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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

ANTWON M. BAKER, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000088

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the post-conviction relief court err by finding trial counsel was not ineffective where counsel admitted he "screwed up" by not calling Petitioner to testify during the pretrial immunity hearing, where Petitioner was attacked at a place he had the right to be, a Waffle House, where Petitioner fired his gun in fear for his life after he was struck in the back of the head and trapped in the small entryway of the Waffle House, since trial counsel's expectation that a law enforcement investigator as the sole witness could carry Petitioner's burden of proof, including that Petitioner was in fear of losing his life, was objectively unreasonable?

STATEMENT OF THE CASE

On June 3, 2012, Petitioner went to a Waffle House in Spartanburg, where he had a right to be. After he was attacked from behind in the enclosed entryway of the establishment, Petitioner pulled a firearm he had concealed on his waistline and fired in self-defense killing the decedent, Anthony Young.

A Spartanburg County grand jury indicted Petitioner on July 19, 2012, for murder, and on May 3, 2013, for unlawful carrying of a pistol. App. 826-829. His case was called to trial on June 3, 2013, before the Honorable J. Derham Cole, and a jury. App. 1. Assistant Solicitors Derrick Bulsa and Lindsey Overby represented the state. Robert Ianuario and Matt Canady represented Petitioner. App. 1.

At the beginning of the trial, the assistant solicitor told the judge that Petitioner was claiming self-defense. He asserted, "This occurred at a Waffle House, and for the sake of the record and for any post-conviction relief should a conviction be obtained, I'm not certain if a pretrial hearing needs to be held regarding the 'Stand Your Ground' law since we've got a self-defense claim. He [Petitioner] could be immune from prosecution altogether." The solicitor indicated that S.C. Code Ann. § 16-11-440(C) was the subsection that needed to be addressed by the court. App. 15, l. 17 – 16, l. 9.

Trial counsel agreed that Petitioner wished to have a pretrial immunity hearing. Counsel argued Petitioner was a "lawful patron at the Waffle House on the evening of the shooting" when he was "summoned outside" and, after a "quarrel" began, Petitioner "said he wanted no part of it, he was going back inside, didn't want to fight." Counsel explained that "as he [Petitioner] was turning around to reenter [the Waffle House] he was jumped by at least one individual." Counsel then argued that even though Petitioner was unlawfully carrying a pistol, his unlawful carrying

was not the proximate cause of the altercation and Petitioner was not engaged in any other unlawful activity at the time. He asserted, "He [Petitioner] was not using the pistol in any sort of manner to intimidate, to attempt to rob, coerce, threaten, was not pointing it, presenting it . . ." App. 16, l. 13 – 17, l. 15.

The trial judge interrupted trial counsel and asked whether counsel would like to present any evidence in support of Petitioner's motion for immunity. Trial counsel asked the judge, "Can you take the police reports without the witness being present, or the witness statements?" Judge Cole responded, "Well, I mean, I think you've got the burden of proof." Counsel then asked for permission to speak "to the prosecutor." App. 17, l. 16 – 18, l. 8.

Trial counsel called Investigator Richie Foster as the sole witness during the pretrial hearing. App. 24, ll. 17-18. Counsel asked Foster, "Would you provide a brief summary for the court of the events that took place on the night of June 3, the early morning hours?" Investigator Foster answered that he understood Petitioner stopped to get something to eat and noticed a crowd in the parking lot. The trial judge interjected at this point: "He's not going to be able just to testify as to what everybody else told him." App. 25, ll. 4-12. The following then occurred between trial counsel and the judge:

> MR. IANUARIO: Shouldn't he be allowed to testify on the information he gathered at the location in the course of his investigation, not the authenticity of it but what he was told?
>
> THE COURT: Well, he can testify what everybody told him if you don't want me to consider it as evidence that would support a grant of immunity.
>
> MR. IANUARIO: Understood, Your Honor.
>
> THE COURT: I mean, this hearing is not different than the trial. I mean, you have a burden to establish that he's entitled to immunity, and you do that through competent evidence, not just hearsay testimony.
>
> MR. IANUARIO: Understood, Your Honor.

App. 25, ll. 10-25.

