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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chesterfield County

Honorable Michael S. Holt, Circuit Court Judge

GARY MOORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000459

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Whether the PCR court erred by failing to rule defense counsel was ineffective for (a) failing to argue that the solicitor's "summary judgment" burden of proof argument at the immunity hearing was incorrect; (b) failing to argue that conflicting evidence alone also did not make self-defense a jury issue, and (c) not objecting to the trial court not making any findings of fact and conclusions of law as to petitioner's right to immunity?

2.

Whether appellate counsel was ineffective for failing to brief the issue of whether the immunity court committed reversible error by failing to make any findings of fact and conclusions of law while denying petitioner immunity since the Court of Appeals did not have any trial level findings of fact and conclusions of law to evaluate on appeal which denied petitioner meaningful appellate review?

3.

Whether the PCR court erred by ruling defense counsel was not ineffective for failing to object to the trial judge not instructing the jury that specific intent was a required element of the crime of attempted murder that the state had to prove beyond a reasonable doubt particularly since the judge twice charged the jury that malice "does not necessarily mean an actual intent to kill," which was highly confusing at best?

4.

Whether the PCR court erred by ruling defense counsel was not ineffective for failing to present available corroborating evidence at the immunity hearing which supported petitioner's

testimony that he was without fault in bringing on the difficulty in a place he had a right to be under the immunity statute, and that he was acting in self-defense?

STATEMENT

Procedural history

Petitioner was indicted at the December 1, 2015 term of the Chesterfield County grand jury for the crime of attempted murder. App. 658-659. An immunity from prosecution hearing was held on February 17, 2016, before the Honorable Roger E. Henderson. Larry Knox represented petitioner. Kernard Redmond and Mary T. Johnson-Lee were the deputy solicitors. App. 2.

At the conclusion of the evidentiary hearing, the judge said: "Alright. I will let you hear from me hopefully tomorrow, if not by the end of the week anyway. So I will contact counsel and they can come over so I can put it on the record." App. 121, ll. 1-4. The judge's ruling was either never put on the record, or as will be seen infra, the judge apparently told defense counsel Knox and the solicitor when they were in court on another occasion that he had denied immunity in this case. Regardless, no findings of fact or conclusions of law were ever made in this case as a reason for denying immunity, and no written order was ever issued.

Petitioner's case was then called for trial on April 5, 2016, before the Honorable Paul M. Burch, and a jury. Petitioner was represented by Larry Knox. The solicitors were Mary Lee Johnson-Lee and Kenard Redmond. App. 123.

On April 6, 2016, the jury found petitioner guilty of attempted murder. App. 354, ll. 18-22. Judge Burch ordered a pre-sentence investigation, and on April 11, 2016, the judge sentenced petitioner to eighteen years' imprisonment. App. 371, ll. 21-24.

Petitioner was represented on appeal by Tricia Blanchette. Petitioner's conviction was affirmed in State v. Gary Moore, 2019-UP-234 (filed June 26, 2019). In the unpublished opinion, the Court of Appeals affirmed the denial of immunity, although there were no findings

of fact or conclusions of law to review. The court also held petitioner was not entitled to a directed verdict and found no reversible error in the judge's redefinition of premeditation to the jury. App. 374-376.

Petitioner then filed an application for post-conviction relief on January 27, 2020. App. 378-388. The state filed a return and motion for a more definite statement dated December 21, 2020. App. 389-418. Petitioner then filed an amended application for post-conviction relief on August 20, 2021. App. 420-430.

An evidentiary hearing was convened on March 14, 2022, before the Honorable Michael S. Holt. Dayne Phillips represented petitioner, and Chelsey F. Marto represented the state. App. 431.

An order of dismissal was filed on July 18, 2022, denying relief. App. 577-618. Petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, on August 3, 2022. App. 619-650. An order denying applicant's motion pursuant to Rule 59(e), SCRP, dated March 19, 2024, was then issued. App. 651-657.

This petition for a writ of certiorari follows.

ARGUMENT

1.

The PCR court erred by failing to rule defense counsel was ineffective for (a) failing to argue that the solicitor's "summary judgment" burden of proof argument at the immunity hearing was incorrect; (b) failing to argue that conflicting evidence alone also did not make self-defense a jury issue, and (c) not objecting to the trial court not making any findings of fact and conclusions of law as to petitioner's right to immunity.

