

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. 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

APPENDIX

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Closing arguments

1 Was he without fault? He went in sort of anticipating
2 something might happen. He armed himself. Is he without
3 fault for what actually happened? He went to a public
4 place armed with a gun knowing he had a problem with
5 somebody at the restaurant.

6 I mean, then he goes outside. Does that mean -- is he
7 without fault as to this situation? That's a jury
8 question. I submit to you that you can easily find, no, he
9 wasn't.

10 Did he have any reason to believe he was in danger?
11 Doesn't sound like it. He went out, and he walked back in
12 and he got hit. He wasn't -- he didn't believe he was in
13 danger.

14 Would a reasonable man in the same circumstances do
15 the same thing? A reasonable man probably wouldn't park
16 and go out and get -- arm himself and go inside. He'd
17 probably just leave.

18 MR. IANUARIO: Objection, Your Honor. He's
19 speculating as to what a reasonable man would do in that
20 situation.

21 THE COURT: Overruled.

22 MR. BULSA: Did he act with reasonable force? I
23 commented about that. I don't think a bullet matches a
24 fist. That's a jury question. But I would certainly argue
25 that five bullets don't match one fist.

Closing arguments

1 Did he act on appearances? Everybody's scattering.
2 Man's trying -- the victim was probably trying to run and
3 get cover behind the car just like everybody else was
4 running and getting behind cars. He wasn't going to get a
5 gun. If he had a gun he probably would have drawn it, but
6 he didn't. He was running for his life, and he lost.

7 The judge will charge you if you're in a public place
8 you actually have a duty to retreat. Mr. Ianuario talked
9 about that a little bit. Is he going to retreat inside?
10 He was going inside. He eventually walked inside.

11 There were -- there were employees there. They had a
12 phone. There were places he could have gone. But those
13 are considerations. You have to believe all of those.

14 The judge will charge you about your duties. And
15 you're -- you're the judges of the facts. You judge the
16 credibility of all of the witnesses. That's why we bring
17 it to court. We know who -- the witnesses we called.

18 The defense recalled Officer Talanges to introduce
19 some photographs. He didn't really ask him any questions
20 about them, just did you take those pictures. It was
21 really kind of confusing why he brought him. I went over
22 the photographs with Officer Talanges so you had an idea of
23 what they were actually showing.

24 He called Charles Mauney, the Waffle House employee,
25 who had no dog in this fight. I think he may have

Closing arguments

1 embellished a little bit, but I'm not going to fault him
2 for that.

3 But Mr. Ianuario went over some of the video. You'll
4 have this back in the jury room, and you may have a little
5 trouble figuring it out. Hopefully, we can send some
6 instructions back with you. But there's a backup viewer on
7 this computer. You have to go into this disc through the
8 backup viewer. You open it up, click the backup viewer.
9 And then down here there's a -- let me see if I can pull it
10 up and show it to you. You might find it actually
11 intriguing.

12 (Pause.)

13 MR. BULSA: We may just send it back with the disc in
14 the computer. But here's the folder. You click on that
15 and go into the C drive. You pull the -- pull this up.
16 And you actually will have to push one of these --
17 highlight one of these buttons and then push play and it'll
18 start playing.

19 But just as Mr. Ianuario did, I went through it as
20 well to look at some times. And there's -- I mean, 71
21 seconds is a long time. Think about it. That's actually a
22 long time, especially if you take into account the
23 defendant's version that all I did was turn around and
24 react and shot, fled to my car and ran then back inside.

25 Now, but if you're chasing somebody down, standing

Closing arguments

1 over them, kicking them, and then come back inside -- but I
2 come to this point because Mr. Mauney, this is actually --
3 he's on the phone here. If you watch all of this all the
4 way through he actually -- apparently called somebody else,
5 because he kind of stays on the phone after the shooting.
6 This is backwards.

7 The black man that he said with the bandanna comes
8 in -- I've got to show all the other screens. Camera two
9 is the one that shows the doorway where you can see people
10 coming in. The most important shots as camera angles are
11 two and three pretty much, because there's the door.
12 Here's the door. It's showing back inside. And you can
13 see Mr. Baker, and you can see the man in black with the
14 bandanna as long as he says he saw the gun. And of course
15 you see everybody back there in the office.

16 But he comes in about 4:55:48. You see him up there
17 under this. Okay. And he stays in there. Let's see. He
18 stays in there about three minutes. This is -- this is
19 really convenient. You've got the time here. About
20 4:58:39 is what I counted. And he leaves. You see the
21 defendant has come in. He's over here. There he goes
22 looking.

23 Okay. And remember Mr. Mauney testified that he was
24 trying to make change for a hundred and he saw an outline
25 of a gun or saw the butt of the gun.

Closing arguments

1 4:58:39 is when he actually walks out the door. Okay.
2 4:58:39 and Mr. Mauney is still up here. Mr. Mauney does
3 not pull his phone for a couple of minutes. Two minutes
4 might sound like a long time, but a lot of stuff happens in
5 that two minutes. What happens is this confrontation
6 between Brandon and Mr. Glover.

7 And, see, Mr. Mauney appears to be going about his
8 business and working in the cleaning up and working in the
9 kitchen area.

10 He hasn't gone back to make a phone call about this
11 guy with a gun. He's looking at those guys. He's watching
12 them. He's still kind of watching them as he's talking to
13 his people.

14 They go outside. He's putting stuff up. He's still
15 not going to call the police. Just kind of ironic. He
16 claims he was fearful that the man was going to come and
17 rob him.

18 He's looking outside again. He appears to see
19 something going on. Then he reaches for his phone and goes
20 to the back. That is right before all of this happens,
21 because you've got Josh here that we saw. So you can't see
22 the shooting in the video, but the timing actually helps
23 you with whether it's consistent with people's testimony.
24 And I submit to you it is.

25 Then the defense called Brandon. And of course when

Closing arguments

1 they called Brandon he didn't ask him about his version of
2 the events. He skipped right over that and tried to hammer
3 Brandon, tried to get him to say he had a gun. But you saw
4 Brandon's reaction to all of those kind of questions, and
5 especially to his reaction about whether he told Baker
6 something in the jail. He was kind of perplexed, shocked,
7 what are you talking about, that kind of thing.

8 That's why we have trials, so you can watch the people
9 on the stand. And then Sease is a young kid trying to gain
10 favor from Mr. Glover, I submit. Sounds like he's had a
11 bad life. He's been in jail for over a year.

12 I'll finish with this, ladies and gentlemen. I ask
13 that you use your common sense. Don't -- you don't come to
14 court and throw away your life experiences. You use your
15 common sense and life experiences to judge credibility,
16 judge the overall set of circumstances.

17 I submit to you the question is not really is this
18 self-defense. It's certainly not that it is phantom
19 shooters, phantom guns.

20 I submit to you the real question is going to be
21 whether this was a murder or whether the judge will charge
22 you it is a lesser included offense of murder, and that is
23 voluntary manslaughter.

24 Voluntary manslaughter would negate the malice
25 element. It's a killing of someone if you're provoked and

Closing arguments

1 then you react and act out of heat of passion.

2 You'll have to decide whether that blow by Brandon to
3 the defendant was legal provocation, and if this man's
4 reaction was merely in response did he act out of heat of
5 passion based on his prior difficulties with this man,
6 because he didn't shoot anybody else. why did he shoot
7 Brandon?

8 But Brandon was clearly with Anthony, so the
9 provocation would be linked to Anthony, because Anthony
10 called his buddies. He said, hey, that's the guy that did
11 that to me. He shouldn't have said that, but he did. It's
12 a fact. That's the guy that hit me with a gun.

13 It is the chasing of Anthony down, shooting him five
14 times, kicking him in the head. Are those acts out of heat
15 of passion based upon that provocation?

16 That I submit to you is the real question in this
17 case, is this murder or is this voluntary manslaughter. I
18 submit to you there's evidence to support the malice. I
19 explained it to you before -- the chasing, the five shots,
20 standing over him. That shows an evil heart, a heart bent
21 on mischief, a heart meaning malice towards another person.
22 Or is it merely manslaughter that was just heat of passion.

23 I submit to you he's guilty of murder, but I would
24 respect a decision for manslaughter. But Mr. Young was
25 shot five times, fatal blow being from the back.

Jury charge

1 If there was a fight going on as Mr. Ianuario keeps
2 calling it, it wasn't much of a fight. It was a blow and
3 multiple shots in the direction of Anthony Young. Thank
4 you.

5 THE COURT: We are going to take a quick break before
6 I provide you with the instruction. So I'll ask you to
7 please go to your jury room. Don't talk about the case.
8 I'll bring you back in just a few minutes.

9 (The following takes place outside the presence of the
10 jury.)

11 THE COURT: We'll be at ease for ten minutes.

12 (Whereupon, a recess was taken.)

13 THE COURT: All right. Bring the jury in, please.

14 (The following takes place in the presence of the
15 jury.)

16 THE COURT: Mr. Foreman and ladies and gentlemen of
17 the jury, you of course have heard and seen all of the
18 evidence, as well as the final summations of the lawyers.
19 So I'm now going to instruct you on the law that's
20 applicable in the case.

21 Then you'll be asked to go back and begin with your
22 deliberations. And through that process you'll examine all
23 of the evidence, you'll decide the facts, apply the law and
24 arrive at a fair and just decision, whatever that decision
25 may be.

Jury charge

1 It is your exclusive duty to determine what the facts
2 are. You do that through your own common sense examination
3 and evaluation of all of the testimony and other evidence
4 received during the course of this trial.

5 You 12 jurors alone will decide what weight, value and
6 effect to give to any particular witness' testimony or
7 other evidence in the case.

8 Your sole objective of course is to render a fair and
9 impartial decision based solely upon the evidence and the
10 law that's applicable as I will have provided it to you.

11 Now, in this case, as you know, the state has accused
12 the defendant, Antwon Baker, with having committed two
13 separate and distinct criminal offenses, although they are
14 alleged to have arisen out of one particular event or
15 course of events which the state alleges occurred back on
16 June the 3rd of 2012.

17 But there are two separate charges. You'll be
18 rendering two separate and distinct decisions. Those
19 decisions may be the same. They may be different. That of
20 course will depend upon your determination of fact and then
21 your application of the law to the facts as you determine
22 those facts to be.

23 The defendant is charged in one indictment with the
24 crime of murder. The state alleges on June the 3rd of 2012
25 he did wilfully and with malice aforethought cause the

Jury charge

1 death of Anthony Young by shooting him with a handgun and
2 that Mr. Young died as a proximate result of that gunshot
3 wound.

4 He's also charged in a separate indictment with the
5 unlawful carrying of a pistol in violation of a particular
6 statute.

7 Now, as to those charges and as to those allegations
8 Mr. Baker has entered a plea of not guilty. And a plea of
9 not guilty, as you know, has placed upon the state the
10 burden of proving the allegations that they have set forth
11 in each of those indictments, the burden of proving each of
12 the essential elements that constitute the crimes alleged
13 against the defendant; and therefore the burden is upon the
14 state to establish the defendant's guilt to the
15 satisfaction of you 12 jurors beyond a reasonable doubt
16 before any verdict of guilty could be returned as to either
17 of the indictments.

18 The burden is never upon a defendant or a person
19 accused of a crime to prove that they are not guilty or to
20 prove that they are innocent because in some cases that
21 might not be possible. The burden is always upon the state
22 because they made the accusation to establish the
23 defendant's guilt to your satisfaction beyond a reasonable
24 doubt.

25 It is a vital, important and cardinal rule of law that

Jury charge

1 every defendant in a criminal trial, no matter how serious
2 the offense might be for which that person stands charged,
3 that person shall always be presumed innocent of the
4 charge.

5 That presumption of innocence remains with any
6 defendant, as it does with this defendant, from the time
7 that he is placed under arrest and throughout the course of
8 the criminal process and even throughout the course of the
9 actual trial in the case.

10 That presumption of innocence will be with Mr. Baker
11 even as you go back into your jury room to begin with your
12 deliberations in this case.

13 That presumption of innocence will be with him in that
14 jury room, and it'll be with him forever unless you 12
15 jurors determine that he's no longer entitled to the
16 presumption of innocence.

17 In other words, after you've carefully considered all
18 of the evidence in the case, and from that evidence you
19 have determined what you believe to be the true facts as
20 they relate to a particular charge, and upon deciding those
21 facts and applying the law as I will have provided it to
22 you if you 12 jurors unanimously determine that his guilt
23 has been proven as to a charge beyond a reasonable doubt,
24 then he would no longer be entitled to the presumption of
25 innocence as it relates to the particular charge. But it

Jury charge

1 is only if, unless and until you are satisfied of his guilt
2 beyond a reasonable doubt that the presumption of innocence
3 would no longer be applicable.

4 Now, while the state does have the burden of proving
5 the defendant's guilt beyond a reasonable doubt, that does
6 not mean that the state has to prove his guilt beyond all
7 doubt or beyond any possible doubt. But it does require
8 the state to prove his guilt to your satisfaction beyond a
9 reasonable doubt.

10 The term reasonable doubt should be given its plain
11 and ordinary meaning. A reasonable doubt is the kind of
12 doubt that would cause a reasonable person to hesitate to
13 act upon the information provided.

14 A defendant in a criminal trial is entitled to any
15 reasonable doubt that arises from the evidence or lack of
16 evidence in a case. And if upon any factual issue
17 essential to a finding of a verdict of guilty you have some
18 reasonable doubt as how that issue should be resolved, it
19 would be your duty to resolve that reasonable doubt in
20 favor of the defendant.

21 And, therefore, if upon your consideration of the
22 whole case you have a reasonable doubt as to the
23 defendant's guilt it would be your duty to resolve that
24 reasonable doubt in his favor and to return a verdict of
25 not guilty.

Jury charge

1 And, at the same time, after you've carefully
2 considered the evidence, decided the facts and applied the
3 law if you have no reasonable doubt as to his guilt it
4 would be your corresponding duty to find him guilty of any
5 crime that has been proven to your satisfaction beyond a
6 reasonable doubt.

7 Now, the same law that provides that you are the
8 judges of the facts also provides that I am the judge of
9 the law. And that simply means that nobody's going to tell
10 you how to arrive at your determination of fact in this
11 case.

12 You do that, as I've already stated, through the
13 exercise of good judgment and common sense conscientiously
14 applied to the testimony and evidence received during the
15 course of this trial.

16 You must however under your oath as a juror accept the
17 law as I provide it to you as being the law that you are to
18 apply in this case.

19 In other words, you're not to concern yourself with
20 what you thought the law was before you came to serve as a
21 juror this week or what you think the law ought to be.

22 Under your oath as a juror you must simply accept the
23 law as I provide it to you as being the law that you are to
24 apply in the case.

25 Then you simply take that law and you apply it to the

Jury charge

1 facts as you 12 jurors determine those facts to be based
2 upon your common sense examination and evaluation of all of
3 the evidence received during the course of the trial.

4 Now, because you are the sole judges of the facts in
5 this case you are therefore necessarily the sole judges of
6 the credibility or the believability of each witness that
7 has testified during the course of the trial.

8 You 12 jurors alone will decide what weight, value and
9 effect to give to any particular witness' testimony or even
10 portions of that testimony.

11 There are a number of factors which you should take
12 into consideration in arriving at your assessment as to a
13 particular witness' credibility, and I'm going to list
14 those factors for you.

15 You should consider the demeanor of the witness, that
16 is how the witness appeared to you as the witness testified
17 from that witness stand. Was the witness straightforward
18 in responding to questions, or was the witness hesitant or
19 evasive in responding to questions that were asked of the
20 witness.

21 Simply put, did the witness appear to you to be
22 telling the truth and to have knowledge of the facts to
23 which that witness has testified.

24 You should also consider whether or not the testimony
25 of a witness is consistent, or is it inconsistent with that

Jury charge

1 witness' own testimony here in court, as well as any
2 statements made by that same witness outside of court, as
3 well as whether or not the testimony of a witness is
4 consistent, or is it inconsistent with other witness
5 testimony or other evidence received during the course of
6 the trial.

7 You should also consider how the witness came to know
8 the facts to which a witness has testified. In other
9 words, what was that witness' opportunity and ability to
10 perceive the existence of those facts to which that witness
11 has testified by having previously used his or her senses.
12 And then what is the ability of that witness to be able to
13 come into court and to accurately recollect to you as to
14 what they have previously perceived by seeing something,
15 hearing something, or feeling something for that matter.

16 You should also consider any bias or prejudice or
17 interest that a witness might have with regard to a case.
18 In other words, do you find some reason that a particular
19 witness would come into court and would testify one way or
20 another to help or hurt one side or the other.

21 You may consider any interest that a witness might
22 have in the outcome of the case if you determine that a
23 witness does have such an interest and you find that that
24 interest would bear upon that particular witness'
25 credibility.

Jury charge

1 You may also consider whether or not the testimony of
2 a witness is strengthened, or is it weakened by other
3 testimony or other evidence received during the course of
4 the trial.

5 Now, you as the finders of the facts and you as the
6 judges of the credibility of each witness are permitted to
7 believe as much or as little of what a witness has
8 testified to as you deem is appropriate. And, therefore,
9 you may believe everything that a witness testified to.
10 You may choose to believe none of it. You may believe some
11 portion of a witness' testimony and reject some other
12 portion of that same witness' testimony.

13 In a given case you may believe one witness as opposed
14 to several, or several as opposed to one. But whatever
15 your good judgment and common sense tells you is the most
16 believable and credible testimony is the testimony you
17 should accept. And you should reject any testimony or
18 other evidence that you find not to be credible or
19 believable.

20 Again, your sole objective is to simply render a fair
21 and just decision based solely upon the law and evidence as
22 received during the course of the trial.

23 Now, while there are various forms of evidence such as
24 photographs, documents, charts and other types of physical
25 exhibits, there are really only two types of evidence.

Jury charge

1 Either or both of those types of evidence may be used to
2 prove any fact that's in issue. But the two types of
3 evidence are direct evidence and circumstantial evidence.

4 Direct evidence is the testimony of a person who
5 testifies from actual knowledge of the fact. It is
6 testimony by a person who has perceived the existence of
7 some fact by means of their senses, and then they come into
8 court and they testify as to what they have previously
9 seen, heard or felt.

10 Circumstantial evidence, on the other hand, is the
11 proof of some other fact or set of facts which taken either
12 singly or correctively may prove the existence of a fact in
13 question as a necessary consequence. That is through an
14 inference.

15 An inference is simply a deduction of fact that may
16 logically and reasonably be drawn from the proof of some
17 other fact or set of facts. In other words, it's not a
18 fact which is proven by the direct testimony of a person
19 based upon their personal perception, but it is a
20 conclusion which might reasonably be drawn from the proof
21 of some other fact or set of facts.

22 In other words, you may infer that a particular event
23 occurred or that a particular fact exists based upon the
24 proof of sufficient factual circumstances which would
25 reasonably warrant your arriving at a particular

Jury charge

1 conclusion.

2 The law however makes no distinction between the
3 weight or value to be given to direct evidence as opposed
4 to circumstantial evidence, nor is a greater degree of
5 certainty required of circumstantial evidence as opposed to
6 direct evidence.

7 Whatever the type of evidence used to prove any fact
8 in issue you should consider all of the evidence presented
9 during the trial of this case. And after carefully
10 considering all of that evidence in your minds if you are
11 not convinced of the guilt of the defendant beyond a
12 reasonable doubt, then it would be your obligation to
13 return a verdict of not guilty.

14 Now, in this case, as you know, the defendant is
15 charged with the crimes of murder and the unlawful carrying
16 of a pistol.

17 I'm going to instruct you first on the law as it
18 relates to the crime of murder. Then afterwards I'll
19 instruct you on the law as it relates to the crime of
20 unlawfully possessing a pistol.

21 As you have been told, you will also be permitted to
22 consider a lesser included offense to that of the greater
23 offense, being the crime of murder. You're also going to
24 be able to consider the lesser included offense of
25 voluntary manslaughter even though that particular criminal

Jury charge

1 offense is not actually set forth in the indictment.

2 So I'll charge you on the law as it relates to the
3 crime of murder, then the lesser included offense of
4 voluntary manslaughter, and then the separate indictment of
5 unlawfully carrying a pistol.

