STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Aiken County

Honorable Jennifer B. McCoy, Circuit Court Judge

DAVID GLOVER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001357

JOHNSON PETITION FOR WRIT OF CERTIORARI

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The PCR court erred in denying relief where petitioner was entitled to the benefit of new substantive law which applied to his case while on collateral review where new law under *State v. King* and *State v. Shands*, that implied malice is not sufficient to support a conviction of attempted murder, rendered the court's thrice repeated implied malice instruction to the jury improper and prejudicial. 4

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ISSUE PRESENTED

Whether the PCR court erred in denying relief where petitioner was entitled to the benefit of new substantive law which applied to his case while on collateral review where new law under *State v. King*,[1] and *State v. Shands*,[2], that implied malice is not sufficient to support a conviction of attempted murder, rendered the court's thrice repeated implied malice instruction to the jury improper and prejudicial?

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[1] 422 S.C. 47, 810 S.E.2d 18 (2017).

[2] 424 S.C. 106, 817 S.E.2d 574 (Ct. App. 2018).

STATEMENT

On September 8, 2014, an Aiken County grand jury indicted petitioner for first-degree burglary, attempted murder, and possession of a firearm during the commission of a violent crime. App. 480-84. On May 13, 2015, petitioner's case was called to trial before the Honorable R. Knox McMahon and a jury. App. 1. Petitioner was represented by David Hayes and Michael Routzong. Jeffrey Slocum Jr. and Cassie Hall represented the state. App. 1.

On May 14, 2015, the jury acquitted petitioner of first-degree burglary but found him guilty of attempted murder and possession of a firearm during the commission of a violent crime. App. 403. Judge McMahon sentenced petitioner to concurrent terms of twenty-five years' imprisonment for attempted murder and five years' imprisonment for possession of a firearm during the commission of a violent crime. App. 414.

On appeal appellate counsel, Laura Baer, argued "the trial court erred in failing to recharge the jury on self-defense where the jury was charged on both attempted murder and assault and battery of a high and aggravated nature three times during the course of the trial court's original jury charge and re-charges, such that, under the totality of the circumstances, the jury charge was unbalanced and prejudicial to the defendant." The South Carolina Court of Appeals affirmed. *State v. Glover*, Op. No. 2017-UP-025 (S.C. Ct. App. filed Jan. 11, 2017). The Court of Appeals denied petitioner's petition for rehearing on February 23, 2017. Thereafter, petitioner filed a petition for a writ of certiorari in the South Carolina Supreme Court, which was denied.

Petitioner filed an application for PCR on November 12, 2018. App. 416-22. An evidentiary hearing was held June 2, 2021, before the Honorable Jennifer B. McCoy. Arthur Aiken represented petitioner and Lindsey McCallister, assistant attorney general, represented the state. App. 438.

On September 30, 2021, Judge McCoy signed an order denying PCR. App. 466-79. The court found trial counsel was not deficient noting that both cases petitioner cited in support of his allegation, *State v. King*, and *State v. Shands*, were not decided until well after petitioner's trial and thus the court must consider the law as it existed at the time of trial and not as it has evolved today. The court found the instruction given by the trial court as to attempted murder was correct at the time of petitioner's trial. The court reasoned that while *King* and *Shands* hint at the issue of whether implied malice can be used to show specific intent, the court found petitioner's assertion that it can never be used was an overstatement.

Further, the PCR court found petitioner was not prejudiced because the only evidence of malice at trial was evidence of express malice. Additionally, the court stated that, on appeal, the Court found that in claiming self-defense petitioner admitted he had an express intent to kill but argued the intent was legally justified due to an imminent threat to his life. Thus, the court found, there was no need for the jury to infer malice. Finally, the PCR court found the trial court correctly instructed attempted murder as well as assault and battery of a high and aggravated nature (ABHAN). App. 745-78.

ARGUMENT

The PCR court erred in denying relief where petitioner was entitled to the benefit of new substantive law which applied to his case while on collateral review where new law under *King* and *Shands*, that implied malice is not sufficient to support a conviction of attempted murder, rendered the court's thrice repeated implied malice instruction to the jury improper and prejudicial.

