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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

Honorable Jane H. Merrill, Circuit Court Judge

CLIFTON E. SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2026-000029

PETITION FOR WRIT OF CERTIORARI

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding trial counsel provided effective assistance of counsel where trial counsel failed to object to the standard self-defense charge and request a charge tailored to the non-lethal facts of the case?

STATEMENT OF THE CASE

On December 26, 2017, Varia Galbreath, her adult son, Michael Todd Reid, and Petitioner rode together to Galbreath's daughter's home for a Christmas get together. During the get together, the group ate pizza and exchanged gifts; Galbreath's daughter gifted Petitioner some mini-bottles of alcohol. Petitioner drank the mini-bottles. Within thirty minutes, Galbreath felt he was "acting up." App. 152. Reid was bothered by Petitioner's behavior and went outside to get away from the situation. Galbreath and Petitioner exited a short time later, and the three left to return to Galbreath's home. App. 150, l. 2 – 152, l. 11; App. 176, l. 19 – 179, l. 19.

Galbreath drove her car, Petitioner rode in the passenger seat, and Reid was in the back seat, directly behind Petitioner. During the ride home, both Galbreath and Reid were upset and irritated with Petitioner's behavior while Petitioner was in his "own little world." Reid decided to make various comments to Petitioner, including that Petitioner could not "handle the alcohol." Petitioner responded that Reid used drugs, and Reid reacted by striking Petitioner. App. 152, l. 14 – 153, l. 6; App. 180, ll. 4-23.

Galbreath stopped the car and hollered at the men to stop. Both Galbreath and Reid stated that at that point, the altercation was over, and Galbreath resumed driving home. App. 154, ll. 8-11; Tr. 180, l. 24 – 181, l. 12. After a short time had passed, Galbreath and Reid asserted that Petitioner turned around in the seat and began to hit or slap at Reid. This led to Galbreath again stopping the car in the road and attempting to intervene in the altercation. Reid exited the vehicle, and realized that he had been cut numerous times, and requested help. Galbreath called 9-1-1. App. 154, ll. 22 – 156, l. 8; App. 181, ll. 1-25.

When first responders arrived, Petitioner was standing at the back of the car. He was "agitated" and shouting. App. 128, l. 22 – 129, l. 16. The first responder asked Petitioner if he

had any weapons. Petitioner admitted that he had a knife in his pocket. The first responder asked Petitioner to put the knife on top of the trunk, and Petitioner complied. App. 130, ll. 1-9. He was "very compliant" and cooperated with law enforcement. App. 139, ll. 14-19. The knife was a pocketknife with an approximately two-to-four-inch-long blade. App. 148, ll. 9-17.

When questioned, Petitioner told law enforcement that he acted in self-defense. Petitioner said there was an argument during which Reid attacked him with a knife, that he was able to take the knife from Reid, and that he ultimately cut Reid with his own knife. App. 210, l. 14 – 211, l. 10; App. 213, ll. 7-11. Petitioner would later state that the knife was his and that he had initially taken it out of his pocket to cut the seatbelt off during the attack. He maintained that Reid hit him repeatedly, causing him to lose consciousness at one point, and that he only cut Reid in self-defense to stop him attacking. App. 78, l. 8 – 79, l. 16.

An Oconee County grand jury indicted Petitioner for assault and battery of a high and aggravated nature (ABHAN) in May 2018. App. 281-282. The state, represented by Jason Alderman, called the case to trial on November 18, 2019, before the Honorable R. Lawton McIntosh and a jury. Lee Cole represented Petitioner. App. 1.

Prior to the start of trial, the court conducted an immunity hearing. Petitioner testified that Reid attacked him from behind and "beat [him] pretty good." App. 75, ll. 20-25. He stated he lost consciousness at one point and had physical wounds to his head and hands from the incident. App. 80, l. 19 – 83, l. 17. Petitioner admitted to cutting Reid but maintained it was in self-defense because Reid was physically attacking him and verbally threatened him. App. 83, ll. 1-12. Petitioner also testified that Reid was younger and physically larger than him. App. 76, l. 24 – 77, l. 22.

The trial court denied immunity. App. 94, l. 19 – 95, l. 6. Petitioner did not testify at trial. App. 226, ll. 6-23. On November 19, 2019, the jury found Petitioner guilty as indicted. Tr. 274, ll. 6-10. He was sentenced to fifteen years imprisonment. Tr. 279, l. 10.