During the immunity hearing, petitioner testified that he dropped by a convenience store in Jefferson, South Carolina on July 14, 2015, to buy gas, a pack of cigarettes, and a Mountain Dew. App. 9, l. 4 – 10, l. 1. Petitioner remembered that the store was dimly lit, "very dark." App. 10, ll. 7-14.

As petitioner was walking down the aisle in the convenience store to get a drink, he heard a man's voice say: "I told you I was going to kill you." App. 10, ll. 2-21. This same man told petitioner: "I told you I was going to catch up with you somewhere you little bitch." App. 10, l. 24 – 11, l. 1. Petitioner's eyes were still adjusting to the darkness of the store, so he did not immediately know who was talking to him. App. 11, ll. 17-24.

Petitioner then noticed Charles Wallace, who had been violent towards petitioner in the past was the man threatening him. Wallace had a "scruffy mustache, white hair, blue outfit, green pen in his pocket, and set of glasses." Wallace had broken petitioner's windshield with an axe handle and knocked the side mirror off of his vehicle in the past. Wallace had also attacked petitioner at a prior magistrate's court proceeding. App. 12, ll. 8-16.

Petitioner testified that Wallace came down the aisle and blocked "my only route for escape." Petitioner tried to go around Wallace, but Wallace slapped him "upside the head." "I

attempted to push him off the aisle. He grabbed me by the hair of my head and snatched me down to the ground with him and a good Samaritan [Steve Hooks] proceeded to choke me around my neck, yanking around my throat choking me." App. 13, ll. 6-23; 14, ll. 17-24; 15, ll. 16-23.

Hooks would later testify during the immunity hearing that he was only trying to break up a fight, and he did not see how it started. Petitioner said during the struggle, he was able to get his work knife out of his knife holder, and he began stabbing towards Wallace to get him off of him. App. 16, l. 10 – 17, l. 11. Petitioner related that he did construction work, and he had used this knife for a long time on his job. App. 17, ll. 3-11.

Petitioner tried to leave the store, but Wallace was choking him. Petitioner told the immunity judge how Wallace in the past had attacked him with an axe handle and tried to kill him. Wallace had also jumped on him at a prior magistrate's court proceeding. App. 17, l. 19 – 18, l. 18. Petitioner feared for his life during this encounter because Wallace had tried to kill him on prior occasions. App. 18, l. 6 – 28, l. 8.

Petitioner testified this was a convenience store that was open to the public and that Wallace had tried to block him from leaving the store. Petitioner described how he was able to loosen Wallace's grip on one side of his hair, and he heard a woman saying: "Somebody get the gun, get the gun." App. 29, ll. 6-15. Petitioner called 911, and the police came. App. 29, l. 22 – 31, l. 17. Petitioner described his injuries as having his hair ripped out, he showed signs of a concussion and he had swelling to his neck. App. 31, ll. 8-17. Petitioner would provide corroborating evidence of his injuries, his lengthy 911 call, and the Magistrate Court incident during the subsequent PCR hearing.

On cross-examination, petitioner testified that the original struggle was between him and Wallace, and that Wallace hit him first. App. 37, l. 14 – 38, l. 12. Petitioner repeated that he feared for his life during this attack by Wallace at the convenience store, and he had feared for his life in prior encounters when he was attacked by Wallace. App. 45, l. 16 – 47, l. 13.

Charles Wallace then testified about the incident with the axe handle. Wallace said he had intended to "knock his [petitioner's] brains out if I had caught him." App. 50, l. 7 – 51, l. 7. Wallace admitted that on a prior occasion he had knocked the windshield out of petitioner's vehicle. App. 52, ll. 4-7. Wallace said repeatedly, "I can't stand him [petitioner]." App. 53, ll. 11-15.

Wallace admitted he slapped petitioner inside the convenience store, but he claimed petitioner came into the store "running his mouth to me." However, Wallace could not recall a single word petitioner said to him. App. 54, l. 17 – 55, l. 14; 57, ll. 13-15. Wallace acknowledged he walked up to petitioner inside the store "and smacked him." App. 58, ll. 2-5. Wallace reasoned: "If you're man enough to run your mouth, then you're man enough to take an ass whipping." App. 58, l. 25 – 59, l. 4. Wallace readily admitted he intended to give petitioner "an ass whipping" in the store that day. App. 59, ll. 5-7.