6 Section 16-3-10 of the Code of Laws defines the crime
7 of murder, and that code section provides that murder is
8 the killing of any person with malice aforethought either
9 expressed or implied. Murder is the killing of any person
10 with malice aforethought either expressed or implied.

11 In order for you to find the defendant guilty of the
12 crime of murder it would be necessary that the evidence in
13 this case has established to your satisfaction beyond a
14 reasonable doubt that the defendant, Antwon Baker, did
15 commit some act or acts which proximately caused the death
16 of Anthony Young and that that killing was done with malice
17 aforethought. Malice aforethought is an essential element
18 of the crime of murder.

19 The test for establishing proximate causation is
20 whether or not the criminal acts of the person charged with
21 an unlawful homicide were the proximate cause of the death
22 of the decedent. In other words, but for the criminal acts
23 the death would not have occurred.

24 Malice as an essential element of the crime of murder
25 is a state of mind connoting an ill will and having the

Jury charge

1 intent to do harm.

2 The term intent refers to the state of a person's mind
3 which directs his actions towards a specific object or
4 goal.

5 Intent would include those consequences which
6 represent the very purpose for which an act is done, as
7 well as those consequences which are known to be
8 substantially certain to result whether actually intended
9 or not.

10 Malice is a technical importing wickedness and
11 excluding just cause or legal excuse. It is something
12 which springs from depravity, from a heart devoid of social
13 duty and fatally bent on mischief.

14 It is a state of mind indicating an extreme disregard
15 for or an extreme indifference to human life. Malice may
16 be likewise defined as a state of mind which indicates a
17 formed purpose and design to do a wrongful act under
18 circumstances that exclude any legal right to do it.

19 The words expressed or implied malice do not mean
20 different kinds of malice but merely the manner in which
21 malice may be shown to have existed, that is to say either
22 proof by direct evidence or by circumstantial evidence from
23 which the existence of malice might be reasonably inferred.

24 Malice may be expressed as where there is an expressed
25 threat to kill or a lying in wait or where the evidence

Jury charge

1 shows directly that the intent to kill was entertained by
2 the killer.

3 Malice may be inferred, though no expressed intent to
4 kill is proven by direct evidence, where the facts and
5 circumstances which have been established by the evidence
6 in the case satisfy you beyond a reasonable doubt that
7 malice was present in the mind of the defendant at the time
8 that any killing took place.

9 The existence of malice may be inferred from
10 circumstances shown to have existed at the time of the
11 event, and the existence of malice may be inferred from
12 acts, declarations or conduct of the defendant along with
13 any other circumstances from which you might reasonably
14 infer such a fact as often the state of a person's mind can
15 only be proven by circumstantial evidence.

16 Malice as an essential element of the crime of murder
17 does not necessarily require proof of an actual or a
18 specific intent to take human life, although such intent
19 may be proven by the evidence in the case. But rather it
20 means a state of mind accompanying conduct signifying a
21 general malignant recklessness and an extreme disregard for
22 or an extreme indifference to human life.

23 Even if the factual circumstances proven are
24 sufficient to raise an inference of malice such an
25 inference would simply be an evidentiary fact to be taken

Jury charge

1 into consideration by you 12 jurors along with all of the
2 evidence received during the course of the trial. You may
3 give such weight to such inferences as you deem they should
4 receive, if any.

5 The state is required to prove malice, just as it must
6 prove any other essential element of the crime, and it is
7 for you 12 jurors to determine whether or not the evidence
8 in this case establishes malice beyond a reasonable doubt.

9 It is also essential that there exist not only malice
10 but that it be malice aforethought. The law does not
11 require that malice must exist for any appreciable length
12 of time before the commission of an act or acts proximately
13 causing a fatal result.

14 Indeed, malice may be conceived at the very moment
15 that the fatal act is committed. It is sufficient in the
16 law so long as the state has proven beyond a reasonable
17 doubt both the existence of malice and the commission of an
18 act or acts by the defendant which proximately caused the
19 fatal result.

20 You must determine whether or not malice aforethought
21 exists based upon your consideration of all of the evidence
22 introduced during the course of the trial and any
23 reasonable inferences that might be derived therefrom.

24 Now, while the state must prove that a killing
25 occurred accompanied by the element of malice aforethought

Jury charge

1 in order to establish the commission of the crime of
2 murder, it is not necessary that the state prove any motive
3 for the killing. Motive is not an essential element of the
4 crime of murder which has to be proven, although in some
5 cases there may be evidence relating to such fact
6 introduced during the trial of the case.

7 An indictment for murder may also include any lesser
8 included offense, whether or not that lesser included
9 offense is actually set out in the indictment.

10 A defendant who has been charged with offense of the
11 crime of murder may be found guilty of only the lesser
12 included offense of voluntary manslaughter if the jury
13 determines that the evidence in the case warrants such a
14 finding whether or not that lesser included offense is
15 actually set forth in the indictment itself.

16 Manslaughter is defined as an unlawful killing of a
17 human being without the element of malice either expressed
18 or implied being present.

19 While the element of malice must be proven in order
20 for the defendant to be found guilty of the crime of
21 murder, malice is not an essential element of the crime of
22 voluntary manslaughter.

23 Voluntary manslaughter is defined in the law as the
24 unlawful killing of another human being committed in a
25 sudden heat of passion which was provoked by a sufficient

Jury charge

1 legal provocation.

2 The law recognizes that sudden heat of passion arising
3 out of exasperation, rage, anger, sudden resentment, fear
4 or terror may for the time being affect the self control of
5 an individual temporarily disturbing the ability to
6 properly reason, creating in a person an uncontrollable
7 impulse to do violence and therefore reduces the crime from
8 that of murder to that of voluntary manslaughter provided
9 that the sudden heat of passion arose from a sufficient
10 legal provocation.

11 The law does not reduce from murder to voluntary
12 manslaughter every homicide that is committed in the heat
13 of passion. It must be the heat of passion justly excited
14 by a sufficient legal provocation. If a sufficient legal
15 provocation does not exist, then the killing even committed
16 in the heat of passion is considered murder and not
17 voluntary manslaughter.

18 The sudden heat of passion aroused by a sufficient
19 legal provocation which may reduce an unlawful homicide
20 from that of murder to that of voluntary manslaughter needs
21 not be such emotion as would dethrone reason entirely or
22 shut out knowledge or volition, but it must be a heat of
23 passion which is provoked by such facts or circumstances
24 related to the event as would naturally disturb the ability
25 of an ordinary reasonable person to properly reason

Jury charge

1 rendering his mind incapable of cool reflection and
2 producing what according to human experience may be
3 described as an uncontrollable impulse to do violence.

4 In determining whether an act resulting in the death
5 of another person was impelled by heat of passion aroused
6 by a sufficient legal provocation or was impelled by malice
7 you should take into consideration all of the surrounding
8 circumstances and the conditions accompanying the event.

9 You are instructed that while no mere words alone, no
10 matter how insulting or threatening, would constitute a
11 sufficient legal provocation or justify the use of deadly
12 force in retaliation, where such words are accompanied by
13 overt threatening or hostile acts or by a physical
14 encounter, then such conduct may, depending upon the
15 circumstances of the case, give rise to a legal provocation
16 sufficient to reduce the offense from that of murder to
17 that of voluntary manslaughter.

18 And, therefore, as I have stated, while murder is the
19 killing of another accompanied by malice aforethought,
20 voluntary manslaughter is an unlawful homicide committed in
21 the absence of malice but in sudden heat of passion aroused
22 by a sufficient legal provocation.

23 And also, again, a sufficient legal provocation is the
24 existence of facts or circumstances as would naturally
25 affect the ability of an ordinary reasonable person to

Jury charge

1 properly reason and render in that person's mind incapable
2 of cool reflection and producing what according to human
3 experience might be described as an uncontrollable impulse
4 to do violence.

5 Now, in this case the defendant has raised what is
6 known in the law as the defense of self-defense. The law
7 recognizes the right of every person to defend himself or
8 herself from death or from sustaining serious bodily harm.
9 And to do this a person may use such force as it reasonably
10 necessary even to the point of taking human life.

11 Even where a person is not lawfully in possession of a
12 pistol he is not precluded from asserting the defense of
13 self-defense in its use where he is justified under the law
14 in acting in self-defense.

15 The right of self-defense is founded upon necessity,
16 either actual or reasonably apparent necessity. And
17 self-defense is a complete defense to a charge of an
18 unlawful homicide should you find it to exist based upon
19 your evaluation of the evidence produced during the trial
20 of the case.

21 The existence of self-defense entitles a person
22 charged with the commission of an unlawful homicide to a
23 verdict of not guilty.

24 Now, although the defendant has raised the defense of
25 self-defense, the burden of proof is not on the defendant

Jury charge

1 to prove the existence of self-defense. As I have
2 previously instructed you, the burden is always upon the
3 state to prove the defendant's commission of the crime
4 alleged against the defendant beyond a reasonable doubt,
5 and this would therefore necessarily require that the state
6 prove beyond a reasonable doubt the absence of
7 self-defense.

8 There are four basic elements required to be present
9 before self-defense can exist where deadly force is
10 employed in defense of an assault.

11 First, it must be shown that the defendant was without
12 fault in bringing on the immediate difficulty which gave
13 rise to the necessity for using deadly force resulting in
14 the taking of a human life.

15 One cannot provoke, initiate or otherwise through his
16 own fault bring about a difficulty and then claim the right
17 of self-defense in the use of deadly force against an
18 attack which was caused by his own provocation.

19 Secondly, it must be shown that at the time the fatal
20 act or acts were committed that the defendant actually
21 believed that he was in imminent danger of losing his life
22 or sustaining serious bodily injury or that he actually was
23 in such imminent danger. The term imminent danger means an
24 immediate or present danger and not a past or future
25 danger.

Jury charge

1 Thirdly, if the defense is based upon a belief of
2 imminent danger, then it must be shown that the belief was
3 reasonable, that a reasonably prudent person of ordinary
4 firmness and courage would have entertained the same
5 belief.

6 If the defendant actually was in imminent danger, then
7 it must be shown that the circumstances were such as would
8 warrant a person of ordinary prudence and courage to
9 inflict the fatal injury in order to save himself from
10 serious bodily injury or loss of life.

11 It must be shown that a reasonably prudent person of
12 ordinary firmness and courage if acting under the same or
13 similar circumstances would have reached the same
14 conclusion and entertained the same belief.

15 Deadly force is only appropriate when necessary and
16 may only be exercised where the defendant entertains a
17 reasonable belief that he is about to sustain a loss of
18 life or suffer serious bodily harm.

19 The law of self-defense encompasses preventive action
20 taken to protect life if such action is taken in
21 anticipation of imminent danger of losing one's own life or
22 sustaining serious bodily injury and such action is in
23 response to an immediate threat.

24 Although words alone will never give rise to a right
25 to the use of deadly force in response, words accompanied

Jury charge

1 by hostile and threatening acts may, depending upon the
2 circumstances relating to the event, give rise to a right
3 to employ deadly force when acting in self-defense.

4 The defendant has the right to act on appearances. He
5 may be mistaken. The law does not hold someone to a
6 refined assessment of the danger as might be accomplished
7 having an adequate time to reflect, provided however that
8 he has acted as a person of ordinary reason, firmness and
9 courage would have acted or should have acted in meeting
10 the appearance of the danger.

11 In other words, he does not have to wait until his
12 assailant gets an advantage, for one always has the right
13 to act under the law of self-preservation and to prevent an
14 assailant from getting an advantage over him.

15 There is however a requirement of objectivity. The
16 belief must be reasonable, that is that a reasonable and
17 prudent person if acting under the same or similar
18 circumstances would have so believed or would have been
19 warranted in so acting.

20 And, fourthly, it must be shown that the defendant had
21 no other means of avoiding the danger of losing his own
22 life or sustaining serious bodily injury other than to act
23 as he did in the particular circumstances, because, as I've
24 stated, self-defense is founded upon necessity.

25 It is therefore a person's duty to avoid the use of

Jury charge

1 deadly force and the taking of human life where it is
2 possible to avoid such action even to the extent of
3 retreating from one's adversary if such can be done without
4 increasing the danger to one's self.

5 In other words, to avoid the necessity of using deadly
6 force against another who might be the aggressor the person
7 claiming self-defense must retreat from the confrontation
8 unless it is shown that by retreating the defendant would
9 have increased the danger of sustaining serious bodily
10 injury or loss of life to himself.

11 If you have a reasonable doubt as to the defendant's
12 guilt after considering all of the evidence received during
13 the trial of the case including any evidence relating to
14 the issue of self-defense, then it would be your duty to
15 resolve that doubt in favor of the defendant and to find
16 him not guilty.

17 And if, on the other hand, you have no reasonable
18 doubt as to the defendant's guilt after considering all of
19 the evidence including any evidence relating to the issue
20 of self-defense, then it would be your duty to find the
21 defendant guilty of any unlawful homicide that has been
22 proven to your satisfaction beyond a reasonable doubt based
23 upon my instruction already provided you as to the elements
24 of the crimes of murder and voluntary manslaughter.

25 The second indictment charges the defendant with

Jury charge

1 unlawfully possessing a pistol. That particular indictment
2 alleges a violation of section 16-23-20. That section
3 provides that it shall be unlawful for anyone to carry
4 about his person, whether concealed or not, any pistol.

5 There are certain -- a certain number of exceptions
6 contained in the statute. None of those exceptions applied
7 under the circumstances of this particular case.

8 So the state would have to prove beyond a reasonable
9 doubt that the defendant did have in his possession
10 unlawfully a pistol as established by the evidence in the
11 case.

12 Now, you are further instructed, and I emphasize to
13 you, that the fact that a defendant does not testify during
14 the trial of the case is not a circumstance that may be
15 considered by you in any way whatsoever in your
16 deliberations or in your determination as to whether or not
17 his guilt has been proven beyond a reasonable doubt.

18 You may not permit such a fact to weigh in the
19 slightest degree against a defendant. As I have already
20 told you, the burden is not upon a defendant to prove that
21 he or she is not guilty or to prove that he or she is
22 innocent because in some cases that might not be possible.

23 The burden is upon the state to prove the defendant's
24 guilt to your satisfaction beyond a reasonable doubt, and
25 therefore you are not to reach any conclusion nor draw any

Jury charge

1 inference from the fact that a defendant does not testify
2 during the trial of the case, nor may that fact be
3 considered in any way by you in your deliberations or in
4 your verdict, nor may that fact even be discussed while you
5 are engaged in your deliberations in the case.

6 Now, Mr. Foreman and ladies and gentlemen, I am not in
7 any way concerned with what your decisions are, but, as I
8 believe I have stated, and it's still true, your decisions
9 must be unanimous. All 12 must be in agreement.

10 As I have said, you've got two separate indictments.
11 One indictment, you'll be considering two separate and
12 distinct offenses. The other indictment is the one alleged
13 in the indictment.

14 But with regard to the indictment charging the crime
15 of murder, you have three potential verdict forms. Those
16 three potential verdict forms are guilty, which means
17 guilty of the charge contained in the indictment.

18 If the state has failed to prove one or more of the
19 essential elements of the crime of murder beyond a
20 reasonable doubt, then you could consider the lesser
21 included offense of voluntary manslaughter.

22 If you find that the state has proven the defendant to
23 be guilty of only the lesser included offense, then under
24 those circumstances the verdict form would be guilty of
25 voluntary manslaughter. You'd have to write that out.

Jury charge

1 If the state has failed to prove the defendant to be
2 guilty of either murder or manslaughter beyond a reasonable
3 doubt, then under those circumstances the verdict form
4 would be not guilty.

5 So, again, the three verdict forms, potential verdict
6 forms for the indictment charging murder, are guilty or
7 guilty of voluntary manslaughter or not guilty.

8 With regard to the indictment charging unlawful
9 possession of a pistol, you have two potential verdict
10 forms, and those forms are guilty or not guilty.

11 So, Mr. Foreman, whatever you and your fellow jurors
12 decide as to the appropriate verdict, you'll see on the
13 back of each indictment in the lower left-hand corner
14 there's the word verdict. And it's beneath that word that
15 you will indicate the jury's unanimous decision as to
16 whatever that decision is. And then you'll sign your name
17 as the foreperson and place the appropriate date. You are
18 the only juror that needs to sign the verdict form.

19 Once you have reached your decisions if you'll knock
20 on the door, tell the bailiff you've reach a verdict, we'll
21 bring you back to receive those verdicts.

22 You may in that instance give the evidence to the
23 bailiff. But, Mr. Foreman, you will maintain the
24 possession of the verdict forms. Do not give those to the
25 bailiff. I will receive those from you after you're back

Jury charge

1 in the courtroom and seated as you are now.

2 Now, during your deliberations there may come a time
3 where you have some question about the facts of the case or
4 evidence in the case.

5 Please understand that I am never permitted to discuss
6 with you the facts or the evidence. I'm not permitted to
7 answer any questions that relate to the facts or that
8 relate to evidence.

9 You are not permitted to have any additional evidence.
10 Even if something out there does exist that you think will
11 be helpful in assisting you in resolving the case, if it
12 hasn't been introduced as of now it cannot be introduced
13 after you go back to deliberate. So do not inquire about
14 any other type of evidence. If it's not in the jury room
15 you cannot have it.

16 If however you ever have a question about the
17 testimony of a witness, you are permitted to have that
18 testimony replayed in its entirety or only in part if
19 that's all you need.

20 I don't have transcripts of the witnesses' testimony,
21 but if you would like to have the testimony of a witness
22 replayed in its entirety or in part if you'll let me know
23 of that fact we'll bring you back to the courtroom to have
24 that witness' testimony reheard.

25 If at any time you have a question about the law that

Jury charge

1 is applicable, I am permitted to answer those questions.
2 So should you need for me to provide you a reinstruction or
3 you need an additional explanation or a clarification of
4 the law that I've already provided, I am permitted to
5 provide you with that additional instruction, explanation
6 or clarification.

7 Mr. Foreman, if at any time you need to address some
8 comment to me if you'll write it on a piece of paper, give
9 it to the bailiff, he'll provide to me, and I'll respond to
10 the issue, answer the question or assist you in any way
11 that I can.

12 I don't know if we have smokers on the jury. If we
13 do, you are permitted to smoke, but you cannot smoke in the
14 jury room. You have to go outside to accomplish that
15 purpose.

16 You are however instructed that should a juror be
17 absent from the jury room for some authorized purpose the
18 deliberations have to stop. They may only resume when all
19 12 jurors are present so that all may participate.

20 Your lunches have been ordered. I don't expect that
21 they're here right now, but they should be here shortly.
22 And I'll leave that up to you as to whether you want to
23 stop the deliberations and eat and then resume, or whether
24 you want to deliberate while you're eating. That's
25 simply -- will be left to your discretion.

Jury charge

1 I think that covers everything. But in the event I
2 have forgotten something I'm sure one of these lawyers will
3 remind me that I neglected to provide you with some
4 information that I was required to. In that event I'll
5 bring you back into the courtroom to provide you with that
6 additional information.

7 If I do not need to provide you with any additional
8 information I'll send word by way of the bailiff that you
9 may begin with your deliberations. In that event he will
10 bring to the jury room all of the exhibits which have been
11 introduced.

12 And to you, Mr. Foreman, he'll also bring the
13 indictments which will simply serve as the verdict forms.

14 There is a disc in that computer that has some videos
15 that have been played during the course of the trial, so
16 that's in evidence, and that'll be back in the jury room
17 with you. It should be simple to use, although I don't
18 have the slightest idea how to do it. But I'm sure one of
19 y'all do or collectively y'all can figure it out. But if
20 you can't, you let me know, and we'll find someone who can
21 assist you with being able to look at those store videos
22 again.

23 Okay. All right. With the exception of Ms. Benson,
24 I'll ask the 12 primary jurors to please retire to your
25 jury room. But do not begin deliberations until I send you

1 word to do so.

2 (Whereupon, the jury retired to deliberate at
3 12:40 p.m.)

4 (Whereupon, the alternate juror was excused.)

5 THE COURT: Are there any exceptions taken to the
6 instruction or requests for additions to the instruction by
7 the state?

