on self-defense but refused to charge Petitioner's requested instruction on prior difficulties. App. 257, ll. 14-16. The trial court also gave the following partial instruction on the right to act on appearances, stating:

> The defendant has the right to act on appearances even though the defendant's belief may have been mistaken. It is for you to decide whether or not the defendant's fear of imminent danger or death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same situation.

App. 319, ll. 4-9. Trial counsel did not object to the charge, nor did he request a more complete charge. App. 325, ll. 6-7.

The jury convicted Petitioner of attempted murder and possession of a weapon during the commission of a violent crime. App. 328. Judge Dennis sentenced Petitioner to consecutive terms of thirty years for attempted murder and five years for the weapons charge. App. 338, ll. 2-5.

Direct Appeal

Originally, appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The Court of Appeals denied appellate counsel's motion to be relieved and ordered further briefing on the following issue:

> Did the circuit court err in denying [Petitioner's] request to give additional instructions on self-defense, including 1) "the right to act on appearances," 2) "the relevance of prior difficulties," and 3) "that a person does not have to wait before acting in self-defense?" *State v. Nichols*, 325 S.C. 111, 117, 482 S.E.2d 121 (1997).

Petitioner then argued that the trial court erred by failing to charge "prior difficulties," and that the trial court had erred by not "giv[ing] the full explanation as required by [*State v.*] *Fuller* [297 S.C. 440, 377 S.E.2d 328 (1989)] and *State v. Jackson*, 227 S.C. 271, 278, 87 S.E.2d 681, 684

(1955)" which "would have included that a defendant does not have to wait for an assailant to attack before acting in self-defense." App. 349-50. However, as the state noted in its brief, the issue of whether the trial court failed to give a full "right to act on appearances" charge was not preserved for appellate review, because trial counsel had not requested the charge, nor had he objected to the trial court's charge. App. 365.

The Court of Appeals apparently agreed that the "right to act on appearances" issue was not preserved, as it did not address the argument in its opinion. App. 376-78. The Court of Appeals addressed the issue of whether the trial court should have charged the jury on prior difficulties. App. 377. It found no abuse of discretion and affirmed Petitioner's convictions. App. 378.

Post-Conviction Relief Application

On August 9, 2022, Petitioner filed a timely application for post-conviction relief (PCR). App. 379-386. An evidentiary hearing was held on the application before the Honorable Thomas William McGee, III. App. 403. Denise G. Swope represented Petitioner; Danielle Dixon and Kylee Kanealey represented the state. App. 403. Prior to the hearing, Petitioner provided the PCR court with an amended application, which alleged that trial counsel was ineffective for failing to request charges on "the right to act on appearances"[1] and that "a person does not have to wait before acting in self-defense" and for failing to preserve the issues for appellate review. App. 400. Trial counsel acknowledged that he had not preserved the issues for appeal. App. 418, ll. 6-16.

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[1] Petitioner stated: "While the trial court gave an abbreviated charge on the right to act on appearances, it did not give the full explanation as required by Fuller and State v. Jackson.... A full explanation would have included that a defendant does not have to wait for an assailant to attack before acting in self-defense." App. 400.

The PCR court denied relief and dismissed the application with prejudice. App. 426. As to the allegation that trial counsel had not requested a "full" charge on the right to act on appearances or objected to the trial court's failure to do so, the PCR court found "the right to act on appearances *was* charged to the jury." App. 430 (emphasis in original). The PCR court further found that Petitioner "was not entitled to the basic self-defense charge, much less any additional self-defense instructions." App. 430. In support of that finding, the PCR court held:

> Here, the right to self-defense never arose because [Petitioner] was the aggressor and brought the situation on himself. The victim tried to leave multiple times while [Petitioner] followed him. First, the victim walked away from [Petitioner] by going into the Quick Mart, and [Petitioner] proceeded to wait for him for two minutes outside of the store. The victim then tried to leave again by walking to his vehicle, and [Petitioner] followed him to his vehicle. Although instructed, [Petitioner] was not entitled to the basic self-defense charge, much less any additional self-defense instructions. Critically, no evidence showed the victim ever approached or threatened [Petitioner].