Wallace told the solicitor that petitioner knew "there was bad blood between me and him. Why did he even come in the store? He should have went on down the road." App. 60, ll. 12-19.

Wallace said he slapped petitioner, and he took petitioner to "the ground." "Mr. Moore told him to get off of him, you know. And so the boy [Hooks][1] broke us up. I told the boy not [to] let him up because I knowed [sic] that he had that knife on his side." App. 62, ll. 14-23.

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[1] Hooks was a grown man. It is not clear why Hook was referred to as "a boy" but there was no racial animus involved in this case.

Wallace said he was stabbed four times, including two stab wounds in his back. App. 67, ll. 1-16. As will be seen infra, Wallace admitted during the trial that petitioner was just "mumbling," and he could not make out any words petitioner said – much less any insulting words or "fighting words."

Steve Hooks remembered coming into the convenience store that day, as he did each day in the afternoon. He remembered the Lance cracker rack was knocked over. He saw two men on the floor fighting, and he saw blood. App. 70, l. 21 – 71, l. 21. He recalled the woman behind the cash register was screaming. App. 71, ll. 14-21. Hooks readily admitted he did not know who started the fight that day inside the store. App. 79, ll. 18-20.

Melissa Ann Griffin was working behind the cash register that day. App. 86, l. 1 – 87, l. 25. Griffin said that "it all happened so fast..." App. 86, l. 21 – 87, l. 3. She remembered the fight starting, and she called 911 immediately. She recalled telling petitioner to leave the store after the men were separated. She testified petitioner then walked to his vehicle in the parking lot where he waited for the police to arrive. App. 87, l. 4 – 89, l. 15.

Chesterfield Sheriff's Deputy Tim Hutchinson testified he was dispatched to a call regarding a fight inside the convenience store. App. 92, l. 9 – 93, l. 22. When he pulled into the parking lot, petitioner was flagging him down. Petitioner was still on the phone with 911 and he told Hutchinson he was the victim of an attack. Hutchinson told petitioner to hang up the phone, and he handcuffed petitioner. He told petitioner he was being detained for investigative purposes. App. 95, l. 20 – 96, l. 24.

At the conclusion of the immunity hearing, defense counsel Knox told the judge that under the statute petitioner was in a place he had the right to be, he had no duty to retreat, and he had the right to stand his ground and meet force with force. App. 114, ll. 3-19. Knox added that

the evidence showed petitioner was not engaged in any unlawful activity and that Wallace admitted he hit petitioner first. Wallace, who Knox referred to as "the victim," said he saw petitioner with a knife when petitioner came into the store. Yet, Wallace attacked petitioner anyway because of his hatred for petitioner. Under the law of self-defense, the judge could take into account the prior attacks by Wallace upon petitioner. Wallace had attacked petitioner and damaged his car in the past and he had also attacked him at the magistrate's court. App. 115, ll. 5-17. When Wallace saw petitioner in the store that day, he saw an opportunity to take all of his "pent up rage and anger" out on petitioner. He slapped petitioner in the face and "they engaged in combat. And as a result, the victim was stabbed by the non-aggressive person, that being Mr. Moore." App. 115, l. 18 – 116, l. 1.

Knox concluded that petitioner had a right to defend himself and to stand his ground. Wallace started the fight, and while Wallace claimed petitioner was talking when he came into the store, Wallace could not even remember what petitioner said. App. 116, ll. 2-14.

The solicitor then compared the burden of proof at an immunity hearing to "summary judgment" in a civil case. The solicitor claimed that if there was any material issue of fact involved, the case had to go to the jury. The solicitor claimed this was the holding of State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013). App. 116, l. 16 – 117, l. 7.

The solicitor said that the state did not contest the fact that petitioner had a right to be in the store but that the conflicting evidence made this a "quintessential jury question" based on the differences in the testimony. App. 117, l. 13 – 119, l. 25; 120, ll. 11-19. Defense counsel did not object, take issue, or try to correct any of these erroneous arguments. The judge then took the case under advisement. App. 121, ll. 1-4. As stated, the judge apparently orally denied immunity when he saw both attorneys in the courtroom the next day.