8 MR. BULSA: Your Honor, I did not hear the expert
9 testimony or criminal-history portion of your general
10 charge.

11 Mr. Sease was impeached with a criminal history, and
12 we had several experts.

13 THE COURT: Well, I charged them on witness testimony.
14 Do you think you need a specific
15 expert-witness-testimony charge? They judge expert
16 testimony just like they do any other.

17 MR. BULSA: That'll be fine.

18 THE COURT: Does the defendant wish to have those
19 instructed?

20 MR. IANUARIO: No, Your Honor.

21 THE COURT: Okay. Well, if they ask me about it I'll
22 provide them some additional instruction.

23 Let me ask y'all to verify the exhibits, please,
24 before they go back.

25 MR. BULSA: I have done it.

1 (Pause.)

2 THE COURT: All right. All of the exhibits are
3 accounted for?

4 MR. IANUARIO: Yes, Your Honor.

5 MR. BULSA: Yes, sir.

6 THE COURT: All right. And we have the C.D. or D.V.D.
7 or whatever you call it that's in the computer now?

8 MR. BULSA: Yes, sir.

9 THE COURT: And it's all ready where they can just
10 turn it --

11 MR. BULSA: It's where we left it in closing
12 arguments, Your Honor. Hopefully, it will come right back
13 up.

14 THE COURT: All right. Take the exhibits back and
15 notify the jury they may begin deliberations and to let us
16 know when they have concluded.

17 We'll be at ease while the jury is deliberating, but
18 I'm going to ask that you not get out of pocket because if
19 they have a question I'm going to need for you to be right
20 here.

21 (Whereupon, a recess was taken.)

22 (Question from the jury answered and returned to the
23 jury. Question and materials sent to the jury marked
24 Court's Exhibit No. 2.)

25 THE COURT: All right. I'm told the jury has reached

Verdict

1 a decision. Are we ready to receive it?

2 MR. BULSA: Yes, sir.

3 MR. IANUARIO: Yes, Your Honor.

4 THE COURT: Okay. Bring them in.

5 (Whereupon, the jury returned to the courtroom at
6 3:45 p.m.)

7 THE COURT: Mr. Foreman, have you and your fellow
8 jurors reached a unanimous decisions on each of the
9 indictments?

10 THE FOREMAN: Yes, Your Honor, we have on each of the
11 indictments.

12 THE COURT: And have you reflected those decisions on
13 the back of the indictment as requested?

14 THE FOREMAN: Yes, sir, I have.

15 THE COURT: Did you sign your name as the foreperson?

16 THE FOREMAN: Yes, sir.

17 THE COURT: And date it?

18 THE FOREMAN: Yes, Your Honor, I have.

19 THE COURT: Please hand those up by way of the
20 bailiff.

21 You may publish the verdicts.

22 THE CLERK: In the General Sessions Court, Case
23 No. 2013-GS-42-2013, the State vs. Antwon Baker, indictment
24 for unlawful carrying of a pistol, the verdict is guilty.

25 This is signed by the foreperson and dated today's

Verdict

1 date.

2 Case No. 2012-GS-42-3668, the State vs. Antwon Baker,
3 indictment for murder, the verdict is guilty of voluntary
4 manslaughter.

5 This is also signed by the foreperson and dated
6 today's date.

7 Ladies and gentlemen of the jury, if this is your
8 verdicts and still your verdicts, please raise your right
9 hand.

10 (Whereupon, all jurors responded in the affirmative.)

11 THE CLERK: So say you all.

12 THE COURT: All right. Does the defendant wish to
13 have the jury polled?

14 MR. IANUARIO: Yes, Your Honor.

15 THE COURT: All right. Poll the jury, please, ma'am.

16 THE CLERK: Ladies and gentlemen of the jury, I will
17 ask a question of you, after which I will call your name
18 and ask you to stand individually and answer my question,
19 the question being is this your verdict and still your
20 verdict.

21 No. 12, Base.

22 THE JUROR: Yes, ma'am.

23 THE COURT: Jason Bass. I'm sorry.

24 No. 143, Rogers.

25 THE JUROR: Yes, ma'am.

Verdict

1 THE CLERK: Sixty-three, Foster.

2 THE JUROR: Yes, ma'am.

3 THE CLERK: Forty, Carpenter.

4 THE JUROR: Yes, ma'am.

5 THE CLERK: 144, Rookard.

6 THE JUROR: Yes, ma'am.

7 THE CLERK: No. 5, Arnold.

8 THE JUROR: Yes, ma'am.

9 THE CLERK: 122, Morton.

10 THE JUROR: Yes, ma'am.

11 THE CLERK: No. 7, Austin.

12 THE JUROR: Yes, ma'am.

13 THE CLERK: 107, Martin.

14 THE JUROR: Yes, ma'am.

15 THE CLERK: 146, Rutter.

16 THE JUROR: Yes, ma'am.

17 THE CLERK: Thirty-six, Camp.

18 THE JUROR: Yes, ma'am.

19 THE CLERK: 149, Shropshire.

20 THE JUROR: Yes, ma'am.

21 THE CLERK: The jury has been polled, Your Honor.

22 THE COURT: All right. Any other matters that need to
23 be addressed with the jury present?

24 MR. BULSA: Not from the state.

25 MR. IANUARIO: None from the defense, Your Honor.

Sentence

1 (Whereupon, the trial jury was excused.)

2 THE COURT: All right. Are there any matters to be
3 addressed prior to the imposition of sentence?

4 MR. IANUARIO: None from the defense, Your Honor.

5 THE COURT: All right. Mr. Bulsa.

6 MR. BULSA: Your Honor, the defendant's prior record
7 consists of a public disorderly conduct in 2009; driving
8 under suspension in 2006.

9 At the time of this crime, Your Honor, he was out on
10 bond for criminal domestic violence of a high and
11 aggravated nature which is still pending at this time.

12 THE COURT: All right. Mr. Ianuario.

13 MR. IANUARIO: Thank you, Your Honor.

14 You're obviously familiar with the facts of the case
15 and the background of it, so I'll skip over that portion of
16 it.

17 I just testify as to Antwon's character. If the
18 purpose of a criminal sentence is to reform and
19 rehabilitate the criminal, he's been a model inmate for the
20 past year. He's been a wonderful client.

21 I don't think he needs to have the harshest penalty
22 that he could incur in order to teach him his lesson, so to
23 speak.

24 I do believe that when he does get out the Court won't
25 be seeing much of him ever again. He's really not -- not a

Sentence

1 bad individual. The history that he has is minimal. He's
2 not been convicted on that C.D.V. high and aggravated. I'm
3 aware of the circumstances behind that, but I won't get
4 into it.

5 If the Court please, I'd like to ask for mercy of the
6 Court. And if you would entertain any of the family
7 members, I'd like to ask for that as well.

8 THE COURT: Sure. Okay.

9 LISA FLEMING: Your Honor, my name is Lisa Fleming.
10 I'm Antwon Baker's mother.

11 He and -- his father and I were divorced when he was
12 two. I raised him up in the church. He's always been a
13 good child, good at heart. Out of all three of my kids,
14 always caring about others. He just had a hard time at
15 life because he always was picked on.

16 He has five beautiful kids that is looking forward to
17 him. One he hasn't even seen as of yet.

18 He is a good son. He just need a good -- he just
19 needs a chance, sir. Thank you.

20 THE COURT: All right. Anyone else?

21 ANTWON BAKER: Your Honor, my name is Antwon Baker.

22 That's my son. He's a good son. He used to come to
23 see me every, every week, and we would talk. He respected
24 everybody.

25 He just got tired. Just like his mother said, people

Sentence

1 picked on him. All of the stories -- he used to tell me
2 what was going on. And just be lenient. I mean, my God.
3 It's just bad.

4 INAUDIBLE WITNESS: Your Honor, my name is
5 (inaudible). I just ask that you be lenient on him too as
6 you do the sentencing.

7 I knew Antwon probably 15 years or better. He always
8 have been a good kid. I mean, I talked to him throughout
9 life about life, about joining the military and doing
10 positive things.

11 I just ask that you should be very lenient on him
12 during the sentencing.

13 DENA MEDLOCK: Your Honor, my name Dena Medlock [sic].
14 I am Antwon Baker's aunt.

15 I first would like to tell them I'm sorry they lost
16 their child, but I want to also tell them that two families
17 affected in this, not just one.

18 Antwon was a good child, and he got a good heart. And
19 if my mother was alive she would prove it to you. My
20 mother was a diabetic. She was 60 something years old when
21 we lost here. She lost her left leg. And this young man
22 when we had to go to work -- worked at night. He would go
23 over during the day and take care of my mother and do
24 anything that lady asked him to do.

25 He's not a bad boy. He is not -- he was not raised up

Sentence

1 in the streets. He was not raised up to carry guns. He
2 was not raised up to be a thug. He was brought up in the
3 church. We all were.

4 And I sympathize with the family, but we -- we are
5 affected by this too. It's not just one family. There's
6 two families involved in this. Thank you.

7 THE COURT: Anyone else?

8 (No response.)

9 THE COURT: All right. Mr. Baker, is there anything
10 you'd like to tell me?

11 THE DEFENDANT: No, sir. Happening, sir, I'm sorry
12 for the loss to him and the family, but it could have went
13 either way because there was more than one gun out there.
14 I know for a fact more than both shots -- more than my gun.

15 I'm sorry for the Young family. And I'm -- easily my
16 family could be on the other side too. It could easily
17 have turned around and be different. I'm sorry for my
18 actions, but I was scared. I'm not...

19 THE COURT: Okay. Thank you.

20 Mr. Ianuario, let me get you to put the addresses on
21 here, please, sir.

22 (Pause.)

23 THE COURT: All right. On Indictment 2012-3668,
24 that's an indictment for murder, wherein you have been
25 found guilty by the jury of the offense of voluntary

Sentence

1 manslaughter, Sentence of the Court is you, Antwon Michele
2 Baker, Jr., be confined to the South Carolina Department of
3 Corrections for a period of 18 years.

4 Indictment 2013-2013, unlawful possession of a pistol,
5 one year concurrent.

6 Mr. Baker, you have a right to appeal the verdicts of
7 the jury and the Sentence of the Court. You must file any
8 notice of your intention to appeal those decisions within
9 ten days of today's date.

10 Anything further?

11 MR. IANUARIO: Nothing further, Your Honor.

12 THE COURT: All right.

13 END OF REQUESTED TRANSCRIPT OF RECORD

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Sentence

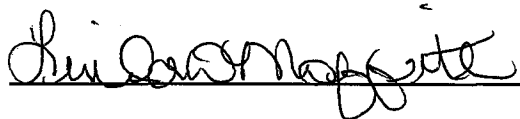
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 3rd through 6th days of June 2013.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

November 20, 2013

A handwritten signature in cursive script, appearing to read "Linda D. Moffitt", is written over a horizontal line.

Linda D. Moffitt
Circuit Court Reporter

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APR 28 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTWON M. BAKER, JR.,

APPELLANT

APPELLATE CASE NO. 2013-001366

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.) The trial judge erred in failing to direct verdicts of acquittal on the gun and murder offenses charged against appellant because the state failed to disprove self-defense in the case, and more importantly, appellant presented evidence of self-defense as a matter of law, particularly since appellant's assailant testified for the defense and admitted he started the fight by attacking appellant from behind with a blow to the back of his head.

2.) The lower court erred in denying appellant's pre-trial motion for dismissal of the case via immunity under the Protection of Persons and Property Act as the Act was applicable to his case despite the fact that he was not attacked in his vehicle, or his residence, or his place of business; because nonetheless, he was attacked in "another place where he had a right to be," i.e., a restaurant, and therefore could protect himself per S.C. Code Ann 16-11-440(c) included in the Act

STATEMENT OF THE CASE

Appellant Antwan Michele Baker was found guilty of murder and unlawfully carrying of a pistol per jury trial held during the June 2013 term of the Spartanburg County General Sessions Court before Judge J. Derham Cole. Appellant was sentenced to imprisonment for an aggregate period of eighteen years. Robert Eugene Ianuario and Matt Canady represented appellant at trial, and Assistant Solicitors Derrick B. Bulsa and Lindsey Overby appeared on behalf of the state.

Appellant appealed his convictions and sentences. This brief follows.

QUESTION I

The trial judge erred in failing to direct verdicts of acquittal on the gun and murder offenses charged against appellant because the state failed to disprove self-defense in the case, and more importantly, appellant presented evidence of self-defense as a matter of law, particularly since appellant's assailant testified for the defense and admitted he started the fight by attacking appellant from behind with a blow to the back of his head.

At trial, state's witness Justin Davis testified that around 2:00 am on June 3, 2012, Brandon Glover drove him (Davis) and Anthony Young to a Waffle House located in Spartanburg County, and that appellant arrived there at the restaurant later while they were still there. Upon seeing appellant, Anthony Young declared that appellant previously pulled a gun on him. Davis testified that Brandon Glover went outside to talk with appellant and told him (appellant) that a fight would commence presumably out of loyalty to and revenge for Anthony Young. Appellant responded by stating that Glover robbed one of his (appellant's) friends and that Anthony Young attacked him (appellant) previously with a gun. Then, as appellant moved to re-enter the Waffle House, Brandon Glover hit appellant about the head. Thereafter, appellant pulled out his gun and started shooting. Everyone ran as shots were fired. Anthony Young was shot in the crossfire and died. Tr. 101, l. 101 – p. 107, l. 25.

State's witness Joshua Hance testified that he was working as a cook at the Waffle House on that same morning and witnessed the events in question. Hance stated that appellant was ordering his food when another man approached and "had words" with him (appellant). Hance added that appellant made an exit, but that when he (appellant) re-

entered, another man ran up and hit appellant, and that appellant responded by pulling out a gun and firing gunshots. Tr. 210, l. 15 – p. 217, l. 18.

Appellant did not testify at trial, but note that Brandon Glover testified at trial on behalf of the defense. Defense witness Glover testified that he was there along with Anthony Young and Justin Davis when the shooting at the Waffle House occurred. When appellant arrived and Young stated that appellant pulled a gun on him previously then he (Glover) went outside and argued with appellant. Glover stated that he threw the first punch at Glover at the Waffle house door and the shooting began afterwards. Tr. 388, l. 1 – p. 395, l. 11.

At the close of the state's case, and at the close of all testimony at the end of the case for the defense, counsel moved for directed verdicts and dismissals on the gun and murder offenses charged against him because the state failed to disprove the elements of self-defense in the case. Tr. 332, l. 10 – 22. The trial judge denied the motions. Tr. 332, l. 23 – p. 333, l. 7; App. 436, 15-22.

Shortly after the shooting, appellant was apprehended by police at the apartment complex nearby where he resided and gave them statements about what happened at the Waffle House. In his first statement, appellant explained that when he parked in the Waffle House parking lot on that night, he saw “ten to twelve boys” in the parking lot so he retrieved his gun. Then, appellant stated that as he was ordering and paying for his food and exiting, one male said he had a problem with him and another male said if he (appellant) didn't fight they would rob him. Appellant explained that he pleaded with them to let it go, but that when he turned to re-enter the Waffle House, “two of them hit [him] in the back of

the head” and that he “pulled out [his] gun and fired three to eight shots.” Tr. 304, lines 1-25.

Appellant’s second statement was almost identical to his first statement except that he added that after he was approached by the male in the blue shirt who insisted that they fight, he (appellant) noticed the following:

A tall dude in a black shirt was telling him that it was going down, that he had his right hand on his waist...something... like he had a gun. And a short dude with dreads had a white t-shirt, was saying that they had guns and if I didn’t fight them, their homeboy that they were going to take everything I had. I told the dude in the blue shirt to let it go. As I was walking back and forward – as he was walking back and forward I was scared that they was going to gang me. Some girls in a – some kind of car was yelling one of them to leave me alone. Then the tall dude in black was saying its going down and I got – it was going down and gets something up.” I can’t make that out. “And he was going to leave me stumped. I told the dude in white to let it go. And then I turned my back and they – and tried to walk in waffle house. Two of them hit me from behind in the back of my head. So I duck and turn around and pull my gun out and start firing it into the crowd. Tr. 306, l. 19 – p. 307, l. 11.

The trial judge charged self-defense to the jury in this case. Tr. 527, l. 1.8 – p. 530, l. 24. In a case of self-defense, the law to be charged is determined from the facts presented in the case. State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999). If there is any evidence in the record from which it can be reasonably inferred that an accused justifiably inflicted a wound in self-defense, then the accused is entitled to a charge on the law of self-defense. State v. Stone, 285 S.C. 386 330 S.E. 2d 286 (1985).

In order to establish self-defense, the defendant must have been without fault in bringing on the difficulty and was or believed he was in actual imminent danger of losing his life or sustaining serious bodily injury, which a reasonably prudent person would have so

believed, and he had no other means of avoiding the danger. State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). Also, depending on the circumstances, words accompanied by hostile acts may establish self-defense and one has a right to act on appearances. State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989). Moreover, when a one claims self defense, the state is required to disprove the elements of self-defense beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 4 89 (1998); State v. Williams, 400 S.C. 308, 733 S.E.2d 605 (2012).

Here, it was clear that Glover fueled the attack, provoked appellant, and chided appellant about engaging in a fight, and then finally struck the first blow attacking appellant about his head from behind. Appellant was surrounded by Glover and his (Glover's) associates who refused to abide by appellant's requests to them to "let it go." Appellant was alone, out numbered, and surrounded by Glover's posse. Also, Glover's gang was armed as appellant saw what he believed to be weapons in their possession. Appellant was in fear of his life and had no other means of avoiding the attack other than to fire his weapon. In other words, Glover was the aggressor and appellant, who was surrounded by foes sans any means of escape, was in danger of losing his life or sustaining serious bodily injury. Hence, appellant was justified in firing his weapon in self-defense as a matter of law.

Compare the holdings in State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), and State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), where the Court in both cases found self-defense existed as a matter of law, which in effect meant that the state's evidence was insufficient to disprove self-defense. In Dickey, the defendant, i.e. Dickey, who was a security guard in a housing complex, responded to a call regarding a male guest that was

angry and drunk and made attempts to assault a resident of the complex. Dickey asked the angry and drunk man to exit the complex and when the man did so, he (Dickey) followed him outside in order to advise police of the man's whereabouts if needed because the police had already been called and notified of the pending event. When the angry man, who had a liquor bottle in his possession, started walking back toward Dickey, threatening to fight, and asking why he was being followed, Dickey pulled out a gun and fired because the angry and drunk man continued to advance aggressively and reached under his shirt (presumably for a weapon). Thereafter, the man continued to march toward Dickey and did not stop moving forward until the second gunshot slowed him and after the third gunshot made him drop to his knees. The Dickey Court held that Dickey was entitled to a directed verdict of acquittal on the charges on the ground of self-defense as Dickey was not the aggressor as he walked outside to inform police of this man's location, and because Dickey believed he was in danger and had the right to act (shoot) on appearances¹ due to this angry and drunk man's aggressive behavior, especially where it appeared as though the man was armed. There was no duty to retreat since there was no other means of avoiding the danger (could not turn back) without losing his life or sustaining injuries.

Moreover, in Hendrix, *supra*, defendant Hendrix, whose relationship with the aggressive intoxicated man who accosted him on the day in question was not good, was approached by this drunk on the day in question threatening to fight him, and thereafter drove to Hendrix's property, pulled out a gun, walked up, pointed the gun, and threatened to

¹ A person has the right to act on appearances even if the person's belief is ultimately mistaken. State v. Fuller, 297 S.C. 440 443-44, 377 S.E. 2d 328, 331 (1989). "Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." Dickey v. State

kill Hendrix. This occurred despite Hendrix's pleas for him to leave the property. Ultimately, Hendrix shot (four times) and killed the man. The Hendrix Court held that the intoxicated man was the aggressor and that Hendrix acted on appearances in believing he was in danger of losing his life or sustaining serious bodily injury and had no duty to retreat.

Here, the state did not meet the requirements to disprove the elements of self defense beyond a reasonable doubt. Clearly, appellant's case was a case of self-defense as a matter of law. Thus, there was insufficient proof of appellant's guilt on the state's charges beyond a reasonable doubt, which meant that his convictions were obtained in violation of the Fourteenth Amendment Due Process Clause and article 1, Section 3 of the South Carolina State Constitution.