Investigator Foster testified that during his investigation, he was unable to determine whether anyone else at the Waffle House had a firearm that morning. App. 26, ll. 2-5. Foster offered that he understood there was "a crowd of folks outside. Mr. Baker [Petitioner] came up, noticed that he had problems with one fellow in the past. He retrieved his firearm from his dash of his car, walked in and ordered. Apparently, some words were exchanged between one or two or three of the group and him. And he came outside one time, *started to come back in. He was hit in the back of the head and at that time turned around and started shooting* and, per the witnesses, chased the victim around in the parking lot and stood over him and kicked him." App. 26, l. 20 – 27, l. 11 (emphasis added).

Foster described the area where Petitioner was attacked, which was also described as the front doorway of the Waffle House, as "not much bigger than that desk you're in front of -- behind." App. 28, ll. 9-18. Foster acknowledged he did not have any evidence that Petitioner started the altercation or difficulties. "He kept telling the individuals . . . to leave it alone." Petitioner told the agitators at the Waffle House to "leave it alone" numerous times before he was attacked. App. 29, ll. 20-24.

Foster recalled, "I believe one of the females did say or was trying to also keep them [the men who wanted to fight Petitioner] calmed down. Without reading through them [the statements] again, I can't be exactly sure." Petitioner told Foster that the men said they were going to rob him. App. 30, ll. 1-10.

Foster testified that Petitioner refused to fight, and according to statements and the investigation, Petitioner came into the restaurant to escape the difficulties. However, Foster

refused to admit that Petitioner could not have avoided the difficulty "given that we never found another weapon . . ." App. 31, ll. 3-21.

Foster was told that Petitioner was hit on the back of the head as he entered the Waffle House. App. 33, ll. 4-8. Foster also related his understanding that Petitioner felt trapped by the men at the time he fired his gun. App. 34, ll. 20-23.

On cross-examination by the assistant solicitor, Foster said he thought Petitioner fired six or seven shots. However, only five cartridge casings were found. App. 36, l. 10 – 37, l. 6. Foster testified that in Petitioner's first statement to the police he said he recognized some of the individuals in the parking lot when he first arrived at the Waffle House. However, Petitioner said, "The boys didn't say nothing at first, so I went on in and ordered my food." App. 38, l. 2 – 39, l. 5. When Petitioner came back outside the Waffle House, "he walked outside to a crowd of people, I think." App. 40, ll. 11-24. Foster said he did not think Petitioner had a concealed weapons permit so Petitioner was not in lawful possession of the gun at the time of the shooting. App. 43, ll. 16-20.

On redirect examination, Foster offered that, "I don't think I would have pulled into the parking lot if I had a problem with somebody that was there." App. 44, ll. 12-16. When asked whether he thought Petitioner had a duty to avoid the men and not go to the Waffle House, Foster answered, "I didn't get to go to law school that long." App. 44, ll. 17-21.

After Foster's testimony, trial counsel told the judge he had no other witnesses. Counsel then argued that the "stand your ground law applies" since there was no evidence Petitioner was engaged in unlawful activity. Counsel emphasized that there was "no indication [Petitioner] was at fault in bringing on the fight" and that Petitioner "even attempted to walk away." He argued Petitioner was attacked in the doorway of the restaurant and did not have "sufficient room" to

"escape the attack." He continued, "Once you enter into the Waffle House, the only way he [Petitioner] would have any sort of cover that would have stopped a bullet would have been to jump over the counter." Counsel maintained "there is evidence that there was another firearm present." App. 51, l. 2 – 52, l. 20.

Finally, trial counsel asserted, "Based on that I don't see that there's enough to disprove that Antwon Baker [Petitioner] was within his rights to defend himself as he was being jumped by numerous men. And at least one of them was flashing a firearm toward Mr. Baker. And the testimony – the independent statement from the Waffle House manager also confirms that." The judge told trial counsel, "Well, I don't have that statement." App. 51, l. 25 – 52, l. 20.

The assistant solicitor argued that "by stepping out of the car and arming himself . . . he [Petitioner] was engaged in unlawful activity. He had no right to possess that firearm. . . . He is therefore not entitled to immunity under this statute, nor can he reasonably believe it was necessary to fire that gun that many times." App. 52, l. 25 – 53, l. 24. The solicitor argued "this is a case for the jury to decide, and he [Petitioner] is not entitled to immunity." App. 53, l. 25 – 54, l. 1.

The judge ruled, "I'm not satisfied that this statute applies to these circumstances." The judge said the General Assembly intended to include occupied vehicles and a person's place of business (but apparently not a business where Petitioner was a customer). App. 55, ll. 4-19.