At the post-conviction relief hearing, defense counsel Knox testified that, based on the testimony at the immunity hearing, "I thought that immunity would be granted." App. 525, l. 22 -526, l. 6. Defense counsel was asked at the PCR hearing why he did not object to the solicitor comparing the burden of proof to "being almost akin to summary judgement." App. 529, l. 18 – 530, l. 19. Knox answered that his research showed the standard of proof was by a preponderance of the evidence "and I didn't think the state met its burden based on preponderance of the evidence. And I think, again, I objected to that [to] preserve the record." App. 530, ll. 20-24.

In fact, defense counsel did not object to the incorrect standard of proof being presented to the immunity judge by the solicitor, and Knox said he could not recall any reason for not objecting. App. 530, l. 25 – 531, l. 23. As to the judge not providing any specific findings of fact or conclusions of law in this case, Knox strangely said he did not agree that the immunity judge was lacking in anyway in this regard. Yet, Knox maintained he "objected to it at the immunity hearing and then objected to it again, at the trial." App. 531, l. 24 – 532, l. 6.

The PCR court noted that the burden of proof was by a preponderance of the evidence under State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). The order further stated while State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013), was seemingly misinterpreted by the state, "the correct case was discussed by the state and the preponderance of the evidence standard was articulated by trial counsel in his closing." App. 599.

The order of dismissal reasoned that the immunity court determined petitioner was the aggressor. "Thus, even if the incorrect standard was applied, reanalyzing the case through the preponderance of the evidence standard would not change the court's conclusion. Applicant as

the perceived aggressor, would have been denied immunity regardless of the standard used. Thus, no prejudice has been established and relief is denied on this ground as well." App. 599.

The order of dismissal also stated that the judge's lack of findings of fact and conclusions of law were not a material defect or fatal defect and that the immunity court's finding of the elements of self-defense could be inferred "from the findings of fact and conclusions of law stated on the record." The PCR court wrote that the immunity court found petitioner was at least partially responsible for "escalating the situation and, thereby, bringing on the difficulty. Thus, the court's failure to address each element of self-defense specifically did not impact his conclusion reached when denying immunity." App. 600-601. The PCR court also found that there was no showing that the lack of specific findings of fact and conclusions of law impacted petitioner's appeal. App. 601.

Discussion

Conflicting evidence as to immunity does not automatically require the immunity court to deny the defendant immunity. See State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019), and that was obviously true at the time of petitioner's immunity hearing as well. First, the immunity act requires the circuit court to determine whether the defendant is entitled to immunity based upon the preponderance of the evidence standard. That goes back to State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), which was decided long before this 2016 immunity hearing in 2011. Further, as the Court stated in State v. Cervantes-Pavon, State v. Curry cannot be read as holding that conflicting evidence automatically requires the immunity court to deny immunity. The immunity court still sits as the fact-finder at the hearing, it must weigh the evidence presented, and reach a conclusion under the act. If the court determines the defendant *has not met* his burden of proof by a preponderance of the evidence, the case then goes

to trial. If the defendant proves he is entitled to immunity by a preponderance of the evidence, then the judge is obligated to grant immunity pursuant to State v. Duncan. The case does not go to trial merely because there is conflicting evidence, which is what the solicitor in petitioner's case excessively urged at the conclusion of the immunity hearing, to petitioner's detriment.

Further, in this case the circuit court made no specific findings of fact and conclusions of law as to immunity for the reviewing appellate court to analyze. While a written order is not absolutely required, these findings of fact and conclusions of law are critical for a reviewing court, and a defendant – here petitioner -- is frankly entitled to know why he was denied immunity by the court. See State v. Cervantes-Pavon, 426 S.C. 442, 452 n. 4, 827 S.E.2d 564, 569 n. 4. The PCR Court's guessing what the immunity court was thinking was no substitute for meaningful findings of fact and conclusions of law. Petitioner did file a Rule 59(e) motion as to the immunity court's findings and counsel's deficient performance. App. 622-623.

