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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Charleston County
Honorable Thomas William McGee, III., Post-Conviction Relief Judge

Appellate Case No. 2025-002578

DERRICK L. PORTER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA

RESPONDENT.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General

KYLEE KANEALEY
Assistant Attorney General
S.C. Bar No. 107060

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
803-734-3737

ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT OF ISSUE ON PETITION FOR CERTIORARI

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?

COUNTERSTATEMENT OF ISSUE ON PETITION FOR CERTIORARI

Whether the post-conviction relief court properly determined Petitioner failed to establish counsel's representation was deficient or the requisite prejudice necessary to reverse his conviction where "the right to act on appearances" charge was given, and no evidence was presented to support the charge "that a person does not have to wait before acting in self-defense."

STATEMENT OF THE CASE

During its November 2016 term, the Charleston County Grand Jury indicted Petitioner for Attempted Murder (2016-GS-10-06124) and Possession of a Weapon During the Commission of a Violent Crime (2016-GS-10-06125). On April 11, 2018, Petitioner proceeded to a jury trial before the Honorable R. Markley Dennis, Jr. Grant Smaldone, Esquire, represented Petitioner. Assistant Solicitors Benjamin Chad Simpson and Daniel Cooper prosecuted the case. The jury found Petitioner guilty as indicted. On April 12, 2018, Judge Dennis sentenced Petitioner to consecutive terms of thirty years' imprisonment for Attempted Murder, and five years' imprisonment for Possession of a Weapon During the Commission of a Violent Crime.

Petitioner filed a timely notice of appeal. Appellate Defender David Alexander perfected the appeal by filing an Anders¹ brief and a petition to be relieved as counsel with the Court of Appeals on the following issue:

Did the circuit court err in denying Porter'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, 481 S.E.2d 121 (1997).

The South Carolina Court of Appeals denied the motion to be relieved as counsel and directed the parties to brief the issue. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Petitioner's conviction on the merits. State v. Porter, Op No. 2022-UP-173 (S.C. Ct. App. filed April 20, 2022). The Remittitur was sent on May 13, 2022.

On August 9, 2022, Petitioner filed an application for post-conviction relief. An evidentiary hearing was held on October 16, 2025, before the Honorable Thomas William McGee, III. Applicant was present and represented by Denise Swope, Esquire. Assistant Attorney General

¹ Anders v. California, 386 U.S. 738 (1967).

Kylee Kanealey represented the State. Petitioner testified on his own behalf. Respondent presented the testimony of Grant Smaldone, Esquire. At the evidentiary hearing, Petitioner presented an unfiled amended PCR application. On December 1, 2025, Judge McGee denied relief and dismissed the application.

On December 30, Petitioner timely filed a notice of appeal. On May 26, 2026, Petitioner filed the petition for writ of certiorari.

This return to petition for writ of certiorari follows.

STATEMENT OF FACTS

On April 16, 2016, Petitioner Derrick Porter shot Fitzgerald Byas outside a Quick Mart in North Charleston. (App. p. 60). Before the shooting, Byas had gone into the Quick Mart, while Petitioner waited outside the store for two minutes until Byas came out of the store. (App. p. 60). The confrontation began with what appeared to be a friendly conversation but quickly escalated into an argument. (App. p. 60-61). Byas attempted to leave by walking to his car; however, Petitioner followed. (App. p. 61). The argument continued, ending with Petitioner pointing a gun at Byas and pulling the trigger. (App. p. 61). Petitioner casually walked away from the scene. (App. p. 61).

On the day of the incident, Pierra Martin was working at the Unique Beauty Supply, which is connected to the Quick Mart. (App. p. 86). Martin heard a gunshot, went outside, saw Byas, and called 911. (App. p. 87). She approached the car, saw that Byas wasn't moving, and saw blood coming from his head. (App. p. 89). She leaned into the car to let the 911 dispatcher know whether Byas was breathing. (App. p. 89). She testified that Byas was in the front seat with the door open. One hand was holding an alcoholic beverage, and the other was empty. (App. p. 90-91). Martin did not see a gun in Byas's car or on his person. (App. p. 89-100).

Patrick Norwood, an officer at the North Charleston Police Department, was the first officer on scene. (App. p. 129). Upon arrival, Officer Norwood observed Byas suffering from a gunshot wound. (App. p. 129). Byas was breathing but only making groaning sounds. (App. p. 129). Norwood testified that the scene was secured by making sure no weapons were present while waiting for EMS to arrive. (App. p. 130). Norwood testified that he looked over the car thoroughly and found no weapons there. (App. p. 131). EMS arrived on scene a few minutes later. (App. p. 132).

David Palawasta, a paramedic for Charleston County EMS, arrived on scene, approached the driver's side door, and was advised that the scene had been secured. The victim had a pulse and was still breathing. (App. p. 111). EMS decided it was best to get Byas out of the car and into the ambulance as quickly as possible. (App. p. 114). Palawasta testified that he assisted from inside the vehicle in moving Byas out of the vehicle. (App. p.117). Palawasta did not observe a firearm in the car when entering the car. (App. p. 117). Both of Victim's hands were in his lap. (App. p. 123). When Palawasta reached for the belt to assist in getting Victim out of the car, he felt a gun and advised those around him. (App. p. 118). Officer Norwood told Palawasta to remove the gun and place it in the driver's seat under the victim. (App. pp. 121,133). Palawasta testified that victim was wearing two shirts, both of which were tucked in to his pants and covering the gun. (App. p.118). Palawasta further stated that it was not until he lifted both shirts that he was able to see the butt of the handle and trigger aspect of the gun. (App. p. 118). The gun was positioned in the posterior aspect of victim's hip or waist area. (App. p.119). It took three attempts for Palawasta to remove the gun from the victim's pants after first having to untuck the two shirts. (App. p. 120).