Defense counsel responded that § 16-11-440(C) applied because Petitioner was acting lawfully in a place that he had a right to be. App. 54, ll. 19-22. The judge then asked the solicitor and trial counsel if they were aware of any case concerning § 16-11-440 that did not involve a person's home, vehicle, or place of business. The attorneys said they had been unable to find such a case. App. 55, ll. 4-19.

The judge concluded the statute was "not applicable to the circumstances" in this case and, that even if it was, Petitioner had failed to prove by a preponderance of the evidence that he was entitled to immunity. Specifically, the judge determined Petitioner failed to show "that he acted reasonably, that he was attacked, and that he had a reasonable fear of imminent peril or death or great bodily injury, and that it was reasonably necessary to use deadly force in order to prevent that death or great bodily injury to himself." App. 55, l. 20 – 56, l. 6.

At the conclusion of the trial on June 6, 2013, the jury found Petitioner guilty of the lesser included offense of voluntary manslaughter and unlawful carrying of a pistol. App. 539, l. 22 – 540, l. 4. He was sentenced to eighteen years' imprisonment for voluntary manslaughter and one year for the weapons offense. App. 545, l. 23 – 546, l. 5.

The Court of Appeals affirmed Petitioner's convictions in an unpublished opinion. App. 582-584; State v. Baker, 2015-UP-178 (S.C. Ct. App. filed April 8, 2015). Petitioner argued on appeal that the trial court erred by failing to direct a verdict since the state failed to disprove Petitioner acted in self-defense beyond a reasonable doubt where the assailant admitted he started the altercation by attacking Petitioner from behind with a blow to the back of his head. Petitioner also argued the trial court erred by denying him immunity from prosecution pursuant to the Protection of Persons and Property Act, where the court reasoned Petitioner was not attacked in his residence, vehicle, or place of business, because nonetheless, Petitioner was attacked in another place where he had a right to be, a public restaurant, and could, therefore, protect himself pursuant to S.C. Code Ann. § 16-11-440(C). App. 551. The Supreme Court ultimately denied Petitioner's petition for writ of certiorari to review the Court of Appeals' decision by order filed October 8, 2015. App. 629.

On December 21, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 631-646. The state filed a return to this application dated July 12, 2016. App. 647-653. With the assistance of counsel, Petitioner filed an amended application on January 25, 2017. App. 654. An evidentiary hearing was convened on March 21, 2017, before the Honorable Robin B. Stilwell. Assistant Attorney General Alicia Olive represented the state. Susannah Ross represented Petitioner. App. 655.

Petitioner testified at the PCR hearing that he wanted to testify during the pretrial immunity hearing and, if he had testified, he would have told the judge he feared for his life after he was attacked at the Waffle House. He asserted, "I was outnumbered and there [were] multiple people out there with guns, I was by myself and they [tried] to hurt me." Petitioner named Brandon Glover, Justin Davis, and Anthony Young, the decedent, as the people who were trying to harm him. Petitioner admitted there was an altercation about two months before the altercation at the Waffle House. Petitioner always carried a gun for his own protection because he worried he would be attacked. App. 662, l. 2 – 663, l. 25.

Petitioner said when he first arrived at the Waffle House, he did not notice the aggressors. However, when he was inside ordering food, he heard one of them say, "That's him over there." Petitioner said he knew these men carried guns. One of the men told Petitioner to come outside because Petitioner "had a problem with one of his cousins." Petitioner testified that he "was tryin' to diffuse the situation and try not to have no problem that night 'cause it [had] been too much 'cause I thought he let it go and I was tryin' tell him let it go." Petitioner said he would have testified consistently with his PCR testimony if he had been called as a witness during his immunity hearing. App. 664, l. 1 – 665, l. 25.

Petitioner also explained during the PCR hearing how he was trapped in a small doorway inside the Waffle House when he was attacked and that he could not push or pull his way out of the entryway. Brandon Glover was the man who hit Petitioner in the back of the head. Again, Petitioner thought one of the men was armed. App. 672, l. 7 – 675, l. 2. Petitioner finally said he did not even remember trial counsel discussing with him whether he thought Petitioner would make a good witness at the immunity hearing or before the jury. App. 676, ll. 1-8.