Here, defense counsel failed to correct the solicitor's "summary judgment" erroneous burden of proof argument to the immunity judge, he also failed to correct the argument that conflicting evidence made self-defense a jury issue, and he failed to object to the trial court not making any findings of fact and conclusions of law as to why petitioner was denied immunity where defense counsel later testified he expected petitioner to be granted immunity. Given these deficiencies and the prejudice in petitioner being denied immunity because of them, petitioner should be granted a new immunity hearing. See Strickland v. Washington, 466 U.S. 668 (1984).

2.

Appellate counsel was ineffective for failing to brief the issue of whether the trial court committed reversible error by failing to make any findings of fact and conclusions of law while denying petitioner immunity since the Court of Appeals did not have any trial level findings of fact and conclusions of law to evaluate and review on appeal.

Appellate counsel simply argued that "the lower court erred in finding that appellant was not entitled to immunity from prosecution." Final Brief of Appellant at 19-24; Supp. App. 46-51. There were no findings of fact and conclusions of law for the Court of Appeals to review as seen above. Appellate counsel wrote "[a]ppellant urges this Court to find the lower court committed an error of law when he determined that appellant had not established that he was entitled to immunity under the preponderance of the evidence standard. Appellant is not asking this Court to amend the standard of review and conduct and *de novo* review, but merely examine the record before the lower court and determine the lower court's factual findings were without evidentiary support." Supp. App. 51. The problem here was there were no factual or legal conclusions of law even made by the immunity court.

Further, a trial level objection to the lack of findings of fact and conclusions of law has not barred this failure of the immunity court from being challenged on appeal in the past. See State v. Cervantes-Pavon. Consequently, appellate counsel should have addressed the failure of the immunity judge to make specific findings of fact and conclusions of law, and, at a minimum requested a remand for proper findings of fact and conclusions of law since the appellate court is naturally going to be reluctant to infer findings of fact which the immunity judge does not explicitly make, and place on the record. See State v. Glenn, 429 S.C. 108, 838 S.E.2d 491 (2019); State v. Cervantes-Pavon, supra.

The appellate court here dispensed with petitioner's immunity argument in a single paragraph. App. 375.

Appellate counsel Blanchette testified the immunity record was "incomplete" and that she did not think this legal issue was preserved because the necessary objections were not put on the record. Appellate counsel said the immunity judge needed to make specific findings of fact and conclusions of law and that she believed this to be an unpreserved issue given the immunity record. App. 457, l. 12 – 458, l. 19.

Respectfully, the failure to object to the lack of specific findings of fact and conclusions of law did not preclude appellate counsel from raising this stark omission as a legal issue on appeal. Appellate counsel was deficient for failing to raise this issue, and petitioner was prejudiced because had appellate counsel raised this issue, it very likely would have resulted in reversal or, at a minimum, a remand for the immunity court to make specific findings of fact and conclusions of law. See Evitts v. Lucey, 469 U.S. 387 (1985) (A defendant is entitled to the effective assistance of appellate counsel). Since appellate counsel was ineffective in this regard, petitioner should be granted a new immunity hearing. See Strickland v. Washington, 466 U.S. 668 (1984).

3.

The PCR court erred by ruling defense counsel was not ineffective for failing to object to the trial judge not instructing the jury that specific intent was a required element of the crime of attempted murder that the state had to prove beyond a reasonable doubt particularly since the judge twice charged the jury that malice "does not necessarily mean an actual intent to kill," which was highly confusing at best.

In State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), the Court of Appeals held that specific intent to commit murder was an element of attempted murder. Therefore, a jury instruction that a general intent, and not specific intent, to commit serious bodily harm was sufficient to convict was reversible error.

Petitioner's trial began on April 5, 2016, almost one year after the Court of Appeals opinion in State v. King. When defining malice in this case, the judge instructed the jury "malice does not necessarily mean an actual intent to kill." App. 341, ll. 15-21.

As will be seen infra, the jury returned during deliberations asking: "What is the attempted murder statute? What qualifies a person to be charged with attempted murder? What is the difference between premeditation and intent?" App. 348, ll. 12-20. Defense counsel Knox objected to the judge giving any answer to the jury's question, focusing his attention on premeditation and not specific or actual intent to kill. App. 350, ll. 12-16. The judge again instructed: "Malice does not necessarily mean an actual intent to kill." App. 351, ll. 6-8. Defense counsel did not object to this instruction which was very confusing at a minimum given the judge's earlier reading of the attempted murder statute to the jury which mentioned "intent to kill." App. 341, ll. 8-24.

