RECEIVED
Jul 09 2026
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

---

# REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

---

W. CHANDLER NORVILLE
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

## INDEX

INDEX ..... i

QUESTION PRESENTED ..... 1

ARGUMENT

**Trial counsel was ineffective for failing to request a complete charge on "the right to act on appearances."** ..... 2

CONCLUSION ..... 6

## QUESTION PRESENTED

Whether trial counsel was ineffective for failing to request a complete charge on "the right to act on appearances?"

## ARGUMENT

Trial counsel was ineffective for failing to request a complete charge on "the right to act on appearances.

There was evidence presented at Petitioner's trial entitling him to jury instructions that: (1) a person does not have to wait before acting in self-defense, and (2) a person entitled to act in self-defense does not have to wait "until his assailant gets the drop on him."[1] Because Petitioner was entitled to these instructions, and trial counsel did not articulate a strategically valid reason for failing to request them, trial counsel rendered deficient performance. Further, because there is both a reasonable probability that the jury would have returned a not guilty verdict had they been properly charged, *and* a reasonable probability that Petitioner's conviction would have been reversed on appeal had trial counsel preserved the requests, Petitioner was prejudiced by trial counsel's deficiency. Therefore, trial counsel rendered ineffective assistance of counsel to Petitioner. This Court should grant certiorari and reverse the PCR court's contrary holding.

Respondent resists this conclusion in several ways. None are availing.

*First*, Respondent insists there was no evidence supporting the additional self-defense jury charges, and thus, trial counsel was not ineffective for requesting them. Return at 10. As noted in the Petition for Writ of Certiorari, this Court, on several occasions, has held that Byas's hostile language, combined with his hand on a firearm, is sufficient to warrant a self-defense charge. Petition for Writ of Certiorari at 8 (collecting cases). Once Petitioner was entitled to a

---

[1] Respondent appears to assert that Petitioner did not allege what specifically should have been included in the trial court's jury charge, other than the "entirely separate instruction of lying in wait." Return at 9. It is not clear what Respondent means by this. Petitioner *did* allege, specifically, that he was entitled to "the full explanation" of the right to act on appearances "as required by *Fuller* and *State v. Jackson*," and that "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.

self-defense charge, "the trial court must consider the facts and circumstances of the case in order to fashion an appropriate charge." *State v. Starnes*, 240 S.C. 312, 322, 531 S.E.2d 907, 913 (2000). Essentially, Petitioner testified that "he thought he saw a gun in the victim's hand and did not wait for [Byas] to fire or aim at him." *State v. Nichols*, 325 S.C. 111, 117, 481 S.E.2d 118, 121 (1997). This Court has held that exact testimony to entitle Petitioner "to a charge that he did not have to wait before acting in self-defense." *Id. (citing State v. Rash*, 182 S.C. 42, 188 S.E. 435 (1936)).[2]

*Second*, Respondent asserts that "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 had this charge been given." Return at 10 (verbatim). Petitioner alleged that trial counsel should have requested the charges, his PCR counsel argued in summation that trial counsel should have requested the charges, and Petitioner testified that he believed trial counsel was ineffective for failing to do so. App. 400, 408, 421. The PCR court was provided with the transcript of Petitioner's trial, from which it could determine whether Petitioner was entitled to the charges. If Petitioner was entitled to the jury charges, failing to request them constitutes deficient performance as a matter of law, at least in the absence of a valid strategic reason for doing so. *Battle v. State*, 305 S.C. 460, 464, 409 S.E.2d 400, 402 (1991) ("[I]f the evidence warranted additional charges on self-defense, trial counsel was ineffective in failing to request them."). It is not clear what more "evidence" the state wanted Petitioner to present. The PCR court was provided with everything it needed to make a decision.

---

2 The PCR court held that Petitioner was not entitled to a charge on self-defense *at all*; Respondent appears not to attempt to defend that holding. *Compare* Return at 8-11 *with* App. 430.

Relatedly, Respondent takes further issue with Petitioner's assertion that there was no evidence presented to the PCR court that trial counsel had a valid strategic reason for failing to request the charges. Specifically, Petitioner asserted that "[t]he state never asked [trial counsel] why he did not make the request...." Petition for Writ of Certiorari at 9. Quoting the foregoing line, Respondent accuses Petitioner of shifting the burden of proof to the state, whereas the burden of proving ineffective assistance of counsel is on Petitioner. Return at 10. This misapprehends the burden-shifting paradigm that exists in PCR cases. It is, of course, true that Petitioner bears the burden of proving trial counsel's ineffectiveness. However, this Court has repeatedly held that trial "[c]ounsel must *articulate* a *valid* reason for employing a certain strategy to avoid a finding of ineffectiveness." *See, e.g., Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (first emphasis added, second emphasis in original). And in the absence of such an articulation, "neither the PCR court nor the appellate court can conclude trial counsel exercised a valid trial strategy...." *Lindsey v. State*, 447 S.C. 93, 133, 924 S.E.2d 103, 126 (2025) (disapproving of PCR court's holding that trial counsel who passed away prior to the PCR hearing exercised "reasonable professional judgment" for not calling a mitigation expert); *Bruno v. State*, 347 S.C. 446, 451, 556 S.E.2d 393, 395 (2001) (finding no evidence supported PCR court's ruling that there was a valid strategy for trial counsel's decisions when "counsel in the instant case gave absolutely no explanation for his failure to object"). Petitioner showed that trial counsel failed to request jury charges to which Petitioner was entitled, which constitutes deficient performance. *Battle*, 305 S.C. at 464, 409 S.E.2d at 402. Nonetheless, had trial counsel articulated a valid strategic reason for doing so, he would not have been deficient. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) (decisions that are part of "sound trial strategy" are "virtually unchallengeable"). The law does not require Petitioner to prove a negative; in the

absence of trial counsel's *articulation* of a valid trial strategy, as a matter of law, none exists. *Ingle*, 348 S.C. at 470, 560 S.E.2d at 402.

*Third*, Respondent asserts that Petitioner applied the wrong standard to his prejudice analysis. Specifically, the state balks at Petitioner's assertion that "the record does not establish beyond a reasonable doubt that the error did not contribute to the verdict," which the state argues is different from the proper, "reasonable probability" standard. Return at 10, n.3. One of Petitioner's allegations of ineffectiveness was that trial counsel failed to preserve Petitioner's requests for additional jury instructions for appellate review. App. 400. When an allegation of ineffective assistance of counsel turns on the failure to preserve an issue for appellate review, the prejudice analysis must necessarily ask whether the appellate courts would have reversed had the issue been preserved. *Milledge v. State*, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018). In other words, the PCR court must use the same standard of review as the appellate court would have on direct appeal. *Id.* Thus, Petitioner's harmlessness analysis does not misstate the standard of review at all, that is the standard of review that an appellate court would have employed to analyze whether the failure to give the requested jury instruction was harmless. *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). Since Petitioner must demonstrate that "there is a reasonable probability that...the result of the proceeding would have been different," *see Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989), it is necessary for Petitioner to grapple with the appellate standard of review for the appellate issues he alleges were deficiently unpreserved. The Court of Appeals reversing Petitioner's conviction on direct appeal would be a "different" "result" than what occurred in this case. Accordingly, Petitioner did not misstate the standard of review.

## CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition for Writ of Certiorari, this Court should grant certiorari and reverse.

W. Chandler Norville
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of July, 2026.