QUESTION II

The lower court erred in denying petitioner's pre-trial motion for dismissal of the case via immunity under the Protection of Persons and Property Act as the Act was applicable to his case despite the fact that he was not attacked in his vehicle, or his residence, or his place of business; because nonetheless, he was attacked in "another place where he had a right to be," i.e., a restaurant, and therefore could protect himself per S.C. Code Ann 16-11-440 (c) included in the Act.

In the case at bar, appellant established by a preponderance of the evidence that he was entitled to immunity under the Protection of Persons and Property Act. S.C. Code Ann § 16 -11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act. See State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013),

citing to State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (citing State v.

where the defendant could not invoke protection under the Act because a valid case of self-defense did not exist, but in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), the Act applied because the deceased kept advancing into the defendant's house after the defendant kicked him out and warned him not to return. Similarly, this case involves a right to immunity in a public place where appellant had a right to be present, i.e., a restaurant known as the Waffle House. Specifically, under 16-11-440 (c) the Act provides that one is justified in using deadly force if:

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...

Moreover, unlike the case of Curry, where there was no valid self-defense claim; here, appellant was not engaged in an unlawful activity and also, appellant's self-defense claim was lawful and valid. Appellant was in a public restaurant, i.e., a public accommodation that was a place where he had a right to be and was attacked from behind by Glover. These are the uncontroverted facts. Glover himself admitted that he attacked appellant from behind at the Waffle House entrance. Also, appellant was confronted by a gang-like posse waiting to defend and attack; and clearly, appellant was outmanned and outnumbered. Appellant lawfully used deadly force to defend himself. Therefore, the trial judge erred in denying appellant immunity under the Act.

Appellant moved for dismissal of the charges against appellant per immunity under the Act prior to trial. Tr. 15, l. 17 – p. 17, l. 24; Tr. 51, l. 1-p. 52, l. 19; Tr. 15, lines 15 – p. 16, l. 18. Counsel made his position known as follows:

Defense Counsel: the statute reads a person who is not engaged in an unlawful activity and who is attached in a place where he has a right to be...has no duty to retreat and may stand his ground. Mr. Baker was a lawful patron at the Waffle House on the evening of the shooting. I know we haven't gotten into the facts of the case yet but he – he was summoned outside. There was a quarrel. He stuck his head out the door and said he wanted no part of it, he was going back inside, didn't want to fight...[so] as he was turning around to reenter he was jumped by at least one individual. I believe there were four or five standing around. Tr. 16 – p. 17. L. 9.

During the pretrial hearing, Detective Richie Foster testified that in the course of his investigation into the Waffle House shooting, he learned that words were exchanged between appellant and a group of men, one of whom appellant had difficulty with previously, and that after these words were exchanged between the members of the group (including their threat to rob him) and appellant, one of the members of the group hit appellant in the back of his head upon his entry into the restaurant. Then, appellant responded by firing gunshots. Tr. 26, l. 1 – p. 29, l. 24. Detective Foster added that appellant was neither trespassing nor banned from the Waffle House and was rightfully at the restaurant, and that appellant pleaded with the gang to leave it alone. Tr. 30, lines 4-20.

The trial judge denied appellant's request for immunity under the Act in effect on the ground that the Act was inapplicable because the crime scene was not appellant's residence, or his vehicle, or his place of business. Tr. 54, l. 2 – p. 35, l. 22.

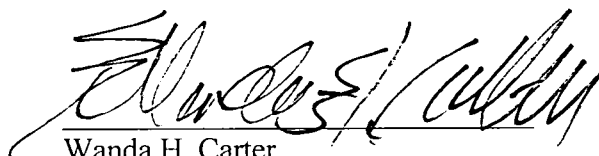
Clearly, the trial judge erred in ruling that the Act was inapplicable to appellant's case and in not reaching a ruling on the merits via S.C. Code Ann § 16-11-440 (c). Again,

appellant was protected from prosecution because he defended himself in self-defense after being attacked in a place where he had a right to be at the time of the attack upon him.

CONCLUSION

Based on the foregoing arguments, appellant requests that his convictions and sentences be vacated because self-defense was established as a matter of law, or in the alternate, that his convictions and sentences be vacated because he was immune from prosecution under S.C. Code Ann § 16-11-440 (c), or that the case be remanded for a proper hearing and ruling per section (c) of the Act.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of April, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
APR 28 2014
SC Court of Appeals

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

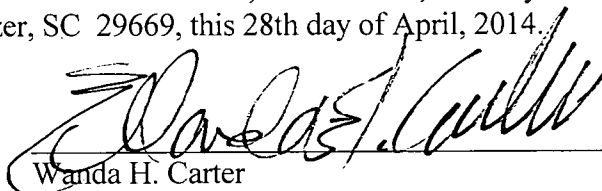
V.

ANTWON M. BAKER, JR.,

APPELLANT

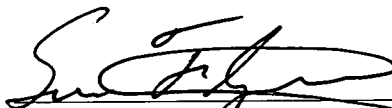
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Megan Harrigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Antwon M. Baker, Jr. #355673, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 28th day of April, 2014.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of April, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022 .

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

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Appeal From Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2013-001366

SC Court of Appeals

THE STATE,

Respondent,

v.

ANTWON M. BAKER, JR.,

Appellant.

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STATEMENT OF ISSUES ON APPEAL

I. The circuit court properly denied Appellant's directed verdict motion because the evidence presented created a jury issue regarding Appellant's self-defense claim.

II. The circuit court properly denied Appellant's motion for dismissal under the Protections of Persons and Property Act because even if the Act applied, Appellant failed to meet its requirements for immunity from prosecution.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF THE FACTS

In July, 2012, the Spartanburg County Grand Jury indicted Appellant Antwon Baker, Jr., on one count of murder arising from the shooting death of Anthony Young (“Victim”) in a Waffle House parking lot on June 3, 2012. In May, 2013, the Grand Jury also indicted Appellant on one count of unlawful carrying of a pistol in connection with the same incident. The case was called for a jury trial on June 3, 2013, before the Honorable J. Derham Cole, Circuit Court Judge.

Prior to trial, Appellant moved to dismiss the murder indictment on the ground he was entitled to immunity from prosecution under the Protection of Persons and Property Act (the Act) (a/k/a Stand Your Ground). In support of the motion, Appellant presented testimony from a police investigator regarding statements made by Appellant and other witnesses about the circumstances leading up to and following the shooting. The circuit court denied the motion, finding the Act did not apply, but even if it did, Appellant “failed to establish by a preponderance of the evidence 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.” (Trial Transcript [TT], pp. 16-17, 24-56; Record on Appeal [R.], pp. _____).

Justin Davis testified Brandon Glover drove him and Victim to the Waffle House around 2:00 a.m. on June 3, 2012. Appellant arrived when they were in the parking lot about to leave, and Victim stated Appellant previously hit him in the face with a gun and knocked his teeth out. Davis testified Glover went inside the Waffle House and told Appellant to come outside. After they walked outside, Davis, Glover, and Victim asked Appellant about the previous incident. Appellant said Glover robbed one of his friends,

and Victim put a gun to this friend's face, and then stated "you fixing to have to fight or something." After Appellant turned to walk back into the Waffle House, Glover hit him in the head, and Appellant pulled out a gun and starting shooting. As Davis was running away, he saw Appellant chasing Victim and shooting him in the back. (TT, pp. 101-112; R., pp. ____).

Hillary Wilkins was in the Waffle House parking lot the night of the shooting, and testified she saw Appellant chasing Victim and shooting at him. (Tr. 194, l. 6-7). Wilkins saw Victim fall down, and as she drove out of the parking lot she, saw Victim laying on the ground with Appellant standing over him. (TT, pp. 187-200; R., pp. ____).

Amy Padgett testified she was also in the parking lot that night, heard gunshots and saw Appellant chasing Victim. After Victim fell down, she saw Appellant stand beside Victim and kick him. (TT, pp. 201-210; R., pp. ____).

Joshua Hance testified he was working at the Waffle House the night of the shooting, and he saw Appellant get hit in the head, pull out a gun and start shooting. He also saw Appellant chasing Victim, firing the gun as he ran, and Victim fall on the ground. (TT, pp. 210-220; R., pp. ____).

Antoine Gist testified he was riding past the Waffle House that night when he saw a lot of people "just scattering and running, leaving, somebody laying outside on the ground." He saw a man standing over the person on the ground, and then getting in a car and leaving the parking lot. He testified the man "wasn't in a hurry." (TT, pp. 221-229; R., pp. ____).

Officers subsequently apprehended Appellant at his apartment complex, and recovered a semi-automatic 9mm handgun, containing a fifteen round clip holding ten

rounds, from the trunk of Appellant's girlfriend's car. They also recovered five shell casings and one fired bullet at the crime scene, including two shell casings in a strip mall parking lot adjacent to the Waffle House parking lot, which were forensically connected to Appellant's gun. (TT, pp. 229-246, 269-274, State's Exhibit 35 [Diagram], State's Exhibit 36 [List]; R., pp. _____).

Appellant gave two voluntary, written statements after his apprehension. In the first statement, he indicated that when he arrived at the Waffle House, he saw "10-12 boys" in the parking lot, and he had problems with some of them in the past, so he put his gun in his waistband before entering the Waffle House. He further stated the boys "didn't say nothing at first," but kept looking at him through the window. As he was paying for his food, one of the men [Glover] came in and told him to come outside because his cousin had a problem with Appellant. Appellant stated he went outside to tell them to let it go, but they continued to tell him to fight. When he turned to go back into the Waffle House, someone hit him in the back of the head, so he turned around, pulled out his gun, and fired "three to eight shots," and "everyone ran but one in the blue shirt," who "fell," and Appellant left to call the police. (State's Exhibit 1 [Voluntary Statement]; R., pp. _____).

Approximately an hour later, Appellant gave a very similar statement, but enhanced his story regarding events leading up to the shooting. This time, he stated one of the boys said "it look like him" as he walked into the Waffle House, and when he walked back outside, one of the men said "it was going down," had his hand on his waistband, and said they were going to rob Appellant if he did not fight Victim. After someone hit him:

“I duck and turn around and pull my gun out and start firing it into the crowd. Everybody starts running. So I started running to my car. I fired another shot because the dude in the blue was running toward his car like he was going to get something.”

((State’s Exhibit 2 [Voluntary Statement]; R., pp. ____)).

Detective Richie Foster testified police found no other weapons, casings or bullets at the crime scene. He further Victim was the only one wounded that night. (TT, pp. 303-307; R., pp. ____).

Dr. John David Wren, who performed Victim’s autopsy, testified he found twelve bullet holes in the body, five entry wounds, one re-entry wound and six exit wounds, and determined Victim was shot five times. He also found a “slightly patterned” abrasion on Victim’s forehead. The fatal wound entered Victim’s back, passed through his heart, and exited his chest. The wounds in Victim’s back were consistent with Victim running away as he was shot, and Dr. Wren stated two wounds (one entry and one exit) to Victim’s leg were inflicted while Victim was on the ground. (TT, pp. 319-327; R., pp. ____).

A forensic DNA analyst with the South Carolina Law Enforcement Division testified he compared swabs from the front of a pair of tennis shoes belonging to Appellant to samples from Victim and Appellant. He determined the swab from the front of the right shoe contained Victim’s DNA, with a one in 1.4 quadrillion likelihood of finding an unrelated individual with that DNA. He testified there was “a good bit” of material from Victim on the shoe, which was consistent with the shoe striking Victim in the head at some point. (TT, pp. 291-298; R., pp. ____).

Appellant moved for a directed verdict on the ground the State did not disprove self-defense beyond a reasonable doubt. Viewing the evidence presented in the light most favorable to the State, the circuit court denied the motion, finding the evidence

presented a jury question on the self-defense issue. (TT, pp. 332-333, 436; R., pp. ____).

The jury convicted Appellant of unlawful carrying of a pistol and voluntary manslaughter, and the circuit court sentenced him to concurrent terms of one year incarceration and eighteen years incarceration, respectively. (TT, pp. 539-540, 545-546; R., pp. ____). This appeal followed.

ARGUMENT

I. The circuit court properly denied Appellant's directed verdict motion because the evidence presented created a jury issue regarding Appellant's self-defense claim.

Appellant asserts the circuit court erred in denying his directed verdict motion because the State failed to disprove self-defense as a matter of law. In support of this assertion, Appellant recites an extremely truncated version of the evidence, and completely ignores the evidence making his self-defense claim a clear jury question.

When ruling on a motion for a directed verdict, the trial judge is concerned with the existence of evidence, not its weight. State v. Butler, 407 S.C. 376, 755 S.E.2d 457, 460 (2014). On appeal from the denial of a directed verdict, the appellate courts view the evidence and all reasonable inferences in the light most favorable to the State. *Id.*; State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

A defendant must meet four prongs to justify using deadly force in self-defense:

- (1) The defendant was without fault in bringing on the difficulty;
- (2) The defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
- (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was 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 this particular instance.

State v. Dickey, 394 S.C. 491, 716 S.E.2d 97, 101 (211) (*citing* State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489, 493 [1998]). “[W]hen a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt.” *Id.*

The directed verdict analysis in this case could begin and end with the first and fourth prongs of self-defense. There was ample evidence from which the jury could find Appellant was at fault in bringing on the difficult, and he had ample opportunity to avoid the danger rather than act as he did under the circumstances..

When Appellant drove up to the Waffle House, he recognized some of the people in the parking lot as people he had trouble with previously, and rather than leave to avoid trouble, he made the conscious decision to park and go inside. He then **illegally** armed himself before exiting his car and entering the Waffle House, specifically **because** he knew there might be trouble with those people.¹ See State v. Slater, 373 S.C. 66, 644 S.E.2d 50, 52 (2007) (“Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense.”) (*quoting* State v. Bryant, 336 S.C. 340, 520 S.E.2d 319, 322 [1999]). Finally, when Glover confronted him inside the Waffle House, Appellant went outside with him rather than call the police, again knowing there might be trouble.²

¹Appellant does not challenge his conviction for unlawfully carrying the pistol.

²Appellant’s assertion he believed one of the men (**not** Victim) had a gun is irrelevant because his own statements reveal he had absolutely **no** basis for such a belief when he armed himself and went inside. When he walked outside with Glover, Appellant only saw the man with a hand on his waistband, and never actually saw a gun. Law enforcement found no other guns at the scene, and there was no evidence anyone other than Appellant fired any shots.

Based on this evidence, the jury could reasonably conclude Appellant was at fault in bringing on the difficulty, and he had several opportunities to avoid the danger entirely.

Analysis of the second and third self-defense requirements also supports denial of Appellant's directed verdict motion. Appellant's conscious decisions to enter the Waffle House, and then walk outside with Glover after Glover confronted him inside, contradict the assertion he actually, or even reasonably, believed he was in danger. Then, even after the men purportedly told him they were going to rob him, and purportedly seeing one of the men holding his hand on his waistband, Appellant turned his back on the men, which contradicts the assertion he believed he was in danger.

Further, witness testimony and Appellant's statements indicated the men outside the Waffle House wanted Appellant to "fight" Victim. No one threatened to shoot Appellant if he did not "fight," and hitting Appellant in the back of the head was likely calculated to initiate a "fight," not a shoot-out. Rather than try to get back inside the Waffle House, Appellant immediately turned around and started shooting, actually chased Victim across the parking lot while shooting him in the back, kicked Victim after he fell, and then shot Victim again while he was on the ground.³

Appellant's reliance on Dickey and State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), is misplaced, because both cases are distinguishable. In Dickey, the defendant was a security guard, and while acting within the scope of his duties, shot a highly intoxicated, aggressive man, who the defendant had just evicted from the premises. The man charged the defendant while threatening him and reaching under his shirt like he was reaching for a weapon, and the defendant's ability to retreat was

³Appellant conveniently ignores this critical evidence.

hampered by his physical condition and a set of locked doors. In reversing the defendant's voluntary manslaughter conviction, the Supreme Court found the **uncontroverted** facts established self-defense as a matter of law. 716 S.E.2d at 101-103.

In Hendricks, the defendant **legally** possessed a firearm while on his own property, and the victim came onto the defendant's property armed with a shotgun and threatened the defendant. The Supreme Court reversed the defendant's voluntary manslaughter conviction, again finding the uncontroverted evidence established self-defense as a matter of law. 244 S.E.2d at 506-507.

Contrary to the defendants in Dickey and Hendricks, Appellant **illegally** armed himself prior to any confrontation, and made no effort to retreat from the very trouble he anticipated. Further, according to Appellant's own version of the events, Victim, who was unarmed, did not say or do anything threatening toward Appellant before Appellant chased him across the parking lot and shot him multiple times in the back. Those facts alone distinguish this case. *Compare State v. Butler*, 407 S.C. 376, 755 S.E.2d 457 (2014) (distinguishing Dickey and finding evidence created credibility issues and questions of fact regarding defendant's self-defense claim).

Viewed in the light most favorable to the State, the evidence in this case created questions of fact for jury determination on each prong of the self-defense issue. The circuit court's denial of Appellant's directed verdict motion is amply supported by the record, and should be affirmed.

II. The circuit court properly denied Appellant's motion for dismissal under the Protection of Persons and Property Act because even if the Act applied, Appellant failed to meet its requirements for immunity from prosecution.

Appellant contends the circuit court erred in denying his motion for immunity pursuant to S.C. Code Ann. §16-11-450, because under S.C. Code Ann. §16-11-440(C), he was not engaged in an unlawful activity and was attacked in a place he had a right to be present (Waffle House). As with his directed verdict argument, Appellant's contention ignores critical evidence.

The expressly stated legislative intent of the Act is “to codify the common law Castle Doctrine which recognized that a person's home is his caste, and to extend the doctrine to include an occupied vehicle and the person's place of business.” S.C. Code Ann. §16-11-420(A) (Supp. 2013). The legislature further provided “that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.” S.C. Code Ann. §16-11-420(B) (Supp. 2013).

The main thrust of the Act is set forth in §16-11-440(A), which “provides a presumption of reasonable fear of imminent peril of death or great bodily injury to a person who uses deadly force if he is attacked by or attempting to remove another from a dwelling, residence, or occupied vehicle.” State v. Curry, 406 S.C. 364, 752 S.E.2d 263, 266 (2013). If subsection (A) does not apply, the analysis defaults to subsection (C), “which deals with the use of force by one who is attacked in another place where he has a right to be.” *Id.*

The immunity from prosecution afforded under §16-11-450 only applies “*if* a person is found to be justified in using deadly force.” *Id.* (emphasis in original). Using a

preponderance of the evidence standard, the trial court must determine the right to immunity pre-trial, which the appellate court reviews for abuse of discretion. *Id.* “A **valid case of self-defense must exist,**’ and the trial court “must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity,” which “includes all elements of self-defense, save the duty to retreat.” *Id.* (emphasis added).

The circuit court questioned whether the Act applied in this case because Appellant was not in his home, vehicle or business when the shooting occurred. Admittedly, whether “another place where he has a right to be” extends beyond places in which the person has a possessory interest remains an open question in South Carolina. Contrary to Appellant’s contention, however, the applicability of the Act was not the sole basis for the circuit court’s ruling.

The circuit court expressly found that even if the Act applied, Appellant failed to sufficiently establish a valid self-defense claim for purposes of immunity. Specifically, the court found Appellant “failed to establish by a preponderance of the evidence 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.” (TT, pp. 55-56; R., pp. ____).

Ignoring the duty to retreat prong for purposes of argument only, the record amply supports the circuit court’s determination Appellant did not establish a valid self-defense claim. The evidence Appellant presented at the pre-trial hearing, including his own

statements to police, clearly established Appellant's fault in bringing on the difficulty, which standing alone, vitiates his immunity claim.

Rather than simply leaving when he recognized some of the people in the parking lot, Appellant consciously armed himself illegally and went inside the Waffle House. He then voluntarily went back outside after Glover confronted him, well knowing there could be trouble. Appellant never actually saw anyone holding a gun, and in response to a blow to his head, he immediately started shooting and chased Victim through the parking lot. There was no evidence of any other guns present or shots fired. (TT, pp. 24-50, State's Exhibit 1, State's Exhibit 2; R., pp. ____).

The circuit court properly exercised its discretion in determining Appellant failed to present a valid self-defense claim for purposes of immunity under the Act. Accordingly, the circuit court ruling should be affirmed.