Petitioner further testified that when he walked outside the Waffle House to tell the decedent he "wanted no part of it," it was "like the whole parking lot had went against me, they was like, he outside, let's get him." Petitioner explained that multiple people then "rushed" him and he was hit from behind. Petitioner was trapped inside the Waffle House entryway. He was scared and feared for his life. That is why Petitioner pulled his gun out and fired in self-defense. Petitioner believed that if he had not fired that morning he would have "end[ed] up dead." App. 679, l. 3 – 680, l. 24.

Robert Ianuario, Petitioner's trial counsel, said not calling Petitioner to testify during the immunity hearing is "one of the screw ups I've made in this case and I'm not denying I screwed up some things in this case but I'm gonna leave it to His Honor to determine whether or not that amounts to ineffective assistance." App. 686, l. 15 – 687, l. 3. Counsel also added, "I freely admit I should have put Antwon [Petitioner] on the stand and leave it to Your Honor's, uh, [whether] or not that was ineffective, I at the time thought I could get all the necessary elements established through Detective Foster's testimony without having to expose Antwon to any cross-examination and expose the case to anything that was beyond the knowledge that was already inside discovery." App. 698, l. 10 – 699, l. 17.

By order dated July 8, 2018, the PCR court denied Petitioner relief. App. 723-733. The PCR court noted that trial counsel testified, "I freely admit I should have put Antwon [Petitioner] on the stand" as well as Petitioner's testimony that if called to testify during the pretrial immunity hearing, he would have explained how he feared for his life during the altercation. The court also emphasized Petitioner's testimony that he attempted to walk away from the hostile group "but was struck in the head and rushed by many people." App. 726. However, despite summarizing this testimony, the court failed to rule on whether trial counsel was ineffective for failing to call Petitioner to testify during the pretrial immunity hearing.

On July 23, 2018, Petitioner filed a Rule 59(e), SCRCP, motion to alter or amend the judgment arguing the "Order of Dismissal fails to address the argument that the trial attorney was ineffective for advising the applicant not to testify during the immunity hearing held pursuant to S.C. Code Ann. § 16-11-420(A)." App. 734-735. By order filed August 16, 2018, the PCR court denied the motion to alter or amend "after having had the opportunity to carefully review the motion." App. 736. However, the court still failed to rule on whether trial counsel was ineffective for not presenting Petitioner as a witness during the pretrial immunity hearing.

On March 26, 2019, Petitioner filed a petition for writ of certiorari with the Supreme Court arguing in part that the PCR court erred by finding trial counsel was not ineffective where counsel admitted that he "screwed up" in not calling Petitioner to testify during the immunity hearing since counsel's expectation that an investigator as the only witness could satisfy Petitioner's burden of proof was objectively unreasonable. App. 739.

By order dated July 1, 2019, the Supreme Court transferred Petitioner's appeal to the Court of Appeals pursuant to Rule 243(l), SCACR. App. 771. The Court of Appeals granted certiorari on the above question on November 2, 2021. App. 772. After further briefing, the

Court of Appeals remanded the case to the PCR court directing the court to make specific findings of fact and conclusions of law in a supplemental order regarding whether trial counsel was ineffective for failing to call Petitioner to testify during the pretrial hearing on Petitioner's claim for immunity pursuant to S.C. Code Ann. § 16-11-440(C). App. 807-808; Baker v. State, 2024-UP-118 (S.C. Ct. App. filed April 17, 2024).

On remand, the PCR court again denied Petitioner relief. The court found trial counsel was not ineffective for refusing to call Petitioner to testify during the hearing on Petitioner's claim for immunity. App. 810. The PCR court suggested trial counsel made a strategic decision not to call Petitioner as a witness. The court stated, "Trial attorneys are often required to make difficult decisions regarding whether a Defendant in a criminal proceeding should testify. Balancing a Defendant's Fifth Amendment privileges against the desire to offer potentially helpful testimony is difficult. These strategic decisions are not made by trial attorneys in a vacuum and must be considered in the context of a Defendant's best interests given specific circumstances. Ultimately, the decision to testify or not is solely that of the Defendant." App. 810. However, the court did not cite to any testimony from the PCR hearing to support the finding that counsel made a strategic decision not to call Petitioner as a witness nor to any case law.

On November 25, 2024, Petitioner filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP. App. 811-824. Petitioner argued the PCR court failed to address the fact that trial counsel's testimony at the PCR hearing revealed that his failure to call Petitioner as a witness was not a strategic decision. Petitioner asserted, "Counsel admitted it was 'one of the screw ups I've made in this case.'" App. 811. Consequently, Petitioner argued the PCR court's "finding that the decision was [a] strategic one is in error." App. 811. Attached to Petitioner's

motion to alter or amend was a proposed supplemental order granting post-conviction relief. App. 812-823.