Petitioner timely appealed his conviction and sentence. On April 6, 2022, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Clifton Eugene Smith, 2022-UP-167 (Ct. App. Filed April 6, 2022). Petitioner filed a *pro se* application for PCR on May 5, 2022. App. 284-293. The state filed a return and partial motion to dismiss on February 15, 2024. App. 295-312. PCR counsel Susannah Ross filed an amended application on September 3, 2025. App. 313-314. An evidentiary hearing was convened on September 9, 2025, before the Honorable Jane H. Merrill. Petitioner was represented by counsel Ross. The state was represented by Ryan T. Kowalski. App. 315.

A preliminary order denying relief was filed on September 12, 202. The final order of dismissal was filed on November 24, 2025. The PCR court found that Petitioner failed to prove any instances of deficient performance and even if there were instances of deficient performance, Petitioner had not shown prejudice. App. 384-400. Counsel Ross timely filed a motion to alter or amend the judgement pursuant to Rule 59(e), SCRCP on December 10, 2025. App. 401-402. The motion to alter or amend was denied without a hearing on January 5, 2026. App. 403-404.

ARGUMENT

The PCR court erred in finding trial counsel provided effective assistance of counsel where trial counsel failed to object to the standard self-defense charge and request a charge tailored to the non-lethal facts of the case.

Relevant Facts

During the jury charge conference, trial counsel requested that the jury be charged that Petitioner did not have a duty to retreat based on the language of the Protection of Persons and Property Act. App. 231, ll. 6-21. The state argued that the court's standard self-defense charge was all that was required. App. 231, l. 22 – 232, l. 4. The court agreed to the proposed charge. App. 232, ll. 5-10. Trial counsel did not request that the court tailor the self-defense charge to the facts of the case.

The court charged the jury as follows:

> The next part of this charge is on self-defense. Ladies and gentlemen, the defendant has raised the defense of self-defense. Self-defense is a complete defense, and if it is established, you must find the defendant not guilty. The State has the burden of disproving self-defense by proof beyond a reasonable doubt.
>
> If you have a reasonable doubt of the defendant's guilt after considering all of the evidence including the evidence of self-defense, then you must find the defendant not guilty.
>
> On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all the evidence, including the evidence of self-defense, then you must find the defendant guilty.
>
> The following elements are required to establish self-defense. First, the defendant must be without fault in bringing on the difficulty. If the defendant's conduct was the type which was *reasonably calculated to and did provoke a deadly assault*, the

defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense.

Self-defense is not available to a person who uses language which is so contemptuous that a reasonable person would expect it to bring on a physical encounter and which did actually contribute to the physical encounter.

The second element of self-defense is that the defendant was actually in imminent danger of death or serious bodily injury or that the defendant actually believed he was in imminent danger of death or serious bodily injury.

If the defendant was actually in imminent danger, it must be shown that the circumstances would have warranted a person of ordinary firmness and courage *to strike the fatal blow* to prevent death or serious bodily injury. If the defendant believed he was in imminent danger of death or serious bodily injury, it must be shown that a reasonably prudent person of ordinary firmness and courage would have had the same belief.

In deciding whether the defendant actually was or actually believed he was in imminent danger of death or serious bodily injury, you should consider all of the facts and circumstances surrounding the crime, including the physical condition and characteristics of the defendant and the victim.

The defendant does not have to show that he was actually in danger. It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. The defendant has a right to act on appearances even though the defendant's belief may have been mistaken.

It is for you, the jury, to decide whether the defendant's fear of imminent danger of death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same situation.

Ladies and gentlemen, words accompanied by hostile acts may, depending on the circumstances, establish self-defense. The

> relative size, ages, and weights of the defendant and the victim may be considered in deciding the apparent or actual need for force in self-defense and the amount of force needed. Threats made by the victim may be considered in determining whether defendant actually was or believed he was in imminent danger.
>
> And, ladies and gentlemen, the final element of self-defense is that the defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the defendant did in this particular circumstance. A person who is not engaged in unlawful activity and who was 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 crime as defined in Code Section 16-1-60.

App. 266 – 269 (emphasis added). Along with the contemptuous language section, the charge repeatedly referenced deadly force, even though there were no facts adduced at trial that supported those portions of the charge. Trial counsel did not object that the self-defense charge was not properly tailored to the case. App. 272, l. 23 – 273, l. 3.