CONCLUSION

Based on the foregoing, Respondent submits Appellant's conviction and sentence should be affirmed.

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ATTORNEYS FOR RESPONDENT

August 4, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

AUG 04 2014

Appeal From Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge **SC Court of Appeals**
Appellate Case No. 2013-001366

THE STATE,

Respondent,

v.

ANTWON M. BAKER, JR.,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify I served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing copies in the United States mail, postage prepaid, addressed to:

Wanda H. Carter
Chief Deputy Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify all parties required by Rule to be served have been served.

This 4th day of August, 2014.



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Administrative Assistant

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Antwon M. Baker, Jr., Appellant.

Appellate Case No. 2013-001366

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Unpublished Opinion No. 2015-UP-178
Submitted March 1, 2015 – Filed April 8, 2015

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General Deborah R.J. Shupe,
both of Columbia; and Solicitor Barry Joe Barnette, of
Spartanburg, for Respondent.

PER CURIAM: Antwon Baker appeals his convictions for voluntary manslaughter and unlawful carrying of a pistol, arguing the trial court erred in (1) failing to direct a verdict of acquittal when he presented evidence of self-defense as

a matter of law and the State did not disprove self-defense and (2) denying his motion for dismissal based upon the Protection of Persons and Property Act (the Act).¹ We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Issue 1: *State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014) ("When ruling on a motion for a directed verdict, the trial [court] is concerned with the existence of evidence, not its weight." (internal quotation marks omitted)); *id.* ("In contrast, when self-defense is properly submitted to the jury, the defendant is entitled to a charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt." (internal quotation marks omitted)); *id.* ("On appeal from the denial of a directed verdict, this [c]ourt views the evidence and all reasonable inferences in the light most favorable to the State."); *id.* ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the [c]ourt must find the case was properly submitted to the jury." (internal quotation marks omitted)); *id.* at 382, 755 S.E.2d at 460 ("When the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury." (internal quotation marks omitted)); *id.* (stating a petitioner's inconsistent accounts of an incident created credibility issues and questions of fact such that the case was properly submitted to the jury).

2. As to Issue 2: *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review."); S.C. Code Ann. § 16-11-420(A) ("It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business."); S.C. Code Ann. § 16-11-440(C) ("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 or to prevent the commission of a violent crime as defined in [s]ection 16-1-60 [of the South Carolina Code]."); *Gilchrist v. State*, 364 S.C. 173, 180, 612 S.E.2d 702, 706

¹ S.C. Code Ann. §§ 16-11-410 to -450 (Supp. 2014).

(2005) (declining to elevate a dance club "to the possessory status of a home or place of business" based upon public policy considerations).

AFFIRMED.²

THOMAS, KONDUROS, and GEATHERS, JJ., concur.

² We decide this case without oral argument pursuant to Rule 215, SCACR.

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT

V.

ANTWON M. BAKER, JR.,

APPELLANT

APPELLATE CASE NO. 2013-001366

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

Opinion No. 2015-UP-178

PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, the undersigned counsel would petition for rehearing in this appeal based on this Court's denial of appellant's self-defense and castle doctrine claims because apparently this Court relied on the jury's rejection of appellant's self-defense case and overlooked evidence presented at trial that established self-defense as a matter of law as well as evidence in support of appellant's qualification for immunity under the castle doctrine since he was attacked in a restaurant, which is a place where he had a right to be protected. In support of this petition, counsel submits the following.

A.) Self Defense as a Matter of Law

Upon entering a Waffle House Restaurant, appellant was attacked by Brandon Glover at the entrance door. Appellant was alone, but Brandon Glover was at the Waffle House with his friends Anthony Young and Justin Davis. Apparently, Glover took it upon himself to take revenge upon appellant based on Young's story (a prior misdeed involving appellant) and hit appellant on his head as he entered the Waffle House. Appellant responded in self-defense by firing a weapon. Young was killed when the gunshots were fired. At trial, the jury rejected appellant's self-defense claim and the judge failed to grant appellant's directed verdict motion requesting a ruling that the shooting was in self-defense as a matter of law. This Court affirmed the trial judge's denial of appellant's request for a ruling of not guilty as charged due to self-defense as a matter of law under the ruling of State v. Butler, 407 S.C. 376, 755 S.E.2d 457 (2014), to the extent that a jury verdict is controlling when there are "inconsistent accounts of an incident" or where the "evidence is susceptible of more than one reasonable inference." However, in the case at bar, the accounts establishing that appellant was not the aggressor, i.e., that he (appellant) was hit first, are uncontroverted, and not inconsistent, and thus proved appellant acted in self-defense as a matter of law based on the life or death situation that followed his assault. Therefore, Butler was inapplicable this case. The facts from the trial support this position.

At trial, state's witness Justin Davis testified that around 2:00 am on June 3, 2012, Brandon Glover drove him (Davis) and Anthony Young to a Waffle House located in Spartanburg County, and that appellant arrived there at the restaurant later while they were still there. Upon seeing appellant, Anthony Young declared that appellant previously pulled a gun on him. Davis testified that Brandon Glover went outside to talk with appellant and told him (appellant) that a fight would commence presumably out of loyalty to and revenge for Anthony Young. Appellant responded by

stating that Glover robbed one of his (appellant's) friends and that Anthony Young attacked him (appellant) previously with a gun. Then, as appellant moved to re-enter the Waffle House, Brandon Glover hit appellant about the head. Thereafter, appellant pulled out his gun and started shooting. Everyone ran as shots were fired. Anthony Young was shot in the crossfire and died. Tr. 101, l. 101 – p. 107, l. 25.

State's witness Joshua Hance testified that he was working as a cook at the Waffle House on that same morning and witnessed the events in question. Hance stated that appellant was ordering his food when another man approached and "had words" with him (appellant). Hance added that appellant made an exit, but that when he (appellant) re-entered, another man ran up and hit appellant, and that appellant responded by pulling out a gun and firing gunshots. Tr. 210, l. 15 – p. 217, l. 18.

Appellant did not testify at trial, but note that Brandon Glover testified at trial on behalf of the defense. Defense witness Glover testified that he was there along with Anthony Young and Justin Davis when the shooting at the Waffle House occurred. When appellant arrived and Young stated that appellant pulled a gun on him previously then he (Glover) went outside and argued with appellant. Glover stated that he threw the first punch at Glover at the Waffle house door and the shooting began afterwards. Tr. 388, l. 1 – p. 395, l. 11.

Shortly after the shooting, appellant was apprehended by police at the apartment complex nearby where he resided and gave them statements about what happened at the Waffle House. In his first statement, appellant explained that when he parked in the Waffle House parking lot on that night, he saw "ten to twelve boys" in the parking lot so he retrieved his gun. Then, appellant stated that as he was ordering and paying for his food and exiting, one male said he had a problem with him and another male said if he (appellant) didn't fight they would rob him. Appellant explained

that he pleaded with them to let it go, but that when he turned to re-enter the Waffle House, “two of them hit [him] in the back of the head” and that he “pulled out [his] gun and fired three to eight shots.” Tr. 304, lines 1-25. Appellant’s second statement was almost identical to his first statement except that he added that after he was approached by the male in the blue shirt who insisted that they fight.

Compare the holdings in State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), and State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), where the Court in both cases found self-defense existed as a matter of law, which in effect meant that the state’s evidence was insufficient to disprove self-defense. In Dickey, the defendant, i.e. Dickey, who was a security guard in a housing complex, responded to a call regarding a male guest that was angry and drunk and made attempts to assault a resident of the complex. Dickey asked the angry and drunk man to exit the complex and when the man did so, he (Dickey) followed him outside in order to advise police of the man’s whereabouts if needed because the police had already been called and notified of the pending event. When the angry man, who had a liquor bottle in his possession, started walking back toward Dickey, threatening to fight, and asking why he was being followed, Dickey pulled out a gun and fired because the angry and drunk man continued to advance aggressively and reached under his shirt (presumably for a weapon). Thereafter, the man continued to march toward Dickey and did not stop moving forward until the second gunshot slowed him and after the third gunshot made him drop to his knees. The Dickey Court held that Dickey was entitled to a directed verdicts of acquittal on the charges on the ground of self-defense as Dickey was not the aggressor as he walked outside to inform police of this man’s location, and because Dickey believed he was in danger and had the

right to act (shoot) on appearances¹ due to this angry and drunk man's aggressive behavior, especially where it appeared as though the man was armed. There was no duty to retreat since there was no other means of avoiding the danger (could not turn back) without losing his life or sustaining injuries.

Moreover, in Hendrix, *supra*, defendant Hendrix, whose relationship with the aggressive intoxicated man who accosted him on the day in question was not good, was approached by this drunk on the day in question threatening to fight him, and thereafter drove to Hendrix's property, pulled out a gun, walked up, pointed the gun, and threatened to kill Hendrix. This occurred despite Hendrix's pleas for him to leave the property. Ultimately, Hendrix shot (four times) and killed the man. The Hendrix Court held that the intoxicated man was the aggressor and that Hendrix acted on appearances in believing he was in danger of losing his life or sustaining serious bodily injury and had no duty to retreat.

Likewise, appellant's case was one of self-defense as a matter of law.

B.) Protection of Persons and Property Act

Also, this Court's use of the holding in Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005), to support its holding in appellant's appeal that the Waffle House did not meet the qualifications of the "possessory status of a home or place of business" that would invoke the protection of the castle doctrine was inapplicable because equating a dance club from the Gilchrist case, which was the place where Gilchrist argued he had a right to protection under the Act, to a restaurant (Waffle House) where appellant argued he should have been protected under the Act,

¹ A person has the right to act on appearances even if the person's belief is ultimately mistaken. State v. Fuller, 297 S.C. 440 443-44, 377 S.E. 2d 328, 331 (1989). "Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." Dickey v. State citing to State v. Starnes, 340 S.C.

constituted an unequal match. The Gilchrist Court overruled State v. Marlowe, 120 S.C. 205, 112 S.e.921 (1922), which found that a member of an Elk Club enjoyed immunity from retreating, and held contrary to Marlowe that with respect to the issue of immunity from the retreating, a club could not be elevated to the possessory status of a home or place of business. First, the holding in Gilchrist is not squarely on point with the immunity connected to the castle doctrine as Gilchrist addresses immunity from the duty to retreat. Next, a restaurant is characterized as a place where one has a right to be inside per the castle doctrine in the same vein as one's home vehicle or business. A restaurant is a place where meals are served to the public². A dance club is the equivalent of a night club, which is a place that stays open late at night and provides food, drink, and entertainment.³ The differences in the nature of these two venues cannot be viewed as equivalent to each other. A restaurant involves the activity of feeding, which encompasses a basic human need. One's attendance at a club involves a voluntary decision of a human being to place himself in an environment that does not meet a human need and where alcohol may be served and where dancing is a part of the scenery, which in turn most likely would encompass the potential for immoral behavior. Clearly, the castle doctrine protection would not apply to a night/dance club, but this protection would certainly apply to a restaurant. The Gilchrist holding was inapplicable in this case.

S.C Code Ann § 16-11-440(c) allows for immunity where one is not engaged in an unlawful activity and is attacked in another place (other than his home, vehicle or bushes) where he had a right to be inside, i.e. in a restaurant such as the Waffle House. In the case at bar, appellant

312, 322, 531 S.E.2d 907, 913 (2000) (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978)).

²The American Heritage Dictionary Second College Edition (1985) p. 1053.

³ The American Heritage Dictionary Second College Edition (1985)p. 841.

established by a preponderance of the evidence that he was entitled to immunity under the Protection of Persons and Property Act. S.C. Code Ann § 16 -11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act. Similarly, this case involves a right to immunity in a public place where appellant had a right to be present, i.e., a restaurant known as the Waffle House. Specifically, under 16-11-440 (c) the Act provides that one is justified in using deadly force if:

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...

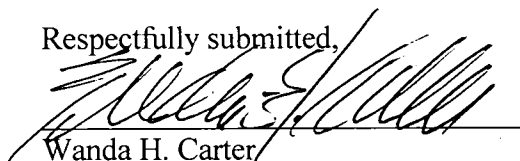
Moreover, unlike the case of Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), where there was no valid self-defense claim; here, appellant was not engaged in an unlawful activity and also, appellant's self-defense claim was established as a matter of law. Appellant was in a public restaurant, i.e., a public accommodation that was a place where he had a right to be and was attacked from behind by Glover. These are the uncontroverted facts. Glover himself admitted that he attacked appellant from behind at the Waffle House entrance. Also, appellant was confronted by a gang-like posse waiting to defend and attack; and clearly, appellant was outmanned and outnumbered. Appellant lawfully used deadly force to defend himself. Therefore, the trial judge erred in denying appellant immunity under the Act.

During the pretrial hearing held in the matter, Detective Richie Foster testified that in the course of his investigation into the Waffle House shooting, he learned that words were exchanged between appellant and a group of men, one of whom appellant had difficulty with previously, and that after these words were exchanged between the members of the group (including their threat to

rob him) and appellant, one of the members of the group hit appellant in the back of his head upon his entry into the restaurant. Then, appellant responded by firing gunshots. Tr. 26, l. 1 – p. 29, l. 24. Detective Foster added that appellant was neither trespassing nor banned from the Waffle House and was rightfully at the restaurant, and that appellant pleaded with the gang to leave it alone. Tr. 30, lines 4-20. g that the Act was inapplicable to appellant's case and in not reaching a ruling on the merits via S.C. Code Ann § 16-11-440 (c). Again, appellant was protected from prosecution because he defended himself in self-defense after being attacked in a place where he had a right to be at the time of the attack upon him.

WHEREFORE, based on the foregoing arguments, appellant requests a rehearing on the issues of appellant's proof of self-defense as a matter of law and statutory immunity under the castle doctrine.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

This 22nd day of April, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
APR 22 2015
SC Court of Appeals

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

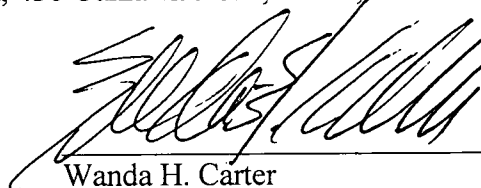
V.

ANTWON M. BAKER, JR.,

APPELLANT

CERTIFICATE OF SERVICE

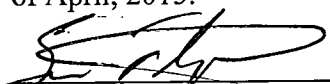
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Antwon M. Baker #355673, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 22nd day of April, 2015.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 22nd day
of April, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

The State, Respondent,

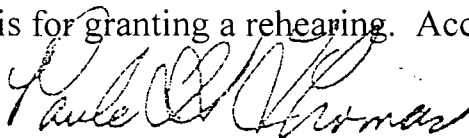
v.

Antwon Michelle Baker, Jr., Appellant.

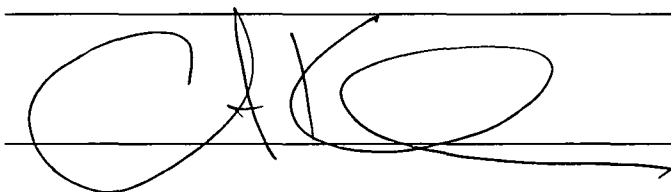
Appellate Case No. 2013-001366

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


Paul D. Thomas

J.



J.


John D. Hester

J.

Columbia, South Carolina

cc: Wanda H. Carter, Esquire
Alan McCrory Wilson, Esquire
Deborah R.J. Shupe, Esquire
Barry Joe Barnette, Esquire

FILED

May 21, 2015

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

J. Derham Cole, Circuit Court Judge

RECEIVED

JUN 22 2015

S.C. Supreme Court

Opinion No. 2015-UP-178 (S.C. Ct. App. filed 4/8/2015)

THE STATE,

RESPONDENT,

V.

ANTWON M. BAKER, JR.,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was filed on April 22, 2015, and denied by the Court of Appeals on May 21, 2015.

QUESTIONS PRESENTED

- 1) The Court of Appeals erred in relying on State v. Butler¹ to support the trial judge's denial of counsel's directed verdict motions after petitioner established proof of self-defense as a matter of law by citing to Butler's holding that a jury's rejection of a self-defense claim is controlling if a case has "inconsistent accounts of the incident" and/or the "evidence is susceptible of more than one reasonable inference," because this case was different in that all accounts and testimony showed evidence that petitioner was not the aggressor here and that his case of self-defense as a matter of law had been proved.
- 2) The Court of Appeals erred in holding that the trial judge properly dismissed petitioners pre-trial motion for immunity under the Castle Doctrine on the ground that the Waffle House did not meet the qualifications of the "possessory status of a home or place of business" per the rationale in Gilchrist² because the comparison of a dance club in Gilchrist, where the Castle Doctrine was inapplicable, to a restaurant (the Waffle House), where the Castle Doctrine was applicable, cannot stand as a comparable legal comparison.

¹ State v. Butler, 407 S.C. 376, 755 S.E.2d 457 (2014).

² Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005).

STATEMENT OF THE CASE

Petitioner Antwon Michele Baker was found guilty of murder and unlawfully carrying of a pistol per jury trial held during the June 2013 term of the Spartanburg County General Sessions Court before Judge J. Derham Cole. Petitioner was sentenced to imprisonment for an aggregate period of eighteen years. Robert Eugene Ianuario and Matt Canady represented petitioner at trial, and Assistant Solicitors Derrick B. Bulsa and Lindsey Overby appeared on behalf of the State.

Petitioner appealed his convictions and sentences, and on April 8, 2015, the Court of Appeals issued an opinion affirming his convictions and sentences. See State v. Baker, Unpublished Opinion No. 2015-UP-178 (S.C. Ct. App. April 8, 2015). App. 1-3. A petition for rehearing was filed on April 22, 2015. App. 4-12. On May 21, 2015, the Court of Appeals issued an Order denying the petition for rehearing filed in the case. App. 13. This petition follows.

QUESTION I

The Court of Appeals erred in relying on State v. Butler³ to support the trial judge's denial of counsel's directed verdict motions after petitioner established proof of self-defense as a matter of law by citing to Butler's holding that a jury's rejection of a self-defense claim is controlling if a case has "inconsistent accounts of the incident" and/or the "evidence is susceptible of more than one reasonable inference" because this case was different in that all accounts and testimony showed evidence that petitioner was not the aggressor here and that his case of self-defense as a matter of law had been proved.

At trial, state's witness Justin Davis testified that around 2:00 am on June 3, 2012, Brandon Glover drove him (Davis) and Anthony Young to a Waffle House located in Spartanburg County, and that petitioner arrived there at the restaurant later while they were still there. Upon seeing petitioner, Anthony Young declared that petitioner previously pulled a gun on him. Davis testified that Brandon Glover went outside to talk with petitioner and told him (petitioner) that a fight would commence presumably out of loyalty to and revenge for Anthony Young. Petitioner responded by stating that Glover robbed one of his (petitioner's) friends and that Anthony Young attacked him (petitioner) previously with a gun. Then, as petitioner moved to re-enter the Waffle House, Brandon Glover hit petitioner about the head. Thereafter, petitioner pulled out his gun and started shooting. Everyone ran as shots were fired. Anthony Young was shot in the crossfire and died. R. 101, l. 101 – p. 107, l. 25.

State's witness Joshua Hance testified that he was working as a cook at the Waffle House on that same morning and witnessed the events in question. Hance stated that petitioner was ordering his food when another man approached and "had words" with him (petitioner). Hance added that

petitioner made an exit, but that when he (petitioner) re-entered, another man ran up and hit petitioner, and that petitioner responded by pulling out a gun and firing gunshots. R. 210, l. 15 – p. 217, l. 18.

Petitioner did not testify at trial, but note that Brandon Glover testified at trial on behalf of the defense. Defense witness Glover testified that he was there along with Anthony Young and Justin Davis when the shooting at the Waffle House occurred. When petitioner arrived and Young stated that petitioner pulled a gun on him previously then he (Glover) went outside and argued with petitioner. Glover stated that he threw the first punch at Glover at the Waffle house door and the shooting began afterwards. R. 388, l. 1 – p. 395, l. 11.