By order filed January 3, 2025, the PCR court denied the motion to alter or amend. App. 825. The court maintained that it "considered Trial Counsel's testimony together with all evidence presented at the hearing" but found Petitioner "failed to meet the requisite burden of proof that trial counsel was ineffective for failing to call [Petitioner] to testify during the hearing on [Petitioner's] claim for immunity." App. 825.

This petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief court erred by finding trial counsel was not ineffective where counsel admitted he "screwed up" by not calling Petitioner to testify during the pretrial immunity hearing, where Petitioner was attacked at a place he had the right to be, a Waffle House, where Petitioner fired his gun in fear for his life after he was struck in the back of the head and trapped in the small entryway of the Waffle House, since trial counsel's expectation that a law enforcement investigator as the sole witness could carry Petitioner's burden of proof, including that Petitioner was in fear of losing his life, was objectively unreasonable.

Trial counsel was ineffective for failing to call Petitioner to testify during the pretrial immunity hearing pursuant to the Protection of Persons and Property Act. Counsel admitted he "screwed up" by not calling Petitioner as a witness. He unreasonably believed that he could satisfy Petitioner's burden of proving he was entitled to immunity solely by presenting the testimony of the lead investigator. Unlike the PCR court found, counsel did not articulate a valid strategic reason for not presenting Petitioner as a witness. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his case would have been different if counsel had properly presented Petitioner as a witness during the pretrial immunity hearing. More specifically, if Petitioner had testified, it is likely the trial judge would have granted Petitioner immunity from prosecution or he would have prevailed on appeal with a proper trial court record.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-88.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"In 2006, the South Carolina General Assembly promulgated the Protection of Persons and Property Act to provide immunity from prosecution to persons acting in defense of themselves or others if they are found to be justified in using deadly force." State v. Glenn, 429 S.C. 108, 117, 838 S.E.2d 491, 495 (2019) (citing S.C. Code Ann. § 16-11-450 (2015) and State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013)). "The Act codified the common law Castle Doctrine and extended its reach." Id. (citing S.C. Code Ann. § 16-11-420(A)).

Section 16-11-440(C) of the Act, the "Stand Your Ground" provision, provides "a person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person . . ." S.C. Code Ann. § 16-11-440(C). This subsection provides immunity from prosecution when an individual uses deadly force against an attacker in places other than a vehicle or residence. An individual can only be granted immunity under this provision if he can demonstrate: (1) he was in a

place where he had a right to be; (2) he was not engaged in unlawful activity; and (3) he reasonably believed it was necessary to use deadly force to prevent great bodily injury to himself or another person.

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). During the pretrial hearing, a defendant must set out "a valid case of self-defense," excluding the duty to retreat, "and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266. To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Davis, 282 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

Trial counsel's reasoning for failing to call Petitioner to testify at the immunity hearing and advising him not to testify at trial was flawed and amounted to ineffective assistance of counsel, which likely affected the outcome of the case. Petitioner's prior convictions of driving under suspension and public disorderly conduct were not admissible for impeachment purposes

pursuant to Rule 609(a)(1), SCRE. Although Petitioner could have been impeached with his prior statements, the content of Petitioner's statements was not inconsistent with immunity or self-defense. Petitioner testified at the PCR hearing that he wanted to testify, but counsel told him not to do so. This advice was objectively unreasonable since only Petitioner, as the person under attack, could testify as to whether he was in fear of losing his life or suffering great bodily injury. Without Petitioner's testimony, it was extremely unlikely, if not impossible, for Petitioner to satisfy his burden of proof during the immunity hearing. Moreover, unlike the PCR court found, trial court did not articulate any valid strategic reason for not calling Petitioner to testify at the immunity hearing. Rather, counsel admitted that he "screwed up" by not presenting Petitioner as a witness.