Relevant Facts

Petitioner and Vernell Weaver were a couple for thirteen years and had recently separated before the following incident. App. 108, ll. 6-17; 315, ll. 11-18. On May 10, 2014, petitioner and Weaver were together at the home of her new boyfriend, George Mackey, and a verbal argument turned physical. App. 109, ll. 5-17; 115-18; 317-24. Weaver sustained a gunshot wound that injured her neck and mouth. App. 119, ll. 6-9; 282, ll. 8-21.

At trial, Weaver testified that petitioner relentlessly, attacked her, shot her, and continued to follow and attack her until she reached the safety of a neighbor's home. App. 115-18. Petitioner testified that Weaver got physically violent with him after he refused to give her money to purchase cocaine base. App. 317, l. 20-318, l. 23. Petitioner said that Weaver had been smoking cocaine base and when he would not give her money to purchase more drugs, she attacked him with a hammer. App. 317-18. Petitioner did not deny that he shot Weaver but testified that he acted because he feared for his life. App. 320, l. 7-321, l. 14.

Weaver's neighbors, Almetha and Otis Green, both testified that Weaver had a hammer when she showed up at their home and that she and petitioner were struggling over it. App. 146-48; 158, l. 14-159, l. 17. Almetha Green called 911 and petitioner left before the police arrived. App. 148, ll. 21-22; 149, ll. 11-12.

At the conclusion of the evidence, the court instructed the jury a total of three times on the

offense of attempted murder. The court's first instruction to the jury regarding the offense of attempted murder was as follows:

> . . . In order to prove this crime, the [s]tate must prove the defendant attempted to kill another person with malice aforethought either express or implied. ...
> . . . Malice aforethought may be either express malice or inferred malice. . . .
> . . . Malice may be inferred from conduct showing total disregard for human life. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be considered by you, the jury, along with the other evidence in the case and you may give it the weight and the value you should decide it should receive.
> The specific intent to kill is not an element of attempted murder. There must be a general intent to commit serious bodily injury. . . .

App. 376, l. 14-377, l. 25.

Defense counsel objected to the language regarding general intent and the court instructed the jury a second time as to attempted murder. App. 386, ll. 14-25; 389-92. This time the court instructed the jury, "[t]he [s]tate must prove specific intent to commit murder as an element of attempted murder. App. 391, ll. 18-19. Nothing else in the charge changed. App. 389-92. After the jury came back with a question regarding the difference between attempted murder and ABHAN the court instructed the jury a third time as to attempted murder. App. 393, ll. 15-21; 395-96.

At the evidentiary hearing petitioner did not present any testimony. PCR counsel made legal argument as to petitioner's allegation. Counsel asserted *State v. King*, and *State v. Shands*, created new substantive law where the elements of attempted murder require both specific intent and express malice. Counsel maintained that because of this change the trial court's instruction on implied malice was erroneous. App. 442-43. He contended the jury in petitioner's trial was charged with implied malice as to attempted murder three separate times. Counsel averred the

change in attempted murder should apply in petitioner's case under *Aiken v. Byars*,[3] which says that if there is a new rule on substantive law that it is applicable to cases on collateral review. App. 446.

Attorney for the state called petitioner's trial counsel Charles Hayes. Hayes testified that he recalled objecting to the trial court's instruction on attempted murder regarding whether it required specific intent. The court agreed to recharge the jury explaining attempted murder did require specific intent. Hayes agreed that he did not object to the trial court's instruction that malice could be express or implied as to attempted murder. App. 453. Hayes said that based on current case law he would object today under similar circumstances. App. 454, l. 2. He testified that in this case the evidence of malice came from Weaver's testimony that, after she retreated, petitioner continued pursuing her with gun, petitioner took her cell phone away, and petitioner continued to beat her. App. 457, ll. 10-20. Hayes admitted there was no way to know whether the jury made a finding of express malice. App. 458, ll. 16-18.

The state argued petitioner was asking for trial counsel to have objected to something at trial which he was under no requirement to object to. The state maintained that there was no requirement for trial counsel to anticipate changes to law. The state also averred that neither *King* nor *Shands*, go as far as PCR counsel claimed. App. 459-60. The state claimed, "[u]ltimately the jury believed [Weaver] and found express[] malice and a specific intent to kill because they convicted [petitioner] of attempted murder." App. 461, ll. 21-23.