Shortly after the shooting, petitioner was apprehended by police at the apartment complex nearby where he resided and gave them statements about what happened at the Waffle House. In his first statement, petitioner explained that when he parked in the Waffle House parking lot on that night, he saw “ten to twelve boys” in the parking lot so he retrieved his gun. Then, petitioner stated that as he was ordering and paying for his food and exiting, one male said he had a problem with him and another male said if he (petitioner) didn’t fight they would rob him. Petitioner explained that he pleaded with them to let it go, but that when he turned to re-enter the Waffle House, “two of them hit [him] in the back of the head” and that he “pulled out [his] gun and fired three to eight shots.” Tr. 304, lines 1-25. Petitioner’s second statement was almost identical to his first statement except that he added that after he was approached by the male in the blue shirt who insisted that they fight.

Upon entering a Waffle House Restaurant, petitioner was attacked by Brandon Glover at the entrance door. Petitioner was alone, but Brandon Glover was at the Waffle House with his friends

³ State v. Butler, 407 S.C. 376, 755 S.E.2d 457 (2014)

Anthony Young and Justin Davis. Apparently, Glover took it upon himself to take revenge upon petitioner based on Young's story (a prior misdeed involving petitioner) and hit petitioner on his head as he entered the Waffle House. Petitioner responded in self-defense by firing a weapon. Young was killed when the gunshots were fired. At trial, the jury rejected petitioner's self-defense claim and the judge failed to grant petitioner's directed verdict motion requesting a ruling that the shooting was in self-defense as a matter of law. The Court of Appeals affirmed the trial judge's denial of petitioner's request for a ruling of not guilty as charged due to self-defense as a matter of law via the holding in State v. Butler, 407 S.C. 376, 755 S.E.2d 457 (2014), to the extent that a jury verdict is controlling when there are "inconsistent accounts of an incident" or where the "evidence is susceptible of more than one reasonable inference." However, in the case at bar, all accounts established that petitioner was not the aggressor, i.e., that he (petitioner) was hit first, and all of these accounts are not inconsistent, but rather uncontroverted and thus proved petitioner acted in self-defense as a matter of law based on the life or death situation that followed his assault. Therefore, Butler was inapplicable this case.

Compare the holdings in State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), and State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), where the Court in both cases found self-defense existed as a matter of law, which in effect meant that the state's evidence was insufficient to disprove self-defense. In Dickey, the defendant, i.e. Dickey, who was a security guard in a housing complex, responded to a call regarding a male guest that was angry and drunk and made attempts to assault a resident of the complex. Dickey asked the angry and drunk man to exit the complex and when the man did so, he (Dickey) followed him outside in order to advise police of the man's whereabouts if needed because the police had already been called and notified of the pending event. When the angry man, who had a liquor bottle in his possession, started walking back toward

Dickey, threatening to fight, and asking why he was being followed, Dickey pulled out a gun and fired because the angry and drunk man continued to advance aggressively and reached under his shirt (presumably for a weapon). Thereafter, the man continued to march toward Dickey and did not stop moving forward until the second gunshot slowed him and after the third gunshot made him drop to his knees. The Dickey Court held that Dickey was entitled to a directed verdict of acquittal on the charges on the ground of self-defense as Dickey was not the aggressor as he walked outside to inform police of this man's location, and because Dickey believed he was in danger and had the right to act (shoot) on appearances⁴ due to this angry and drunk man's aggressive behavior, especially where it appeared as though the man was armed. There was no duty to retreat since there was no other means of avoiding the danger (could not turn back) without losing his life or sustaining injuries.

Moreover, in Hendrix, *supra*, defendant Hendrix, whose relationship with the aggressive intoxicated man who accosted him on the day in question was not good, was approached by this drunk on the day in question threatening to fight him, and thereafter drove to Hendrix's property, pulled out a gun, walked up, pointed the gun, and threatened to kill Hendrix. This occurred despite Hendrix's pleas for him to leave the property. Ultimately, Hendrix shot (four times) and killed the man. The Hendrix Court held that the intoxicated man was the aggressor and that Hendrix acted on appearances in believing he was in danger of losing his life or sustaining serious bodily injury and had no duty to retreat. Likewise, petitioner's case was one of self-defense as a matter of law.

⁴ A person has the right to act on appearances even if the person's belief is ultimately mistaken. State v. Fuller, 297 S.C. 440 443-44, 377 S.E. 2d 328, 331 (1989). "Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." Dickey v. State citing to State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000) (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978)).

QUESTION II

The Court of Appeals erred in holding that the trial judge properly dismissed petitioners pre-trial motion for immunity under the Castle Doctrine on the ground that the Waffle House did not meet the qualifications of the “possessory status of a home or place of business” per the rationale in Gilchrist⁵ because the comparison of a dance club in Gilchrist, where the Castle Doctrine was inapplicable, to a restaurant, (the Waffle House), where the Castle Doctrine was applicable, cannot stand as a comparable legal comparison.

Also, this Court’s use of the holding in Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005), to support its holding in petitioner’s appeal that the Waffle House did not meet the qualifications of the “possessory status of a home or place of business” that would invoke the protection of the castle doctrine was inapplicable because equating a dance club from the Gilchrist case, which was the place where Gilchrist argued he had a right to protection under the Act, to a restaurant (Waffle House) where petitioner argued he should have been protected under the Act, constituted an unequal legal comparison.

The Gilchrist Court overruled State v. Marlowe, 120 S.C. 205, 112 S.E.921 (1922), which found that a member of an Elk Club enjoyed immunity from retreating, and held contrary to Marlowe that with respect to the issue of immunity from the retreating, a club could not be elevated to the possessory status of a home or place of business. First, the holding in Gilchrist is not squarely on point with the immunity connected to the Castle Doctrine as Gilchrist addresses immunity from the duty to retreat. Next, a restaurant is characterized as a place where one has a right to be inside

⁵ Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005)

per the castle doctrine in the same vein as one's home vehicle or business. A restaurant is a place where meals are served to the public⁶. A dance club is the equivalent of a night club, which is a place that stays open late at night and provides food, drink, and entertainment.⁷ The differences in the nature of these two venues cannot be viewed as equivalent to each other. A restaurant involves the activity of feeding, which encompasses a basic human need. One's attendance at a club involves a voluntary decision of a human being to place himself in an environment that does not meet a human need, and where alcohol may be served, and where dancing is a part of the scenery, which in turn most likely would encompass the potential for immoral behavior. Clearly, the Castle Doctrine protection would not apply to a night/dance club, but this protection would certainly apply to a restaurant. The Gilchrist holding was inapplicable in this case.

S.C Code Ann § 16-11-440(c) allows for immunity where one is not engaged in an unlawful activity and is attacked in another place (other than his home, vehicle or bushes) where he had a right to be inside, i.e. in a restaurant such as the Waffle House. In the case at bar, petitioner established by a preponderance of the evidence that he was entitled to immunity under the Protection of Persons and Property Act. S.C. Code Ann §16 -11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act. Similarly, this case involves a right to immunity in a public place where petitioner had a right to be present, i.e., a restaurant known as the Waffle House. Specifically, under 16-11-440 (c) the Act provides that one is justified in using deadly force if:

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

⁶The American Heritage Dictionary Second College Edition (1985) p. 1053.

⁷ The American Heritage Dictionary Second College Edition (1985) p. 841.

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...

Moreover, unlike the case of Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), where there was no valid self-defense claim; here, petitioner was not engaged in an unlawful activity and also, petitioner's self-defense claim was established as a matter of law. Petitioner was in a public restaurant, i.e., a public accommodation that was a place where he had a right to be and was attacked from behind by Glover. These are the uncontroverted facts. Glover himself admitted that he attacked petitioner from behind at the Waffle House entrance. Also, petitioner was confronted by a gang-like posse waiting to defend and attack; and clearly, petitioner was outmanned and outnumbered. Petitioner lawfully used deadly force to defend himself. Therefore, the trial judge erred in denying petitioner immunity under the Act.

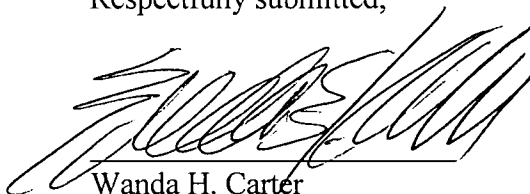
During the pretrial hearing held in the matter, Detective Richie Foster testified that in the course of his investigation into the Waffle House shooting, he learned that words were exchanged between petitioner and a group of men, one of whom petitioner had difficulty with previously, and that after these words were exchanged between the members of the group (including their threat to rob him) and petitioner, one of the members of the group hit petitioner in the back of his head upon his entry into the restaurant. Then, petitioner responded by firing gunshots. R. 26, l. 1 – p. 29, l. 24. Detective Foster added that petitioner was neither trespassing nor banned from the Waffle House and was rightfully at the restaurant, and that petitioner pleaded with the gang to leave it alone. R. 30, lines 4-20. g that the Act was inapplicable to petitioner's case and in not reaching a ruling on the merits via S.C. Code Ann § 16-11-440 (c). Again, petitioner was protected from prosecution

because he defended himself in self-defense after being attacked in a place where he had a right to be at the time of the attack upon him.

CONCLUSION

Based on the foregoing arguments, counsel for petitioner requests that this Court grant the petition and allow full briefing the issues.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 22nd day of June, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

J. Derham Cole, Circuit Court Judge

Opinion No. 2015-UP-178 (S.C. Ct. App. filed 4/8/2015)

THE STATE,

RESPONDENT,

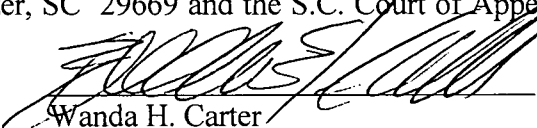
V.

ANTWON M. BAKER, JR.,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Deborah R. J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Antwon Baker #355673, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669 and the S.C. Court of Appeals this 22nd day of June, 2015.

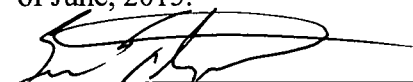


Wanda H. Carter

Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of June, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA

RECEIVED

IN THE SUPREME COURT

JUL 13 2015

S.C. Supreme Court

Appeal From Spartanburg County
 The Honorable J. Derham Cole, Circuit Court Judge
 Appellate Case No. 2015-001332
 (Opinion No. 2015-UP-178, S.C. Ct. App., filed April 8, 2015)

THE STATE,

Respondent,

v.

ANTWON M. BAKER, JR.,

Petitioner.

**RETURN TO PETITION FOR WRIT OF
 CERTIORARI TO THE COURT OF APPEALS**

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF QUESTIONS ON APPEAL

I. Did the Court of Appeals properly affirm the circuit court's denial of Petitioner's directed verdict motion because the evidence presented created a jury issue regarding Petitioner's self-defense claim?

II. Did the Court of Appeals properly affirm the circuit court's denial of Petitioner's motion for dismissal under the Protections of Persons and Property Act because even if the Act applied, Petitioner failed to meet its requirements for immunity from prosecution?

STATEMENT OF THE CASE

In July, 2012, the Spartanburg County Grand Jury indicted Petitioner Antwon Baker, Jr., on one count of murder arising from the shooting death of Anthony Young (“Victim”) in a Waffle House parking lot on June 3, 2012. In May, 2013, the Grand Jury also indicted Petitioner on one count of unlawful carrying of a pistol in connection with the same incident. The case was called for a jury trial on June 3, 2013, before the Honorable J. Derham Cole, Circuit Court Judge.

Prior to trial, Petitioner moved to dismiss the murder indictment on the ground he was entitled to immunity from prosecution under the Protection of Persons and Property Act (the Act) (a/k/a Stand Your Ground). In support of the motion, Petitioner presented testimony from a police investigator regarding statements made by Petitioner and other witnesses about the circumstances leading up to and following the shooting. The circuit court denied the motion, finding the Act did not apply, but even if it did, Petitioner “failed to establish by a preponderance of the evidence 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.” (Record on Appeal [R.], pp. 16-17, 20-52).

Justin Davis testified Brandon Glover drove him and Victim to the Waffle House around 2:00 a.m. on June 3, 2012. Petitioner arrived when they were in the parking lot about to leave, and Victim stated Petitioner previously hit him in the face with a gun and knocked his teeth out. Davis testified Glover went inside the Waffle House and told Petitioner to come outside. After they walked outside, Davis, Glover, and Victim asked Petitioner about the previous incident. Petitioner said Glover robbed one of his friends and Victim put a gun to that friend’s face, and Petitioner then stated “you fixing to have

to fight or something.” After Petitioner turned to walk back into the Waffle House, Glover hit him in the head, and Petitioner immediately pulled out a gun and starting shooting. As Davis was running away, he saw Petitioner chasing Victim and shooting him in the back. (R., pp. 61-72).

Hillary Wilkins was in the Waffle House parking lot the night of the shooting, and testified she saw Petitioner chasing Victim and shooting at him. (R., p. 154). Wilkins saw Victim fall down, and as she drove out of the parking lot she saw Victim laying on the ground with Petitioner standing over him. (R., pp. 147-160).

Amy Padgett testified she was also in the parking lot that night, heard gunshots and saw Petitioner chasing Victim. After Victim fell down, she saw Petitioner stand beside Victim and kick him. (R., pp. 161-170).

Joshua Hance testified he was working at the Waffle House the night of the shooting, and he saw Petitioner get hit in the head, pull out a gun and start shooting. He also saw Petitioner chasing Victim, firing the gun as he ran, and Victim fall on the ground. (R., pp. 170-180).

Antoine Gist testified he was riding past the Waffle House that night when he saw a lot of people “just scattering and running, leaving, somebody laying outside on the ground.” He saw a man standing over the person on the ground, and then getting in a car and leaving the parking lot. He testified the man “wasn’t in a hurry.” (R., pp. 181-189).

Officers subsequently apprehended Petitioner at his apartment complex, and recovered a semi-automatic 9mm handgun, containing a fifteen round clip holding ten rounds, from the trunk of Petitioner’s girlfriend’s car. They also recovered five shell casings and one fired bullet at the crime scene, including two shell casings in a strip mall

parking lot adjacent to the Waffle House parking lot, which were forensically connected to Petitioner's gun. (State's Exhibit 35 [Diagram], State's Exhibit 36 [List]; R., pp. 189-206, 229-234).¹

Petitioner gave two voluntary, written statements after his apprehension. In the first statement, he indicated that when he arrived at the Waffle House, he saw "10-12 boys" in the parking lot, and he had problems with some of them in the past, so he put his gun in his waistband before entering the Waffle House. He further stated the boys "didn't say nothing at first," but kept looking at him through the window. As he was paying for his food, one of the men [Glover] came in and told him to come outside because the man's cousin had a problem with him. Petitioner stated he went outside to tell them to let it go, but they continued to tell him to fight. When he turned to go back into the Waffle House, someone hit him in the back of the head, so he turned around, pulled out his gun, and fired "three to eight shots," and "everyone ran but one in the blue shirt," who "fell," and Petitioner left to call the police. (State's Exhibit 1 [Voluntary Statement]).

Approximately an hour later, Petitioner gave a very similar statement, but enhanced his story regarding events leading up to the shooting. This time, he stated one of the boys said "it look like him" as he walked into the Waffle House, and when he walked back outside, one of the men said "it was going down," had his hand on his waistband, and said they were going to rob Petitioner if he did not fight Victim. Petitioner claimed that after someone hit him:

¹ The following Exhibits are on file with the Court: State's Exhibit #1 (Voluntary Statement); #2 (Voluntary Statement); #35 (Diagram); #36 (List for Sketch); #57 (Diagram); #59 (Wound Chart); #60 (Diagram).

“I duck and turn around and pull my gun out and start firing it into the crowd. Everybody starts running. So I started running to my car. I fired another shot because the dude in the blue was running toward his car like he was going to get something.”

(State’s Exhibit 2 [Voluntary Statement]).

Detective Richie Foster testified police found no other weapons, casings or bullets at the crime scene. He further testified Victim was the only one wounded that night. (R., pp. 263-267).

Dr. John David Wren, who performed Victim’s autopsy, testified he found twelve bullet holes in the body, five entry wounds, one re-entry wound and six exit wounds, and determined Victim was shot five times. He also found a “slightly patterned” abrasion on Victim’s forehead. The fatal wound entered Victim’s back, passed through his heart, and exited his chest. The wounds in Victim’s back were consistent with Victim running away as he was shot, and Dr. Wren stated two wounds (one entry and one exit) to Victim’s leg were inflicted while Victim was on the ground. (R., pp. 279-287).

A forensic DNA analyst with the South Carolina Law Enforcement Division testified he compared swabs from the front of a pair of tennis shoes belonging to Petitioner to samples from Victim and Petitioner. He determined the swab from the front of the right shoe contained Victim’s DNA, with a one in 1.4 quadrillion likelihood of finding an unrelated individual with that DNA. He testified there was “a good bit” of material from Victim on the shoe, which was consistent with the shoe striking Victim in the head at some point. (R., pp. 251-258).

Petitioner moved for a directed verdict on the ground the State did not disprove self-defense beyond a reasonable doubt. Viewing the evidence presented in the light

most favorable to the State, the circuit court denied the motion, finding the evidence presented a jury question on the self-defense issue. (R., pp. 292-293, 338).

The jury convicted Petitioner of unlawful carrying of a pistol and voluntary manslaughter, and the circuit court sentenced him to concurrent terms of one year incarceration and eighteen years incarceration, respectively. (R., pp. 438-439, 443-444). This appeal followed.

In an unpublished opinion filed April 8, 2015, the South Carolina Court of Appeals affirmed Petitioner's conviction, and denied his Petition for Rehearing by Order filed May 21, 2015. (Appendix, pp. 1-13). On June 22, 2015, Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals, asking this Court to review and reverse the Court of Appeals' opinion.

ARGUMENT

I. The Court of Appeals properly affirmed the circuit court's denial of Petitioner's directed verdict motion because the evidence presented created a jury issue regarding Petitioner's self-defense claim.

Petitioner asserts the Court of Appeals erred in affirming the denial of his directed verdict motion because the State failed to disprove self-defense as a matter of law. As he did before the Court of Appeals, Petitioner purports to support this claim with an extremely truncated version of the evidence, and completely ignores evidence making his self-defense claim a clear jury question.

When ruling on a motion for a directed verdict, the trial judge is concerned with the existence of evidence, not its weight. State v. Butler, 407 S.C. 376, 755 S.E.2d 457, 460 (2014). On appeal from the denial of a directed verdict, the appellate courts view the evidence and all reasonable inferences in the light most favorable to the State. *Id.*; State v. Weston, 367 S.C. 279, 625 S.E.2d 641, 648 (2006). If there is any direct evidence, or any substantial circumstantial evidence, reasonably tending to prove the guilt of the accused, the appellate court must find the case was properly submitted to the jury. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63, 69 (1998).

A defendant must meet four prongs to justify using deadly force in self-defense:

- (1) The defendant was without fault in bringing on the difficulty;
- (2) The defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
- (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was 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 this particular instance.

State v. Dickey, 394 S.C. 491, 716 S.E.2d 97, 101 (2011) (*citing* State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489, 493 [1998]). “[W]hen a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt.” *Id.*

The directed verdict analysis in this case should begin and end with the first and fourth prongs of self-defense. There was ample evidence from which the jury could find Petitioner was at fault in bringing on the difficult, and he had ample opportunity to avoid the danger rather than act as he did under the circumstances..

As Petitioner drove up to the Waffle House, before he even parked his car, he recognized some of the people in the parking lot were people he had trouble with previously. Rather than leave to avoid trouble, he made the conscious decision to park and go inside. He then **illegally** armed himself before exiting his car and entering the Waffle House, specifically **because** he knew there might be trouble with those people.² See State v. Slater, 373 S.C. 66, 644 S.E.2d 50, 52 (2007) (“Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense.”) (*quoting* State v. Bryant, 336 S.C. 340, 520 S.E.2d 319, 322 [1999]).

Finally, when Glover confronted him inside the Waffle House, Petitioner went outside with him rather than call the police, again well knowing there might, and most likely would, be trouble. Based on this evidence, the jury could reasonably conclude

²Appellant did not challenge his conviction for unlawfully carrying the pistol.