Respectfully, the trial judge erred by finding § 16-11-440(C) did not apply where Petitioner was attacked at a Waffle House, a public restaurant, since it was a place Petitioner had a right to be even though it was not his place of business.[1] See State v. Jones, 416 S.C. 283, 297, 786 S.E.2d 132, 139 (2016) (holding "the Legislature intended the protection of subsection (C) to apply to incidents, provided the other requirements are met, without a geographical restriction"). Trial counsel correctly moved for immunity from prosecution on Petitioner's behalf, but failed to realize that he could not possibly establish the elements of self-defense necessary for an immunity finding, including that Petitioner was in fear of death or great bodily

[1] Petitioner sought certiorari from the South Carolina Supreme Court after the Court of Appeals affirmed his conviction and rejected his claim of immunity in State v. Antwon M. Baker, 2015-UP-178 (S.C. Ct. App. filed April 8, 2015). See State v. Antwon Michele Baker, Jr., Appellate Case No. 2015-001332 (S.C. Sup. Ct. filed October 8, 2015). This denial of certiorari by our Supreme Court had no precedential value, and likely was based on the lack of a trial record supporting immunity despite the trial judge's erroneous legal reasoning on the applicability of S.C. Code Ann. § 16-11-440(C).

injury, without Petitioner's testimony. See State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013).[2] It was objectively unreasonable for counsel to rely solely on Investigator Foster's testimony during the immunity hearing and to expect his testimony alone to be sufficient to satisfy Petitioner's burden of proof.

Not surprisingly, Investigator Foster testified he thought Petitioner could have escaped the danger without shooting when trial counsel pressed him on the subject. Further, Foster's reasoning that Petitioner should have avoided the Waffle House that morning misapprehends the law. Petitioner was not obligated to avoid the Waffle House and had the right to stand his ground once he was attacked since (1) he was not engaged in an unlawful activity, (2) he was attacked in another place where he had a right to be, (3) he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, and (4) his PCR testimony revealed he reasonably believed it was necessary to prevent death or great bodily injury to himself. See S.C. Code Ann. § 16-11-440(C).

Petitioner's testimony at the PCR hearing shows he would have testified that he was in fear of great bodily injury, and, indeed, death, if he did not act as he did when he was attacked and trapped at the Waffle House. Petitioner being in possession of a gun without a concealed weapons permit does not bar him from claiming immunity or self-defense. See State v. Glenn,

[2] The fact that Curry was not decided until six months after the immunity hearing in this case does not add to the analysis. Our Supreme Court in Curry wrote, "In *Duncan,* [State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011)] we set forth the pretrial procedure, burden of proof and appellate standard of review under the Act. Because Appellant misapprehends the reach of the Act, we take this opportunity to interpret what we believe to be the legislative intent regarding a trial court's authority to weigh the underlying claim of self-defense in determining an accused's entitlement to immunity." The Court then explained that the defendant in Curry misunderstood the Act, in particular, to the extent that he alleged the court had to accept his testimony as true. State v. Curry, 406 S.C. 364, 371-72, 752 S.E.2d 263,266-67 (2013). Thus, Curry explained misconceptions – it did not lay out the fundamental law of immunity for the first time. No one was requiring trial counsel to be clairvoyant in this case. Rather, counsel simply bungled his handling of the immunity hearing, and he admitted so during Petitioner's PCR hearing.

429 S.C. 108, 120, 838 S.E.2d 491, 498 (2019) (holding a proximate cause analysis must be applied to the unlawful activity element of subsection (C)); see also State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) ("[A] person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting."); State v. Goodson, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1994) ("[T]he burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide.").

It is evident from the record that trial counsel did not understand Petitioner had the burden of proof at the immunity hearing. Counsel even spoke of the state *disproving self-defense* at the immunity hearing, which showed counsel did not understand the difference between the burden of proof during trial (the state must disprove the defendant acted in self-defense beyond a reasonable doubt), and the burden of proof during an immunity hearing, which rests on the defendant by a preponderance of the evidence. See State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). Counsel should have realized that the only way he could satisfy the burden of establishing self-defense, or having the judge understand at the immunity hearing that Petitioner feared for his life, was by having Petitioner testify as he did at the PCR hearing.

If Petitioner had testified at the immunity hearing, as he did at the PCR hearing, and had trial counsel understood the burden of proof at the immunity hearing so he could have made a competent argument that Petitioner was entitled to immunity, there was a reasonable likelihood Petitioner would have been granted immunity at the trial level or prevailed on appeal with a proper trial record. Consequently, Petitioner was prejudiced by counsel's deficient performance.

Respectfully, this Court should reverse the decision of the PCR court and remand for a new immunity hearing.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse the ruling of the PCR court and remand his case for a new immunity hearing pursuant to the Protection of Person and Property Act.

Respectfully submitted,

Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of June, 2025.