During the trial, Charles Wallace was the state's key witness as the "victim" in this case. As during the immunity hearing, Wallace testified at trial that when he arrived at the convenience store that day "he [petitioner] was running his mouth to me so I reached and grabbed him. Me and him went to struggle and the little boy [Hooks]—me and him [petitioner] went to the ground and then there was this little boy, broke us up, and he come, commencing to stabbing somebody." App. 161, ll. 18-23. Wallace claimed that petitioner walked right by him near the beer cooler when he entered the store while he was "running his mouth." Wallace did not say what exactly petitioner was allegedly saying, he claimed only that petitioner was "mumbling stuff to me." App. 162, l. 8 – 163, l. 13. Wallace grabbed petitioner and "he fell to the floor." App. 163, ll. 14-22. Wallace added that petitioner "fought back and "slapped back at me." Wallace "confirmed" to the solicitor that they then engaged in "mutual combat" and that petitioner "struck me [on the] side of the head here." App. 134, ll. 3-6.

Wallace testified that he was carrying a pocketknife, but he claimed, "I never took out a pocketknife." The solicitor then "asked" Wallace: "In other words, [you] don't bring a knife to a fist fight?" Wallace responded, "exactly right." App. 164, ll. 23-24. Wallace then said, "he [petitioner] pulled out a knife and stabbed me." App. 164, l. 25 – 165, l. 2.

Wallace offered that he had a punctured lung and four stab wounds in all. He was taken to CMC Lane Hospital in Charlotte, North Carolina. App. 167, l. 10 – 168, l. 1. Wallace testified that he had surgery while in the hospital, and he was there for four or five days. App. 168, ll. 2-15.

On cross-examination, Wallace denied that he had said he hated petitioner. He would only admit: "I don't like him." App. 172, ll. 2-17. Wallace did acknowledge he knocked out petitioner's windshield on a prior occasion. App. 174, ll. 3-19.

Wallace repeated that he slapped petitioner because he was "running his mouth." Wallace claimed petitioner was "calling me names" but he again confirmed petitioner was actually just "mumbling." App. 176, ll. 7-22. Wallace admitted petitioner never touched him during the prior incident where Wallace used the axe handle. Also, inside the convenience store Wallace admitted that petitioner had not touched him before Wallace slapped him. "If you're man enough to run your mouth to somebody, you ought to be man enough to back it up." App. 178, ll. 2-21. Wallace readily admitted that he slapped petitioner and "I carried him to the ground." App. 182, l. 18 – 183, l. 10. Wallace admitted that petitioner was swinging his knife after he took him to the ground, and that he chose to tackle petitioner after slapping him. App. 187, l. 22 – 188, l. 1.

On recross-examination, Wallace said even though he slapped petitioner and took him to the ground, he did not think petitioner should have used a knife or a stick "or whatever" to defend himself during the fight. App. 194, l. 11 – 195, l. 2.

Steve Hooks also testified during the trial. Hooks remembered coming into the convenience store and seeing the cracker stand was knocked over and there were a lot of crackers on the floor. He saw Wallace and petitioner on the floor. Hooks grabbed petitioner "to try and break them apart from each other. And then the next thing I know, it went so fast, Mr. Moore was out the door and I helped Mr. Wallace to the bathroom." App. 231, l. 8-23. Hooks did not hear any words exchanged, "just a bunch of grunting when they were on the floor." App. 231, l. 24 – 232, l. 2. Hooks opined it looked like an equal fight to him, and that he did not see a weapon involved. App. 232, ll. 3-19. Hooks termed himself just a "good Samaritan." App. 233, ll. 18-25.

Detective Tim Perry noted that the video in the convenience store did not have audio accompanying it. Perry confirmed on cross-examination that Wallace hit petitioner which petitioner reacted to. App. 257, ll. 17-22. Perry said, "watching the video you would see Mr. Moore...just basically come in and walk and then go down the aisle and then you'd see Mr. Wallace come up and then the action takes place." App. 267, l. 23 – 268, l. 3. Perry confirmed that petitioner was just "minding his own business" and that Wallace hit petitioner which was an unlawful battery. App. 258, l. 18 – 259, l. 19. Perry said that if the person who was hit first "complained" about then he would be considered the "victim" in the case. App. 259, l. 11 – 260, l. 22.