When questioned at the PCR hearing, Petitioner testified that he was the victim in the case because Reid hit him "a hundred times…He beat me until he was tired." App. 324, ll. 2-24. He confirmed that he cut Reid but testified that it was because Reid was going for a gun. App. 325, ll. 3-19; App. 332, ll. 3-23

During the PCR hearing, trial counsel conceded that he did not object to the charge on the back end and that it contained instructions inapplicable to the case. App. 362-363. He acknowledge the charge as given was "a standard self-defense which would normally be a fatal situation." App. 363, ll. 16-20. Trial counsel did not offer any reasoning for failing to request that the inapplicable language be removed and the charge tailored to the non-fatal facts of the

case, but counsel contended that the charge as given did not have any impact on the case. App. 365, ll. 13-16.

The PCR court found that, while the limited language of the self-defense charge was incorrect, the charge as a whole was proper. App. 397 – 398. The court found counsel "did not object to the charge because he believed the language within the jury charge did not impact the outcome of the trial." App. 397. Thus, counsel was not deficient for failing to object, and Petitioner did not suffer any prejudice. App. 397.

Discussion

In State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), this Court held it was error for the trial judge to exclusively charge the standard instruction on self-defense when the defendant requested additional charges and the evidence supported the requests. This Court instructed trial courts that when charging self-defense "the trial court must consider the facts and circumstances of the case in order to fashion an appropriate charge." State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000). Unquestionably, the self-defense charge in Petitioner's case was not tailored to fit the facts and circumstances of the case before the jury. Most concerning is that the charge was littered with references to deadly force when this case involved a non-deadly force claim of self-defense.

As the PCR court found, the jury instruction on self-defense was incorrect. Failing to object to an incorrect jury instruction is deficient performance. See Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011) (The failure to object to supplemental jury instructions that erroneously enlarged the indictment by instructing the jury it could convict the defendant of a crime not alleged in the indictment was deficient performance); Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008) (Trial counsel's failure to object to the trial court's supplemental jury

instruction on malice murder, which impermissibly shifted the burden of proof for malice from the State to defendant, constituted ineffective assistance of counsel.). Trial counsel's failure to object to a self-defense charge that discussed deadly force was deficient performance.

Petitioner was prejudiced by trial counsel's failure to object because there was no deadly force used in the case. Further, "it makes little sense to require a person to believe serious bodily injury is imminent before resorting to non-deadly force in self-defense." State v. Stoots, 445 S.C. 127, 134, 912 S.E.2d 248, 252 (2025) (There is no requirement the defendant anticipate serious bodily injury or death before responding with non-deadly force in self-defense.) The jury charge on Petitioner's only defense was confusing and misleading, as it contained wholly inapplicable aspects of the law. Petitioner received ineffective assistance of counsel where counsel failed to request additional, specific self-defense instructions warranted by the evidence in the case. See Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991).

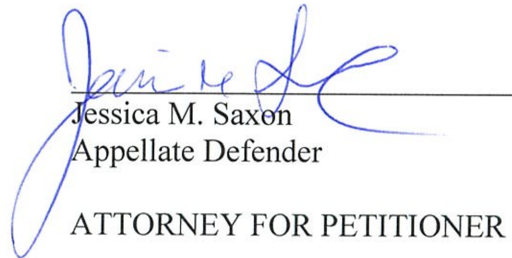
The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Bailey v. State, 392 S.C. 422, 432, 709 S.E.2d 671, 676 (2011) citing Strickland v. Washington, 466 U.S. 668, 687 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. citing Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Id. citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). This Court will uphold the findings of the PCR judge when there is any evidence of probative value to

support them, and will reverse the decision of the PCR judge when it is controlled by an error of law. Id. citing Suber v. State, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007).

Petitioner's entire defense was self-defense, and for the jury to properly consider that defense, it needed to be instructed on the proper law. That did not occur in this matter. The PCR court found that, while the instruction was incorrect, counsel was not deficient for failing to object because "the language withing the jury charge did not impact the outcome of the trial." App. 397. However, that testimony does not exists in the record. The state asked trial counsel "do you think that the charges as given *after your review of them today* had any impact on the outcome of the trial?" to which trial counsel responded in the negative. App. 365, ll. 13-16. While counsel, in hindsight, may not have thought the improper jury charge did not impact the verdict, there was no strategic reason given by counsel for failing to object or request a more specific self-defense charge. Petitioner has shown both deficient performance and prejudice. Trial counsel did not request a non-deadly force self-defense charge and did not object to the incorrect charge as given to the jury.

CONCLUSION

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



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of June, 2026.