

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5943 (S.C. Ct. App. filed August 31, 2022)

Lower Court Case No. 2014-GS-32-03244

THE STATE,

RESPONDENT,

V.

NICHOLAS BENJAMIN CHHITH-BERRY,

PETITIONER

APPELLATE CASE NO. 2022-001612

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. The circuit court judge failed to make credibility findings when he abdicated his duty as fact finder during the hearing pursuant to the Protection of Persons and Property Act.

Repeatedly, Respondent claimed the circuit court judge made credibility findings when he denied Petitioner immunity from prosecution. See e.g., Ret. at 9. It is no wonder that Respondent is desperate to make it appear the judge made such findings as that would be extremely helpful to defeating Petitioner's claim for relief. However, the judge never made a single credibility finding.

At the conclusion of the hearing, the judge ruled as follows:

Here's where I have a problem with the immunity question. His testimony was consistent up until he took the one blow against Jamie and then it's very vague and his memory is very, very, very vague from that point forward and it seems to me that the proof doesn't get clear by a preponderance of the evidence that he needed to continue to defend his brother; that if he was clearer, and it wasn't at that point, he was consistently not clear about what happened from the first blow to after that. His memory got worse on every issue. I don't believe that the - - that would entitle him. I would think that he failed to meet his burden of proving he would be entitled to immunity because he only has recollection of one blow that he took to assist his brother if that's the case.

So I don't think he's entitled to immunity under that statute. It's just - - the proof fails because it's unclear from that point forward as to what happened and who knew what, who struck the next blow. I have a very unclear picture. I think that makes it a factual question and I think immunity is - - he's not entitled to immunity under that statute that you're claiming, [defense counsel].

R. 158, l. 8 – R. 159, l. 4. After defense counsel placed his argument for immunity on the record, the judge stated:

All right. I understand your argument. I just don't agree with it. I think that under the statute it requires you to prove more past the initial blow and I've not heard anything about what happened after that. It gets very vague after that, so I'm gonna decline to grant immunity under that statutory section.

R. 160, ll. 6-12.

When defense counsel renewed his request for dismissal of the charges based upon the Protection of Persons and Property Act, the judge ruled:

Having already considered the immunity under 16-11-440(C), evidence goes both ways. I mean, there's - - it's a factual question. The state has presented plenty of testimony for which a verdict could be found and there is evidence to support presenting it to the jury under just a factual question, so for that reason I will not grant immunity under 440(C).

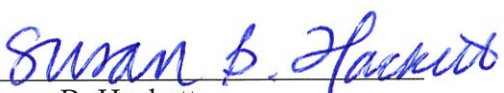
R. 512, l. 23 – R. 513, l. 4.

Despite the fact that the transcript showed the judge never made a credibility finding, Respondent repeatedly and emphatically claimed otherwise. See Ret. at 9 (“Judge Griffith found petitioner was not credible,” “Judge Griffith found ... petitioner’s testimony was ... not credible”); Ret. at 10 (“Judge Griffith ... determined it was not credible”); Ret. at 10 n.11 (“after finding petitioner was not credible”); Ret. at 12 (“Judge Griffith found that here, petitioner’s testimony was not credible”); Ret. at 13 (“Judge Griffith did not abuse his discretion in finding petitioner was not credible”); Ret. at 14 (the judge “found, not only was petitioner not credible on this issue”).

Respondent’s desperation is understandable here. Had the judge actually found Petitioner not credible as Respondent claimed again and again, then Respondent’s argument that the judge acted as fact finder would be improved significantly. However, the record clearly shows the judge never made a credibility finding regarding Petitioner’s testimony. Instead, the judge abdicated his role as fact finder.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.


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ATTORNEY FOR PETITIONER

This 19th day of January, 2023.