Surveillance footage from the Quick Mart was collected by Officer Sean Reiter. (App. p.142-143). Sergeant Ryan Terrell of the North Charleston Police Department gathered surveillance footage from the Unique Beauty Supply. (App. p.148).

An article was published in *The Post and Courier* on April 17, 2016, with a headline stating that the victim had a gun. (App. pp. 210-11). The article also reported on the type of gun found and named Petitioner as the suspect. (App. pp. 211-12).

Petitioner turned himself in on May 9, 2016. (App. p. 168). Jerry Jelico, an investigator with the North Charleston Police Department, interviewed Petitioner. (App. p. 172). Jelico testified that during the interview, Petitioner confessed to firing his 9mm gun once at victim. (App. p. 185).

Petitioner claimed it was self-defense, that he saw a gun on the victim, and gave further details about the type of gun it was. (App. 185-186). Jelico testified that even with his knowledge of guns, there would be no way to identify the type of gun by just the butt of the gun. (App. pp. 203-204).

At trial, Petitioner claimed self-defense, and the jury was charged on self-defense with no objections to the charge by defense counsel. (App. p. 325). The jury found Petitioner guilty of both attempted murder and the weapons charge. (App. p. 327-328).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly determined Petitioner failed to establish counsel's representation was deficient or the requisite prejudice necessary to reverse his conviction where "the right to act on appearances" charge was given, and no evidence was presented to support the charge "that a person does not have to wait before acting in self-defense."

On appeal, Petitioner asserts the post-conviction relief court erred in not finding trial counsel's representation constitutionally ineffective for failing to request a complete charge on "the right to act on appearances."

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice because of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To establish prejudice, the applicant must prove "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.

Petitioner contends counsel failed to request a complete 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." (PWC p. 7). However, there is no caselaw that states that "the right to act on appearances" charge must include "that a person does not have to wait before acting in self-defense" to be considered a complete charge. Contrary to Petitioner's incorrect attempt to blend these charges into one, these are two distinct jury charges. The PCR court correctly assessed these jury instructions separately.

As provided in the record and the PCR court correctly found, the right to act on appearances

was charged to the jury as follows:

“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 the right to act on appearances even though the defendant’s belief may be—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. p. 319).

Thus, as correctly stated in the post-conviction relief court’s order denying the application, this is directly refuted by the record. The Supreme Court of South Carolina articulated the charge for appearances that “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) (quoting State v. Jackson, 277 S.C. 271, 87 S.E.2d 681, 684–685 (1955)). The instruction from these cases that Petitioner claims should have been given is nearly identical to the instruction given at trial. Petitioner failed to allege what more should have been included in this specific instruction other than the entirely separate instruction of lying in wait. As the PCR court correctly found, the allegation that counsel was ineffective for failing to request the additional jury instruction on “the right to act on appearances” was directly refuted by the record.

The PCR court properly found that trial counsel was not deficient for failing to request the additional charge “that a person does not have to wait before acting in self-defense” because Applicant was not entitled to the additional jury charge. In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere

allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).² As an initial matter, the extent of Petitioner's testimony as to this issue at the PCR hearing was PCR counsel asking him, "The first one you listed was failure to object, and I clarified that in the amended in that there were questions regarding jury instructions about self-defense and additional instructions on self-defense. And one of your allegations is that he – your trial counsel, did not adequately preserve that issue for review, is that right?" to which Petitioner responded "Yes." That was the entirety of the evidence presented by Petitioner at the post-conviction relief hearing on that issue.

As the PCR court correctly found, trial counsel was not deficient in failing to request this additional charge because there was no evidence to support it. Further, as the PCR court properly found, Petitioner did not prove that had trial counsel requested the instruction and it had been given, there is a reasonable probability the outcome would have been different and thus, failed to prove prejudice. See Cherry at 117-18, 386 S.E.2d at 625.³ Critically, Petitioner presented no evidence or testimony as to why this charge should have been given and further or to how there is a reasonable probability the outcome of the trial would have been different had this charge been given. The PCR Court reviewed the record and correctly concluded that trial counsel was not deficient for failing to request the additional charge. Therefore, the PCR court properly found

² Contrary to Petitioner's unfounded, speculative assertion that "the state never asked him why he did not make the request, likely because no plausible or valid reason could exist." (PWC p. 9), the State is not required to ask any questions. The burden of proof is on the Applicant at a post-conviction relief hearing.

³ Petitioner asserts "because the record does not establish beyond a reasonable doubt that the error did not contribute to the verdict, Petitioner was prejudiced." (PWC. P. 10). However, this is the incorrect standard for a post-conviction relief action. To establish prejudice in a PCR action, the applicant must prove by a preponderance of the evidence "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.

Petitioner failed to prove deficiency and prejudice.

CONCLUSION

Based on the foregoing, the PCR court correctly determined that Petitioner failed to show that trial counsel provided constitutionally ineffective assistance. Therefore, this Court should deny Petitioner's Petition for Writ of Certiorari.

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General

KYLEE KANEALEY
Assistant Attorney General

By: 

Kylee M. Kanealey
S.C. Bar No. 107060

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

This 8th day of July, 2026