The following occurred when the judge charged the jury on the law:

> I am now going to instruct you as to the statutory law. Give me just a second. All right. I charge you from Section 16-3-29 of the Code of Laws of 1976, as amended as to the charge of attempted murder. A person *who with intent to kill, attempts to kill another person with malice* aforethought either expressed or implied commenced the offense of attempted murder. What is malice? Malice is defined in the law of homicide as a term of art. *Malice does not necessarily mean an actual intent to kill.* It is a technical term importing wickedness and excluding just cause or legal excuse. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid on social duty, and fatally bent on mischief. The words express or inferred malice do not means different kinds of malice but merely the manner in which the only kind of malice known to law may be shown to exist.

App. 341, ll. 8-24. (emphasis added). The judge also charged the jury the law of self-defense. App. 343, l. 10 – 344, l. 13.

As stated, the jury returned during deliberations asking: "What is the amended murder statute? What qualifies a person to be charged with attempted murder? What is the difference between premeditation [and] intent?" App. 348, ll. 12-20. The solicitor argued the real issue was not premeditation, but "malice aforethought." App. 348, l. 21 – 349, l. 6. Defense counsel

only objected to a recharge on premeditation. App. 350, ll. 5-16. The judge then repeated his instruction that "malice does not necessarily mean an actual intent to kill." App. 351, l. 7-8.

Discussion

The trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

"The purpose of instructions is to enlighten the jury and to aid at arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987) *quoting* State v. Hewitt, 305 S.C. 207, 31 S.E.2d 257 (1944).

At a minimum, the jury instruction on attempted murder was hopelessly confusing. The judge at first told the jury the statute defined attempted murder as involving an intent to kill but, as seen above, added almost immediately that "malice does not necessarily mean an actual intent to kill." App. 341, ll. 8-24.

More importantly, when the judge recharged the jury, he again told them that "malice does not necessarily mean an actual intent to kill." App. 351, ll. 7-8. This was significant in this case because it was undisputed that Wallace started the fight by slapping petitioner and pulling him to the ground. While petitioner did not testify during the trial as he did during the immunity hearing, the evidence at trial nonetheless showed that petitioner was swinging his knife because he had been taken to the ground. Wallace, and not petitioner, was the person with a deep-seated hate or strong dislike for the other man, petitioner. A properly instructed jury on the specific intent to kill being an element of attempted murder the state had to prove beyond a reasonable

doubt would have found it very difficult to find that petitioner had a specific intent to kill Wallace. Therefore, this error, particularly given its repetition when the jury had focused its "critical attention" on the meaning of attempted murder during deliberations was highly prejudicial. See State v. Blassingame, 271 S.C. 44, 46-47, 244 S.E.2d 528, 530 (1978) (When the jury submits a question to the court during deliberations following a jury charge, it is reasonable to assume the jury has focused its "critical attention" on the specific question asked.).

Defense counsel was ineffective for failing to object to this misleading or hopelessly confusing jury instruction on specific intent or actual intent to kill not being a necessary element of attempted murder that the state had to prove beyond a reasonable doubt. See State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *aff'd as modified* State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). At best, the jury instruction was very confusing since specific intent is an element of attempted murder that the state was obligated prove beyond a reasonable doubt. State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015). Petitioner should be granted a new trial. See Strickland v. Washington, supra.

4.

The PCR court erred by ruling defense counsel was not ineffective for failing to present available corroborating evidence at the immunity hearing supporting petitioner's testimony that he was without fault in bringing on the difficulty in a place he had a right to be under the immunity statute, and that he was acting in self-defense.

As seen, appellate counsel Blanchette complained that the immunity record was not a good record from which to appeal. App. 456-457. During the PCR hearing, petitioner introduced various exhibits which would have strongly corroborated his testimony that he was attacked in a place he had a right to be, he was acting lawfully, he did not bring on the difficulty, and showed that he would have been badly wounded or killed if he had not defended himself.