App. 430-31 (internal transcript citations omitted). This petition follows.

ARGUMENT

The PCR court erred by finding that trial counsel was not ineffective for failing to request a complete charge on "the right to act on appearances," particularly where the PCR court's holding is grounded in the erroneous conclusion that Petitioner was not entitled to any self-defense charge.

Petitioner told police that he saw Byas reach for a gun. That statement is all that is needed to entitle him to an instruction on self-defense, and the additional charges of "the right to act on appearances" and "that a person does not have to wait before acting in self-defense." The PCR court erred in deciding otherwise, and this Court should grant certiorari and reverse.

A. Petitioner was entitled to a self-defense charge.

If there is any evidence of self-defense, the issue must be submitted to the jury upon request. *State v. Hill*, 315 S.C. 260, 261, 433 S.E.2d 848, 849 (1993). "A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *Id.* at 262, 433 S.E.2d at 849 (*citing, inter alia, State v. Lee*, 298 S.C. 362, 380 S.E.2d 834 (1989)). Self-defense has four elements: (1) "the defendant must be without fault in bringing on the difficulty," (2) "the defendant must have actually believed he was in imminent danger of" death or serious bodily injury, (3) "a reasonably prudent man of ordinary firmness and courage would have entertained the same belief," and (4) "the defendant had no other probable means of avoiding the danger." *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

The PCR court seemed to hold that Petitioner was not entitled to self-defense because he was not without fault in bringing about the difficulty. App. 430. That conclusion is belied by the evidence presented at trial. As the Court of Appeals observed, the surveillance video that captured the incident showed Petitioner and Byas talking, seemingly in a friendly manner.

Petitioner's statement to police, which was entered as evidence at trial, was that Petitioner and Byas were simply talking before Byas threatened Petitioner's life and reached for a gun.[2] That evidence cannot support the proposition that Petitioner was at fault for bringing about the difficulty. It cannot be true that a person who merely converses with another person who goes on to make death threats, has brought that difficulty upon themselves.

Further, there was evidence supporting the other elements of self-defense. Petitioner told police that Byas threatened his life and reached for a gun. Under such circumstances, a "reasonably prudent man of ordinary firmness and courage" would certainly have believed there was a threat to his safety. *Davis*, 282 S.C. at 46, 317 S.E.2d at 453; *see also Fuller*, 297 S.C. at 443-44, 377 S.E.2d at 331 (right to act on appearances). And the jury could have drawn the conclusion that Petitioner "had no other probable means of avoiding the danger." *Id.* For these reasons, Petitioner was at least entitled to the self-defense charge he received.

B. Petitioner was entitled to additional self-defense instructions.

Petitioner was also entitled to a full charge on "the right to act on appearances," which would have included "that a person does not have to wait before acting in self-defense." A person entitled to act in self-defense "doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant [from] getting the drop on him." *State v. Starnes*, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (*quoting State v. Rash*, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936)). "Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired *or aimed* his weapon in order to act." *Id.* (emphasis added). When a defendant is

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[2] The PCR court held that "no evidence showed the victim ever approached or threatened [Petitioner]." App. 430-31. This holding ignores Petitioner's statement to police was that Byas threatened to kill him. App. 195, ll. 23-25.

entitled to this charge, refusal to give it is reversible error. *Id.* (*citing State v. Nichols*, 325 S.C. 111, 482 S.E.2d 118 (1997)).