Discussion

The PCR court ruled that trial counsel was not deficient for failure to object to the court's jury instructions on attempted murder because the charge given by the trial court was correct law

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[3] 410 S.C.534, 765 S.E.2d 572 (2014).

at the time of trial. However, that was not the argument made by PCR counsel at the evidentiary hearing. Instead, PCR counsel argued, not that trial counsel was deficient, but that petitioner should benefit from new substantive law that applied to petitioner's case while on collateral review. PCR counsel asserted new law under *King* and *Shands*, was that implied malice is not sufficient to support a conviction of attempted murder. App. 446, ll. 5-16; 463, ll. 4-9.

Our Supreme Court in *Aiken v. Byars*, 410 S.C. 534, 540, 765 S.E.2d 572, 575 (2014), stated, "a new rule may be applied retroactively if the rule is substantive." *Teague v. Lane*, 489 U.S. 288, 311 (1989). Second, a new rule may be applied retroactively if it is a "watershed rule" of criminal procedure. *Id.*

"A rule is substantive if it prohibits the States from criminalizing certain conduct or prohibits 'a certain category of punishment for a class of defendants because of their status or offense.'" *Id. Saffle v. Parks*, 494 U.S. 484 (1990) (quoting *Penry v. Lynaugh*, 492 U.S. 302 (1989), abrogated by *Atkins v. Virginia*, 536 U.S. 304 (2002)). New substantive rules apply retroactively on collateral review because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Schriro v. Summerlin*, 542 U.S. 348 (2004) (internal quotation marks omitted). Conversely, a rule that merely regulates the way a defendant is adjudicated guilty is procedural. *Id.*

In a footnote in *King*, our Supreme Court stated:

> While we find it unnecessary to address King's additional sustaining ground, we would respectfully suggest to the General Assembly to re-evaluate **the language following "malice aforethought" as the inclusion of the word "implied" in section 16-3-29 is arguably inconsistent with a specific-intent crime**. *See Keys v. State*, 104 Nev. 736, 766 P.2d 270, 273 (1988) (stating, "[o]ne cannot attempt to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result" (citation and

> internal quotation marks omitted)). **Moreover, if there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the crime would involve a lower level of intent and, thus, would fall within the lesser degrees of the assault and battery offenses** codified in section 16-3-600. See S.C. Code Ann. § 16-3-600 (2015 & Supp. 2016) (identifying levels and degrees of assault and battery offenses).

State v. King, 422 S.C. 47, 64, 810 S.E.2d 18, 27 n.5 (2017).

In *Shands*, this Court found, "the State needed to prove Shands acted with express malice and the specific intent to kill in order to be found guilty of attempted murder." *State v. Shands*, 424 S.C. 106, 131, 817 S.E.2d 524, 537 (Ct. App. 2018).

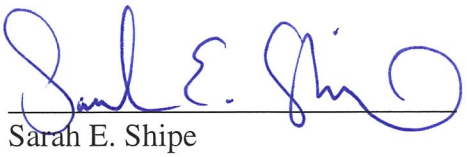
Here, the PCR court erred in denying petitioner relief where *Shands* and *King* support petitioner's claim that implied malice is inconsistent with the specific intent to kill required for attempted murder. Moreover, the court incorrectly found that the only evidence of malice during petitioner's trial case was evidence of express malice. In *King* the Court cited *Keys v. State*, for the following proposition:

> Express malice is the "deliberate intention unlawfully" to kill a human. Attempted murder, then, is the attempt to kill a person with express malice, or more completely defined: Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill.
> 104 Nev. 736, 766 P.2d 270, 273 (1988), (citations omitted).

State v. King, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017). Indeed, there was evidence presented that the jury might have determined was express malice but there was also evidence presented that petitioner shot Weaver in self-defense as she was attacking him with a hammer. Self-defense is a *lawful* action to protect oneself it is not "deliberate intention to unlawfully" kill a person.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on the issue.



Sarah E. Shipe
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This 8th day of July, 2022.

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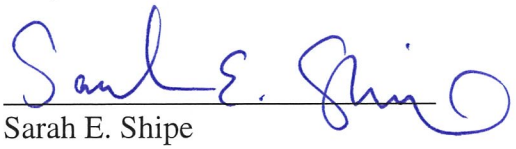
PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Glover states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Jennifer B. McCoy, which was held on June 2, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for David Glover.

Respectfully Submitted,



Sarah E. Shipe
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This 8th day of July, 2022.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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This 8th day of July, 2022.