These include Plaintiff's Exhibit 3, which was a 911 call where petitioner described to a 911 operator in great detail what had just occurred. App. 472. This exhibit is before this Court to review. Plaintiff's Exhibit 4 are the records of petitioner's visit to Dr. Jeffrey Brock on July 20, 2015, which was several days after he was attacked by Wallace. These records showed that Dr. Brock or his nurse, Julie Hall, or even just a records custodian could have gotten the contents of this exhibit before the immunity judge showing that petitioner suffered head trauma and PTSD from this incident and that an MRI was recommended for a possible head injury. The medical records showed petitioner had been hit in the head, that he was seeing white spots, and that he had neck and knee pain. Supp.App. 10-19.

During the PCR hearing, petitioner also introduced photographs of his hair being ripped out and the marks on his body following the attack by Wallace. App. 477. These photographs are before this Court for review. Further, the Deputy Hutchinson body cam was also introduced during the PCR hearing. It showed petitioner was telling the truth during the immunity hearing,

and his behavior following being attacked by Wallace was the behavior of a victim. Plaintiff's Exhibit 7 would also have greatly corroborated petitioner's testimony during the immunity hearing. This body video is also before this Court for viewing.

In addition, Plaintiff's Exhibit 11 is a 911 call that would have also corroborated petitioner's testimony. Plaintiff's Exhibit 12 is the interview with Steve Hooks. App. 493. Both of these exhibits are before this Court for viewing, and they both would have corroborated petitioner's testimony.

Plaintiff's Exhibit 8 is a photograph of the knife that petitioner gave to Officer Hutchinson immediately upon Hutchinson's arrival at the gas station and convenience store, as is Plaintiff's Exhibit 9. They would have corroborated petitioner's testimony that his knife was a common work knife, which is what he used it for daily, and they are before this Court for viewing.

Plaintiff's Exhibit 10 is a disposition sheet from the Pageland magistrate involving Charles Wallace which would have corroborated petitioner's testimony about the prior incident where Wallace attacked him at the magistrate's office. App. 482; Supp. App. 24.

All of this corroborating evidence was just as available to defense counsel as it was to PCR counsel. Trial counsel did not locate it and present it to the immunity judge. As seen above, defense counsel Knox said he was surprised he did not win the immunity hearing, and erroneously thought he had done enough to prevail which was an error in judgment. Petitioner submits the corroborating evidence before this Court following PCR, which was available after a reasonable investigation before the immunity hearing, could have been the difference in petitioner being found immune from prosecution.

Discussion

A criminal defense attorney has a duty to investigate. That investigation must be reasonable under the circumstances of the case. See Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986); Strickland v. Washington, 466 U.S. at 691. Counsel has a duty to interview potential witnesses and to conduct an independent investigation of the facts and circumstances of the case. See Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

In Ard, defense counsel was ineffective for not having further investigated and more thoroughly have challenged the gunshot residue evidence. Defense counsel was similarly found ineffective in Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008), for failing to adequately investigate and discover available evidence in mitigation in that death penalty case.

In this case, the corroborating evidence of petitioner's immunity claim was presented at PCR. All of this evidence was available to defense counsel if he did a minimally adequate investigation. See Rutland v. State, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (failure to use available evidence of prior inconsistent statements was substantial evidence of deficient performance to Rutland's prejudice).

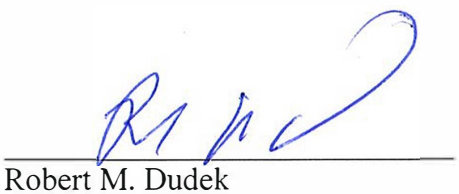
As seen, appellate counsel complained that the record of the immunity hearing was lacking, and that was why she did not prevail on appeal on the immunity issue. Defense counsel conversely testified at PCR that he thought petitioner should have prevailed given the evidence he put forward at the immunity hearing.

Given that this was a close case, corroborating evidence of petitioner's testimony was critical. Defense counsel's deficient performance -- his lack of investigation and failure to present corroborating evidence at the immunity hearing -- prejudiced petitioner. Petitioner should

be granted a new immunity hearing. See Ard v. State; Council v. State; Rutland v. State; Strickland v. Washington, supra.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be granted so that these four legal issues can be fully briefed for this Court.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of October, 2024.