Petitioner was at fault in bringing on the difficulty, and he had several opportunities to avoid the danger entirely.³

Analysis of the second and third self-defense requirements also supports denial of Petitioner's directed verdict motion. Petitioner's conscious decisions to enter the Waffle House, and then walk outside with Glover, contradict the assertion he actually, or even reasonably, believed he was in danger. Then, even after the men purportedly told him they were going to **rob** him, and purportedly seeing one of the men holding his hand on his waistband, Petitioner turned his back on the men, which clearly contradicts the assertion he believed he was in danger, and had "no other means of avoiding the danger (could not turn back) without losing his life or sustaining injuries." (Petition, p. 8).

Further, witness testimony and Petitioner's statements indicated the men outside the Waffle House were going to rob Petitioner if he did not "fight" Victim. No one threatened to shoot Petitioner if he did not "fight," and hitting Petitioner in the back of the head was likely calculated to initiate a "fight," not a shoot-out. Rather than try to get back inside the Waffle House, Petitioner immediately turned around and started shooting,

³Petitioner's assertion he believed one of the men (**not** Victim) had a gun is irrelevant because his own statements reveal he had absolutely **no** basis for such a belief when he armed himself and went inside. When he walked outside with Glover, Petitioner only saw a man with a hand on his waistband, and never actually saw a gun. Law enforcement found no other guns at the scene, and there was no evidence anyone other than Petitioner fired any shots. In spite of this undisputed evidence, in an obvious attempt to present himself as a victim with no way to avoid death or injury but fire his gun, Petitioner states Victim "was shot in the crossfire and died." (Petition, p. 5) (emphasis added).

actually chased Victim across the parking lot while shooting him in the back, kicked Victim after he fell, and then shot Victim again while he was on the ground.⁴

Petitioner's reliance on Dickey and State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), is misplaced because both cases are distinguishable. In Dickey, the defendant was a security guard, and while acting within the scope of his duties, shot a highly intoxicated, aggressive man he had just evicted from the premises. The man charged the defendant while threatening him and reaching under his shirt like he was reaching for a weapon, and the defendant's ability to retreat was hampered by his physical condition and a set of locked doors. In reversing the defendant's voluntary manslaughter conviction, the Supreme Court found the **uncontroverted** facts established self-defense as a matter of law. 716 S.E.2d at 101-103.

In Hendricks, the defendant **legally** possessed a firearm while on his own property, and the victim came onto the defendant's property armed with a shotgun and threatened the defendant. The Supreme Court reversed the defendant's voluntary manslaughter conviction, again finding the uncontroverted evidence established self-defense as a matter of law. 244 S.E.2d at 506-507.

Contrary to the defendants in Dickey and Hendricks, Petitioner was not acting in the scope of any legal duty, he was not on his own property facing someone with a shotgun threatening to kill him, he **illegally** armed himself prior to any confrontation, and he made no effort to retreat from the very trouble he anticipated when he got out of his car. Further, according to Petitioner's own version of the events, Victim, who was unarmed, did not say or do anything threatening toward Petitioner before Petitioner

⁴Petitioner conveniently ignores this critical evidence because it completely belies his self-defense claim.

chased him across the parking lot and shot him multiple times in the back. Those facts alone distinguish this case. *Compare Butler*, 755 S.E.2d at 460 (distinguishing *Dickey* and finding evidence created credibility issues and questions of fact regarding defendant's self-defense claim).

Petitioner asserts the Court of Appeals erred in citing *Butler* as support for affirming the circuit court on the directed verdict issue, claiming the evidence in this case was not susceptible of more than one reasonable inference, and he proved his case of self-defense as a matter of law. The record reveals both of these assertions are demonstrably inaccurate, and Petitioner relies on hyperbole and unsupported assumptions as evidence.

By way of example, Petitioner states Glover confronted him "presumably out of loyalty to and revenge for [Victim]," and "Glover took it upon himself to take revenge upon petitioner based on [Victim's] story." He is unable to cite anything in the record to support these statements, because there simply is no support. He further states Victim "was shot in the crossfire," even though there is absolutely no evidence anyone else had a gun or fired any shots that night. (Petitioner, pp. 5-7).

As to his self-defense "as a matter of law" contention, Petitioner apparently equates being "the aggressor" with being "at fault in bringing on the difficulty," but they are two different concepts. The mere fact Petitioner did not strike the first blow does not absolve him of any fault in bringing on the difficulty. On the contrary, he knew he had previous problems with some of the people in the Waffle House parking lot, and with full knowledge there might be trouble, he consciously armed himself illegally and proceeded into the Waffle House, which directly led to the ultimate confrontation. (State's Exhibits 1 and 2 [Voluntary Statements]). *See Slater*, 644 S.E.2d at 52 (any action reasonably

calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense). Consequently, the evidence did not prove his self-defense claim as a matter of law.

Viewed in the light most favorable to the State, the evidence in this case created questions of fact for jury determination on each prong of the self-defense issue, and amply supports denial of Petitioner's directed verdict motion. The Court of Appeals properly affirmed the circuit court's ruling, and the Petition should be denied on this issue.

II. The Court of Appeals properly affirmed the circuit court's denial of Petitioner's motion for dismissal under the Protection of Persons and Property Act, because even if the Act applied, Petitioner failed to meet its requirements for immunity from prosecution.

Petitioner contends the Court of Appeals erred in affirming the denial of his motion for immunity pursuant to S.C. Code Ann. §16-11-450 and S.C. Code Ann. §16-11-440(C), because he was not engaged in an unlawful activity and was attacked in a place he had a right to be present (Waffle House). As with his directed verdict argument, Petitioner's contention ignores critical evidence. Further, he misconstrues the immunity provision of the Act as interpreted by this Court in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013).⁵

The expressly stated legislative intent of the Act is “to codify the common law Castle Doctrine which recognized that a person's home is his castle, and to extend the doctrine to include an occupied vehicle and the person's place of business.” S.C. Code Ann. §16-11-420(A) (Supp. 2013). The Legislature further provided “that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.” S.C. Code Ann. §16-11-420(B) (Supp. 2013).

The main thrust of the Act is set forth in §16-11-440(A), which “provides a presumption of reasonable fear of imminent peril of death or great bodily injury to a person who uses deadly force if he is attacked by or attempting to remove another from a dwelling, residence, or occupied vehicle.” Curry, 752 S.E.2d at 266. If subsection (A)

⁵Petitioner completely ignores the Curry analysis and holding, stating only there was no valid self-defense claim in that case, which he summarily contends distinguishes Curry from this case. As discussed herein, however, Petitioner likewise had no valid self-defense claim.

does not apply, the analysis defaults to subsection (C), “which deals with the use of force by one who is attacked in another place where he has a right to be.” *Id.*

Any immunity from prosecution afforded under §16-11-450 only applies “*if* a person is found to be justified in using deadly force.” *Id.* (emphasis in original). Using a preponderance of the evidence standard, the trial court must determine the right to immunity pre-trial, which the appellate court reviews for abuse of discretion. *Id.* “A **valid case of self-defense must exist**,” and the trial court “must necessarily consider the elements of self-defense in determining a defendant’s entitlement to the Act’s immunity,” which “includes all elements of self-defense, save the duty to retreat.” *Id.* (emphasis added).

The circuit court questioned whether the Act applied in this case because Petitioner was not in his home, vehicle or business when the shooting occurred. Admittedly, whether “another place where he has a right to be” extends beyond places in which the person has a possessory interest remains an open question in South Carolina. The Court does not need to address the issue in this case because the applicability of the Act was not the ultimate basis for the circuit court’s ruling, and Petitioner failed to establish a valid claim of self-defense.

The circuit court expressly found that even if the Act applied, Petitioner failed to sufficiently establish a valid self-defense claim for purposes of immunity. Specifically, the court found Petitioner “failed to establish by a preponderance of the evidence 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.” (R., pp. 51-52). As discussed above in Issue I, the evidence amply supported the circuit court’s ruling.

Ignoring the duty to retreat prong for purposes of argument only, the evidence Petitioner presented at the pre-trial hearing, including his own statements to police, clearly established Petitioner’s fault in bringing on the difficulty, which standing alone, vitiates his immunity claim. Rather than simply leaving when he recognized some of the people in the parking lot, Petitioner consciously armed himself illegally and went inside the Waffle House. He then voluntarily went back outside after Glover confronted him, well knowing there could be trouble. Petitioner never actually saw anyone holding a gun, and in response to a blow to his head, he immediately started shooting, chased Victim through the parking lot while shooting him in the back, and then kicked and shot Victim after he fell down.⁶ (State’s Exhibit 1, State’s Exhibit 2; R., pp. 20-46).

Using a tortured analysis, Petitioner argues this Court’s holding in Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005), does not apply because the instant case involved a restaurant, which involves food as a basic human need. He asserts Gilchrist involved a night club, which is “a place that stays open late at night and provides food, drink, and entertainment,” and is “an environment that does not meet a human need, and where alcohol may be served, and where dancing is a part of the scenery, which in turn most likely would encompass the potential for immoral behavior.” (Petition, pp. 9-10). Petitioner’s argument is internally inconsistent on its face because a restaurant frequently stays open late at night,⁷ serves alcohol, and provides entertainment.

⁶As noted above, there was no evidence of any other guns present or shots fired.

⁷Indeed, Waffle Houses are generally open twenty-four hours a day.

Even overlooking the inconsistency, however, Petitioner completely misses the point. The extent of the Act's applicability to a "place where [the person] has a right to be" is open to debate, but it is not necessarily determined by the type of place involved, and may include virtually any place generally open to the public.

There is no dispute Petitioner had the right to be in the Waffle House, but the inquiry does not end there. Petitioner did not have a legal right to enter the Waffle House, or any other place, carrying a concealed firearm, so he was "engaged in an unlawful activity" when he did.⁸ Based on that undisputed fact alone, the Act does not apply to Petitioner.

Further, as this Court held in Curry, the applicability of §16-11-440(C) requires "a valid case of self-defense," which "includes all elements of self-defense, save the duty to retreat." 752 S.E.2d at 266. Thus, even assuming for argument purposes Petitioner was not engaged in unlawful activity, and was in a place he had a right to be, and therefore had no duty to retreat, he must still establish all the other elements of self-defense before he would be entitled to immunity under §16-11-440(C). As discussed in detail above, at a minimum he simply could not establish he was not at fault in bringing on the conflict.

The circuit court's determination Petitioner was not entitled to immunity under the Act is amply supported by the evidence, and the Court of Appeals properly affirmed the circuit court's ruling. Accordingly, Petition should be denied as to this issue.

⁸Petitioner's continued declarations he was not engaged in an unlawful activity do not alter the undisputed facts establishing he was. Simply stated, Petitioner saying it repeatedly "don't make it so."

CONCLUSION

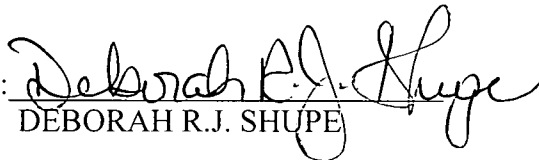
Based on the foregoing, Respondent submits the Petition for Writ of Certiorari to the Court of Appeals should be denied in its entirety.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

BARRY BARNETTE
Solicitor, Seventh Judicial Circuit

By: 
DEBORAH R.J. SHUPE

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 13, 2015

RECEIVED

JUL 13 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Spartanburg County
 The Honorable J. Derham Cole, Circuit Court Judge
 Appellate Case No. 2015-001332
 (Opinion No. 2015-UP-178, S.C. Ct. App., filed April 8, 2015)

S.C. Supreme Court

THE STATE,

Respondent,

v.

ANTWON M. BAKER, JR.,

Petitioner.

PROOF OF SERVICE

I, Sally Ellison, certify I served the Return to Petition for Writ of Certiorari to the Court of Appeals on Petitioner by depositing copies in the United States mail, postage prepaid, addressed to:

Wanda H. Carter
 Chief Deputy Appellate Defender
 South Carolina Commission on Indigent Defense
 Division of Appellate Defense
 PO Box 11589
 Columbia, SC 29211-1589

I further certify all parties required by Rule to be served have been served.

This 13th day of July, 2015.



SALLY ELLISON
 Legal Assistant

Office of Attorney General
 Post Office Box 11549
 Columbia, SC 29211
 (803) 734-3727

The Supreme Court of South Carolina

The State, Respondent,

v.

Antwon Michele Baker, Jr., Petitioner.

Appellate Case No. 2015-001332

Lower Court Case No. 2013-GS-42-02013

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Baker*, Op. No. 2015-UP-178 (S.C. Ct. App. filed April 8, 2015). We deny the petition.



C.J.
FOR THE COURT

Columbia, South Carolina

October 8, 2015

cc:

Wanda H. Carter, Esquire

Alan McCrory Wilson, Esquire

Deborah R.J. Shupe, Esquire

Barry Joe Barnette, Esquire

The Honorable Jenny A. Kitchings

The Honorable M. Hope Blackley



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

November 20, 2015

The Honorable M. Hope Blackley
PO Box 3483
Spartanburg SC 29304-3483

REMITTITUR

Re: The State v. Antwon M. Baker, Jr.
Lower Court Case No. 2013GS4202013
Appellate Case No. 2013-001366

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Wanda H. Carter, Esquire
Alan McCrory Wilson, Esquire
Deborah R.J. Shupe, Esquire
Barry Joe Barnette, Esquire

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF Spartanburg)Antwon)Antwon Michele Baker, Jr., 3536TB,)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

2015-CP-42- 5198

APPLICATION FOR

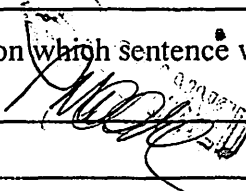
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and veified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention SCDC at Perry Correctional Institution
2. Name and location of Court which imposed sentence General Sessions Court for Spartanburg County
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012-GS-42-3668 (murder)
 - (b) 2013-GS-42-2013 (unlawful carrying of a Pistol)
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. Petition for Writ of Certiorari
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. The Court denied the appeal
- ii. The Petition for Writ of Certiorari was denied.
- iii. _____
- (c) the date of each such result:
- i. April 8, 2015
- ii. October 8, 2015.
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Opinion No. 2015-UP-178-Filed April 8, 2015
- ii. N/A
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A
- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

CLERK OF COURT
SPARTANBURG COUNTY
2015 DEC 21 AM 9:39
M. HOPE BACKLEY

- (a) Ineffective assistance of trial Counsel
- (b) The trial Court lacked Subject Matter Jurisdiction to convict the applicant
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Trial Counsel failed to object to a constructive amendment of applicant's murder indictment.
- (b) _____
- (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No N/A
- (d) any other petitions, motions or applications in this or any other Court? Yes

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. Petition for Rehearing
- ii. Petition for Writ of Certiorari
- iii. _____
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. S.C. Court of Appeals
- ii. S.C. Supreme Court
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. Petition for Rehearing was denied May 21, 2015
- ii. Petition for Writ of Certiorari was denied
- iii. _____

CLERK OF COURT
SOUTH CAROLINA
2015 DEC 21 AM 9:39
M. HOPE BLACKLEY

- iv. _____
- (d) the date of each such disposition:
- i. denied May 21, 2015
- ii. denied October 8, 2015
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A N/A
- ii. N/A
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. _____

- (b) the proceedings in which each ground was raised:

- i. N/A
- ii. N/A
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) Exclusive PCR Issue
- (b) II
- (c) _____

17. Were you represented by an attorney at any time during the course of:

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M. HOPE BLANKLEY
ST. MARTIN'S COUNTY
COURT

- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

- i. Robert E. Januario,
- ii. Wanda H. Carter, P.O. Box 11589, Columbia, S.C. 29211-1589
- iii. _____

(b) the proceedings at which each such attorney represented you:

- i. Trial
- ii. Direct appeal
- iii. _____

19. State clearly the relief you seek in filing this application:

Reversal and Dismissal of the Case

20. Are you now under sentence from any other court that you have not challenged?

No

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SPARTANBURG COUNTY
2015 DEC 21 AM 9:39
M. HOPE ELACKLEY

STATE OF SOUTH CAROLINA)
)
 County of)

VERIFICATION

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Attorney M. Baker Jr

SWORN to and subscribed before me this 17
 day of December, 2015.

Tamara Connell (L.S.)
 Notary Public

My Commission Expires: My Commission Expires
September 23, 2023

RECEIVED

DEC 17 2015

P.C.I. MAILROOM

CLERK OF COURT
 SPARTANBURG COUNTY
 2015 DEC 21 AM 9:39
 M. HOPE BLACKLEY

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, , hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Arthur M. Baker Jr.
Applicant

SWORN or affirmed to and subscribed before me this
17 day of December, 2015.

Tamara C. Enwell
Notary Public

My Commission Expires

My Commission Expires: September 25, 2023

RECEIVED

DEC 17 2015

P.C.I. MAILROOM

2015 DEC 21 AM 9:39
 CLERK OF COURT
 SPANISHBURG COUNTY
 M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
Antwon Michael Baker, Jr.,	)	
SCDC No. 353673,	)	
Applicant,	)	MEMORANDUM OF LAW
	)	IN SUPPORT OF APPLICATION
v.	)	FOR POST-CONVICTION
	)	RELIEF
The State,	)	
Respondent.	)	

Come now, the applicant, above named, presents his Memorandum of Law in Support of Application for Post-Conviction Relief (PCR) and would show the following unto the Honorable Court.

STATEMENT OF THE CASE

The applicant was indicted by the Spartanburg County Grand Jury during the July 2012 Term of General Sessions Court on one count of murder (2012-GS-42-3668) and in May 2013 the Grand Jury also indicted him for unlawful carrying a pistol (2013-GS-42-2013) in connection with the murder offense. He was represented by Robert Eugene Ianurgio, Esq., and the State was represented by Derrick B. Bullock, Solicitor for Spartanburg County. The applicant went to trial on June 3-6, 2013, before the Honorable J. Derham Cole, Judge and Jury. The Jury found him guilty of manslaughter and unlawful carrying a pistol, and Judge sentenced him to eighteen (18) years for manslaughter and one (1) year for unlawful carrying a pistol. A timely appeal was filed on applicant's behalf.

The applicant was represented on direct appeal by Wanda H. Carter, Deputy Chief Appellate Defender. The Court of Appeals Affirmed the lower Court's convictions (2013-001366 in unpublished Opinion No. 2015-UP-178, Submitted March 1, 2015 - Filed April 8, 2015. A timely Petition for Rehearing was filed on April 22, 2015. On May 21, 2015, the Court of Appeals denied the Petition for Rehearing.

On June 22, 2015, a Petition for Writ of Certiorari was filed to the Court of Appeals. On October 8, 2015, the S.C. Supreme Court denied the petition.

ARGUMENTS

(1) The trial Court lacked Subject-matter Jurisdiction to try and convict the applicant.

To begin with, the South Carolina Constitution and Statutory Laws mandates that "no person may be held to answer for any crime... except upon a presentment of indictment by a grand Jury of the County where the crime took place". S.C. Const., Art. I, §11; S.C. Code Ann. §17-19-10.

In this case, the petitioner contends that the Spartanburg County Solicitor did not lawfully obtain his murder indictment by way of a lawfully convened Spartanburg County Grand Jury to justify his trial and conviction. In addressing such ^{a claim} as that alleged by the applicant, the S.C. Supreme Court has held that it will presume a lawful presentment of indictment to the grand Jury absent any evidence to the contrary. State v. James, 472 S.E.2d 38 (S.C. App. 1986).

For evidence contrary to the lawful presentment of his murder indictment, the applicant submits that the face of his indictment indicates that it was "True Billed" on July 19, 2012 (a Thursday); the body of the indictment indicates that the grand Jury convened to present his indictment on July 19, 2012 (a Thursday). However, contrary to these Thursday dates, the face of the indictment indicates that the Spartanburg General Sessions July Term of Court did not began until July 23, 2012, the Monday following the "Thursday dates" indicated by his indictment?

Having shown there was no "July 19, 2013, term of general Sessions court in Spartanburg County to convene a grand Jury for presentment of his murder indictment, the appli-

Cant now directs the Court's inquiry as to whether the Court's inquiry as to whether the absence of a grand Jury's lawful presentment of his indictment could deprive the general Sessions Court of its "subject-matter Jurisdiction to try and Convict him."

Having shown there was no "July 19, 2013," term of general Sessions Court in Spartanburg County for presentment of his murder indictment, the applicant now directs the Court's inquiry as to whether the absence of a grand Jury's lawful presentment of his indictment could have deprived the general Sessions Court of its "Subject-matter Jurisdiction" to try and Convict him.