Here, evidence in the record that Byas threatened Petitioner's life and then reached for a gun. That created the requirement to give the appearances charge. The jury needed to know that Petitioner was not required to wait until Byas was on "equal terms" or until Byas "got the drop on him." *See id.* Byas reached for a gun. "The test is not whether there was testimony of an *intended* attack but whether or not [Petitioner] *believed* he was in imminent danger of death or serious bodily harm, and he is not required to show that such danger actually existed because he had a right to act upon such appearances as would cause a reasonable and prudent man of ordinary firmness and courage to entertain the same belief." *Jackson*, 227 S.C. at 278, 87 S.E.2d at 684 (emphasis in original). Put simply, the evidence in this case showed hostile language combined with Byas's hand on a gun, which this Court has, on several occasions, held is sufficient to justify using force in self-defense. *See generally, e.g., id.*; *Fuller*, 297 S.C. 440, 377 S.E.2d 328 (defendant saw "shiny object" in decedent's hand); *Starnes*, 340 S.C. 312, 531 S.E.2d 907 (after argument, defendant thought decedent had a gun); *State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978) (after altercation, decedent retrieved shotgun from his truck); *Nichols*, 325 S.C. 111, 481 S.E.2d 118 (during argument, defendant saw shiny object in decedent's hand that he thought was a gun); *State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011) (defendant saw assailant reach under his shirt while walking aggressively toward him). Therefore, Petitioner's statement to police, taken as true as the law requires when evaluating jury charges, would establish self-defense under the theory that he needed not wait until Byas was on equal terms and entitled Petitioner to the charge. *Hill*, 315 S.C. at 261, 433 S.E.2d at 849.

C. Because Petitioner was entitled to the charges, trial counsel's failure to request them constitutes ineffective assistance of counsel.

"[I]f the evidence warranted additional charges on self-defense, trial counsel was ineffective in failing to request them." *Battle v. State*, 305 S.C. 460, 464, 409 S.E.2d 400, 402 (1991); *see also Jackson v. State*, 355 S.C. 568, 586 S.E.2d 562 (2003) (trial counsel rendered deficient performance by failing to request a self-defense charge that was warranted by the evidence). Moreover, trial counsel articulated no valid reason for not requesting the charges. *See Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (holding trial counsel ineffective where he did not request an alibi charge that was supported by evidence and did not articulate a valid reason for failing to do so). The state never asked him why he did not make the request, likely because no plausible or valid reason could exist. Accordingly, trial counsel rendered deficient performance by failing to request the above jury charges.

Further, because there is a reasonable probability that but for trial counsel's failure to request the jury instructions the result of the proceeding would have been different, Petitioner was prejudiced by trial counsel's failure to request the charges. *See Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002); *accord, Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner's allegations of ineffective assistance were based not only on trial counsel's failure to request additional self-defense charges, but also in his failure to preserve the requests for appellate review. As established above, there was evidence to support the jury charges. Therefore, the trial court's failure to give them, upon request, would have constituted reversible error unless harmless beyond a reasonable doubt. *Hill*, 315 S.C. at 262, 433 S.E.2d at 849; *see State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). Therefore, Petitioner was prejudiced by trial counsel's deficient performance.

Here, the failure to give complete self-defense instructions was not harmless beyond a reasonable doubt. For one, the jury could have believed Petitioner's statement that Byas had threatened his life and then reached for a gun. If the jury did believe this statement, Petitioner would be entitled to self-defense, but in the absence of the proper jury charges, this entitlement becomes less clear. Secondly, although the incident is recorded on video, the video is unclear, and nothing in the video completely contradicts Petitioner's statement. In fact, parts of the video, such as Petitioner and Byas engaging in seemingly friendly conversation, contradict the state's theory that Petitioner set out to kill Byas. Further, by not telling the jury that Petitioner did not have to wait until Byas was on equal ground, the trial court did not adequately "convey the applicable law of self-defense." *State v. Marin*, 415 S.C. 475, 483, 783 S.E.2d 808, 812 (2016). The jury could have been left to speculate about whether Byas reaching for a firearm was sufficient to entitle Petitioner to acquittal based on self-defense. That potential confusion means that the trial court's erroneous failure to give a complete self-defense charge cannot be harmless "beyond a reasonable doubt." *Middleton*, 407 S.C. at 317, 755 S.E.2d at 435.

For the foregoing reasons, the PCR court erred in finding that Petitioner was not entitled to a self-defense charge. Further, Petitioner was entitled to the further self-defense charges that he alleges trial counsel was ineffective for not requesting. Because trial counsel did not request charges that Petitioner was entitled to, he was ineffective. And because the record does not establish beyond a reasonable doubt that the error did not contribute to the verdict, Petitioner was prejudiced. Accordingly, Petitioner received ineffective assistance of counsel. This Court should reverse the PCR court's denial of relief.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to allow fuller briefing on the issue presented.

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ATTORNEY FOR PETITIONER

This 26th day of May, 2026.