This question has been answered by the U.S. Supreme Court's decision in U.S. v. Cotton, 122 S.Ct. 1781 (2002), which guided the S.C. Supreme Court's ruling in State v. Gentry, 610 S.E.2d 494 (2005). In both Cotton and Gentry, the Courts held that the term "subject-matter Jurisdiction" means the Court's "Statutory and Constitutional" power to adjudicate (try) cases.

Here, a review of S.C. Constitutional and Statutory Laws shows that (1) no person may be held to answer for any crime except upon presentment of an indictment by a grand Jury, S.C. Const., Art I, §11; and (2) the "grand Jury shall meet with the Court of general Sessions at each of its terms (to present bills of indictments)," S.C. Code §14-9-170; (3) the County Solicitor shall... present to grand Jury (while it is at a term of general Sessions Court) bills of indictment (to be true billed (for general Sessions Court's Jurisdiction to try criminal cases), S.C. Code §14-9-210.

As shown above, no indictment may be presented by a grand Jury, or true billed, when general Sessions Court is not in a term since the grand Jury's Jurisdiction is coextensive (having necessary authority) with the Criminal Jurisdiction of the general Sessions Court in which it is convened and for which it is to make inquiry (on bills of indictments). See State v. McClure, 289 S.E.2d 158 (1982).

Accordingly, as there was no general Sessions Court in a term on July 19, 2012, (when there was no term of general Sessions Court) the grand Jury could not have lawfully presented the applicant's indictment to confer Subject-matter Jurisdiction upon the trial Court to Convict and Sentence applicant.

Wherefore, for the foregoing reason, the Honorable Court should Reverse and Vacate the applicant's Conviction due to the Court's lack of Subject-matter Jurisdiction to Convict and Sentence him.

CLERK OF COURT
SPARTANBURG COUNTY

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M. HOPE BLACKLEY

6) The applicant was denied the right to effective assistance of trial Counsel by Counsel's failure to object to the Solicitor's constructive amendment of his murder offense.

To establish a claim of ineffective assistance of Counsel, a PCR applicant must show that Counsel's representation fell below an objective standard of reasonableness and, but for Counsel's error, there is a reasonable probability that the results at trial would have been different; a reasonable probability is one that is sufficient to undermine confidence in the outcome at trial. Edmond v. State, 534 S.E.2d 682 (S.C. 2003).

Here, the applicant submits that during his trial the Solicitor constructively amended his murder indictment to convict him of an "unindicted manslaughter" offense. A constructive amendment occurs when either the Solicitor (usually during his presentation of his evidence and/or his closing argument to the Jury), or when both the Solicitor and Court broaden the possible bases for conviction beyond those (charges) presented by a grand Jury. See, e.g., U.S. v. Floresca, 38 F.3d 706 (4th Cir. 1994); Stirone v. United States, 80 S.Ct. 270 (1960) (holding that after an indictment has been presented (by grand Jury) its charges may not be broadened (changed) except by grand Jury itself).

Accordingly, the applicant was indicted for murder; however, during his trial, the Solicitor presented evidence of a "manslaughter offense" by two of its witnesses, Justin Davis and Joshua Hance, as follows:

Solicitor: Okay. Would you in your own words tell the Jury what happen?

Davis: We were leaving the Waffle House, and that's when the (defendant) pulled up. And that's when Anthony (victim) was like that's the dude (defendant) who pulled a gun on me a week ago... And that's when Little Bradon (victim's friend) went out and him (defendant) to come outside (of the Waffle House)...

He (defendant) came out, and we (victim's friends) approached him (defendant) and asked him what happen between him and victim... and told him (defendant) that he had to fight (victim). And when defendant tried to walk back into the Waffle House,

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M. HOPE BLACKLEY
SPRINGFIELD COUNTY

Brandon (victim's friend) hit defendant in the head. That's when he (defendant) pulled out a gun and started shooting (the victim).

Solicitor: So all this happened because of something Anthony (victim) said?

Tr. p. 104, L. 8 - p. 105, L. 17.

In addition, the Solicitor presented testimony by Joshua Hince, a Waffle House employee, as follows:

Solicitor: Tell the Jury what you saw?

Hince: I seen Mr. Baker (defendant) come in Waffle House and ordered his food. There was another gentleman come inside and they went out the door.

As Mr. Baker (defendant) was coming back in there was a gentleman come running up beside of the building. He hit Mr. Baker (defendant) in the side of the head, and that's when Mr. Baker pulled out the gun, and he (defendant) started shooting.

Tr. p. 215, L. 20 - p. 216, L. 2.

At the close of the case and during request for Jury charges, the Solicitor requested a Jury charge on its amended manslaughter offense, as follows:

Solicitor: The State believes that while the Jury could certainly find malice based on the extent of the shooting and number of shots, the State also believe that they (Jury) might find that there was no malice or that malice was negated by "Sufficient legal provocation, the defendant acted in heat of passion". Therefore we would request a lesser included offense of manslaughter.

Tr. p. 439, L. 1 - p. 440, L. 6.

Here, while defense Counsel did take exception to the Solicitor's requested manslaughter Jury charge, he did not specifically object to this requested charge by the Solicitor to preserve this issue for appellate review. Tr. p. 440, L. 4-20. Thus, the applicant contends that Counsel's failure to object to this requested charge was ineffective assistance of Counsel. The Judge agreed to charge the Jury on the Solicitor's

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CLERK OF COURT
SPRINGFIELD COUNTY

manslaughter offense. Tr. p. 440, L. 21 - p. 441, L. 25.

For a review of the prejudice prong of his ineffective assistance of Counsel claim, the applicant submits that it is well-settled law in South Carolina that a criminal defendant is entitled to be tried only on the indicted offense; and if convicted, he must be convicted on the particular offense charged in the indictment. See State v. Ellison, 586 S.E.2d 596 (S.C. App. 2003); accord In re Winship, 90 S.Ct. 1068 (1970) (holding that least there be any doubt, the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the charge for which he is indicted).

Here, contrary to Ellison and Winship, the applicant submits that the solicitor's presentation of the state's manslaughter evidence and requested jury charge on this offense amounted to a "constructive amendment" of his murder indictment to specifically convict him of an unindicted manslaughter offense. Therefore, the applicant submits that his counsel's failure to object to the solicitor's requested jury charge on its constructive amended manslaughter offense was per se prejudicial as it deprived him of a fundamental right to a fair trial and subjected him to a conviction on a unindicted manslaughter offense. Tr. p. 540, L. 2-4.

See State v. Ramsey, 430 S.E.2d 511 (S.C. 1993), holding that when case has been submitted on erroneous jury instructions, prejudicial to a defendant, judgment should be reversed. The applicant accordingly contends that counsel's failure to object to the erroneous jury request deprived him of a review of this issue on direct appeal where there was a reasonable probability of obtaining a reversal of his conviction. Edmon, Supra.

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SPARTANBURG COUNTY
CLERK OF COURT
B. ACKLEY

The applicant was denied the right to effective of Counsel by Counsel's failure to motion the Court for a verdict in arrest of Judgment and entry of a verdict of acquittal on his conviction for an unindicted, constructive amended manslaughter offense.

To prove Counsel was ineffective, a post-conviction relief applicant must show that Counsel's performance was deficient and the deficient performance caused prejudice to the applicant's case. McLaughlin v. State, 575 S.E.2d S.E.2d 841 (S.C. 2003), accord Strickland v. Washington, 104 S.Ct. 2052 (1984).

As previously shown, the applicant was indicted for murder. Consequently, during his trial the Solicitor introduced evidence of applicant alleged commission of a "manslaughter offense" during the State's presentation of its case. Tr. p. 104, L. 8 - p. 105, L. 17; Tr. p. 215, L. 20 - p. 216, L. 2. Based on this presentation of evidence, the Solicitor requested a Jury Charge on manslaughter. Tr. p. 440, L. 21 - p. 441, L. 15.

The Judge honored the Solicitor's request and charged the Jury on the offenses of murder, manslaughter (Tr. p. 523-526), and, in particular charged the Jury that the applicant had only raised a "self-defense" defense to challenge his murder charge (Tr. p. 526, L. 5-10). The Jury found him guilty of the Solicitor's and Judge's "Constructive Amended Manslaughter offense". Tr. p. 540, L. 2-4. The Judge sentenced him to eighteen (18) years on the Constructive amended manslaughter offense.

Thus, the applicant contends that a Constructive amended of his murder occurred when the Judge's Jury Charge on the manslaughter offense broadened (amended) the basis for his conviction beyond those presented by the grand Jury's indictment. Addressing such an amendment (broadening) of an indictment, the U.S. Supreme Court held that a Constructive amendment of an indictment constitutes error per se... because a Court cannot permit a defendant to be tried ^{on} charges that are not made in the indictment against him. Storey v. U.S., 361 U.S. at 217, 80 S.Ct. at 273.

Notwithstanding, the Stirone Court held that for clarity sake, it pointed out that where the government's presentation of evidence at trial does not broaden the legal bases for conviction by allowing the jury to consider a "different or less specific offense" no constructive amendment occurs. 361 U.S. at 217, 80 S.Ct. at 273. (The jury was allowed to consider a lesser offense in this case).

In fashioning a remedy to correct an unlawful constructive amendment such as that in the applicant's case, our S.C. Supreme Court has held that a defendant may move for a verdict in arrest of judgment and entry of a judgment of acquittal where the trial court lacked subject-matter jurisdiction to convict or sentence him upon an unindicted manslaughter offense see e.g., State v. Follin, 573 S.E.2d 812 (S.C. App. 2002); State v. Taylor, 558 S.E.2d 917 (S.C. App. 2001); State v. Brown, 23 S.E.2d 381 (1942).

Finally in conjunction with the S.C. Supreme Court's holding in Follin, Taylor, and Brown above, the U.S. Supreme Court has held that a constructive amendment of an indictment constitutes error per se because a court cannot permit a defendant to be tried on a charge not made in the indictment against him. Id. 361 U.S. at 217, 80 S.Ct. at 273. Therefore, trial counsel's failure to move for a verdict in arrest of judgment and entry of judgment of acquittal based on the trial court's lack of subject-matter jurisdiction to convict him of an "unindicted manslaughter offense" was ineffective assistance of counsel that was per se prejudicial to entitle him to reversal of his conviction. McLoughlin, Supra, Strickland, Supra.

CONCLUSION

WHEREFORE, for the foregoing reasons set forth above, the Honorable Court should reverse and vacate the applicant's conviction(s).

Respectfully Submitted

Antawn M. Baker Jr.

Antawn Michael Baker, Jr.

SCAC No. 353673

Perry Correctional Inst.

430 Oaklawn Road - 048/

Peizer, S.C. 29669

This 17 day of December, 2005

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Antwon Michele Baker, Jr. , #355673,	)	Case No.: 2015-CP-42-5198
	)	
Applicant,	)	
	)	RETURN AND MOTION FOR
v.	)	A MORE DEFINITE STAMTENT
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on December 21, 2015, would respectfully show this Court:

I.

Antwon Michele Baker, Jr. ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the July 2012 term of Spartanburg County Grand Jury for murder (2012-GS-42-3668) and at the May 2013 term of the Spartanburg County Grand Jury for unlawful carrying of a pistol (2013-GS-42-2013). Robert E. Ianuario, Esquire, and Matt Canady, Esquire represented Applicant. On June 3-6, 2013, Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Applicant guilty of the lesser included offense of voluntary manslaughter and as indicted for the unlawful carrying of a pistol. Judge Cole sentenced Applicant to imprisonment for concurrent terms of 18 years for voluntary manslaughter and one year for unlawful carrying of a pistol.

Applicant filed a timely notice of appeal. Wanda H. Cater, Esquire represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Baker, Op. No. 2015-UP-178 (S.C. Ct. App. filed April 8, 2015). A Petition for Rehearing was

filed on Applicant's behalf, which was subsequently denied by the Court of Appeals on May 21, 2015. On June 22, 2015, Applicant filed a Petition for Writ of Certiorari to review the Court of Appeals' opinion. The South Carolina Supreme Court denied the petition in an order dated October 8, 2015. The Remittitur was returned on November 20, 2015.

Attached herewith and incorporated herein by reference are the records of the Spartanburg County Clerk of Court regarding the subject conviction, the transcript from Applicant's trial, and Applicant's records for the Department of Corrections and appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel, in that;
 - a. Trial counsel failed to object to a constructive amendment of applicant's murder indictment
2. Trial court lacked subject matter jurisdiction.

III.

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant alleges the court did not have subject matter jurisdiction over his charges. An Applicant may challenge the subject matter jurisdiction of the trial court and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). However, "[c]ircuit courts

obviously have subject matter jurisdiction to try criminal matters." Gentry, 363 S.C. 93; See also S.C. Const. Art. V, § 7. Thus, the Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. The Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction. The Respondent submits the Applicant has failed to present any evidence that the convictions he challenges in this application are in a class over which the circuit court does not have the authority to provide. Therefore, the Respondent requests that this allegation be summarily dismissed.

V.

Respondent also hereby moves for a more definite statement. Applicant has failed to set forth any facts to "support each ground" or to explain with any specificity whatsoever the facts upon which his claims are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

VI.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. All claims should

be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

VII.

Respondent therefore requests that this Court convene an evidentiary hearing only on the allegations of ineffective assistance of trial counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact that would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VIII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

[conclusion and signature on following page]

IX.

WHEREFORE, having made its Return and Motion for More Definite Statement, Respondent requests that a hearing be held solely on the claims of ineffective assistance of trial counsel.

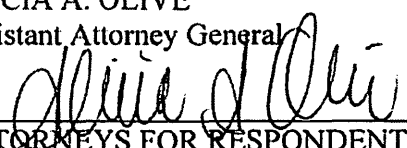
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA VALENZUELA
Senior Assistant Deputy Attorney General

ALICIA A. OLIVE
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

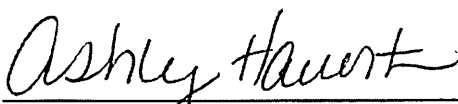
July 12th, 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
	)	2015-CP-42-5198
ANTWON MICHELE BAKER, #355673,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ms. Susannah C. Ross, Esquire
Ross & Enderlin, PA
330 East Coffee St.
Greenville, SC 29601

DATED this 12TH day of July, 2016.

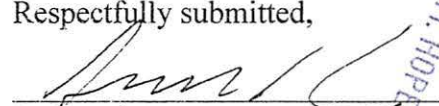


 Ashley Haworth, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	IN THE SEVENTH CIRCUIT
	)	
ANTWON BAKER	)	
APPLICANT,	)	
	)	APPLICATION ADDENDUM
VS.	)	
	)	
THE STATE OF SOUTH CAROLINA	)	CASE NO: 2016-CP-42-5198
RESPONDENT.	)	

This matter comes before the Court by way of application of post conviction relief filed December 21, 2015, alleging ineffective assistance of trial counsel for failing to object to the voluntary manslaughter charge and Due Process violations and lack of subject matter because the murder indictment was true billed July 19, 2012, when the Grand Jury was not convened until July 23, 2012. A Return was made on July 12, 2016, requesting a more definite statement of the allegations. This application is intended to incorporate Mr. Baker's allegations and additionally alleges Fifth, Sixth, Eighth and Fourteenth Amendment violations of the Constitution of the United States & Art. I Sec.3, 10, & 14 of the South Carolina Constitution due to ineffective assistance of trial counsel for failing to investigate, make proper objections to State's attacks on opposing counsel, and failure to request charges on appearances and State's burden to disprove self-defense.

Respectfully submitted,


 Susannah Ross
 Attorney for the Applicant
 330 E. Coffee St,
 Greenville, SC 29601
 (864) 242-0029

Greenville, South Carolina
 This 30 day of December, 2016

CLERK OF COURT
 SPARTANBURG COUNTY
 2017 JAN 25 PM 2:41
 M. HOPKINS-BLACKLEY

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF COMMON PLEAS
3
4 Antwon Michele Baker, Jr.,)
5 Applicant,) TRANSCRIPT OF RECORD
6 -vs-) 2015-CP-42-5198
7 The State,)
8) March 21, 2017
9 Respondent.) Spartanburg, South Carolina
10

11 B E F O R E:

12 HONORABLE ROBIN B. STILWELL, JUDGE
13
14

15 A P P E A R A N C E S:

16 SUSANNAH C. ROSS, ESQUIRE
17 Attorney for the Applicant

18 ALICIA A. OLIVE, ESQUIRE
19 Attorney for the Respondent
20
21
22

23 Margaret A. Woods
24 Circuit Court Reporter
25

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DERRICK BULSA

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Certificate of reporter 68

NO EXHIBITS INTRODUCED

MOTIONS AND MATTERS

1 THE COURT: Okay, let's call to bar the case of Antwon
2 Michele Baker, Jr. vs. the State a South Carolina, it's case
3 number 2015-CP-42-5198 and you are Mr. Baker, sir?

4 THE APPLICANT: Yes, sir.

5 THE COURT: And good mornin', how are ya ---

6 THE APPLICANT: Doin' well.

7 THE COURT: --- today, sir?

8 THE APPLICANT: Fine, how are you?

9 THE COURT: Good, thank you. Okay, Ms. Olive, I'll be
10 happy to hear from you, ma'am.

11 MS. OLIVE: Thank Your Honor, may it please the Court.
12 Mr. Baker was indicted in the July 2012 term of the
13 Spartanburg County grand jury for murder and subsequently at
14 the May 2013 term for unlawful carrying of a pistol, he was
15 represented by Robert Ianuario and Matt Canaday [sic]. On
16 June 3rd through the 6th 2013, he proceeded to trial before
17 Judge Cole and a jury, the jury found him guilty of the lesser
18 included offense of voluntary manslaughter and as indicted for
19 the unlawful carrying of a pistol. Judge Cole sentenced him
20 to concurrent terms of 18 years for voluntary manslaughter and
21 1 year for unlawful carrying of a pistol. He did file timely
22 notice of appeal and the South Carolina Court of Appeals
23 affirmed his conviction in an unpublished opinion filed April
24 8th 2015, subsequently a petition for rehearing was denied by
25 the Court on May 21st 2015. He filed a petition for writ of

MOTIONS AND MATTERS

1 certiori with the South Carolina Supreme Court which was
2 denied October 8, 2015, the remittitur was returned on
3 November 20th 2015. He subsequently filed this application
4 for post-conviction relief on December 21st 2015 which he
5 alleges ineffective assistance of trial counsel or failure to
6 obdrec -- object to a constructive amendment of his murder
7 indictment, he also alleges that -- he also alleged that the
8 trial court lacked subject matter jurisdiction. Your Honor,
9 the State filed a return in motion for a more definite
10 statement and Mr. Baker did amend his application on December
11 30th of 2016 alleging ineffective assistance of counsel,
12 failure to object to a voluntary manslaughter charge as well
13 as due process violation for lack of subject matter
14 jurisdiction. Your Honor, the State would move to dismiss the
15 allegation that the Court lacked matter jurisdiction, it's a
16 general sessions court, um, that it clearly had subject matter
17 jurisdiction over the charge and we would turn it over to
18 Ms. Ross at this time.

19 THE COURT: Okay, Ms. Ross.

20 MS. ROSS: Thank Your Honor, may it please the Court,
21 that and at some point I I did do an application and addendum
22 with, um, would a -- where I did, uh, alleged, um, subject
23 matter jurisdiction which was his, um, part of the application
24 but I also allege ineffective assistance of counsel dura --
25 due due to failure to investigate, make proper objections and

ANTWON MICHELE BAKER, JR. - DIRECT EXAMINATION BY MS. ROSS

1 failure to rest -- request charges on right to act on
2 appearances and burdens, State's burden disprove self-defense.
3 Um, this is essentially a stand your ground, um, case, uh,
4 which turned into a self-defense case. Mr. Baker, um, who had
5 no prior record didn't testify but I would, um, call him to
6 the stand right now.

7 THE COURT: Okay, all right. Mr. Baker, if you'd come up
8 please, sir.

9 (Whereupon, the applicant came forward.)

10 THE COURT: You come around here (indicating) and you
11 place your left hand on the Bible and then to the extent that
12 you're able raise your right hand, you put those papers down
13 just right there (indicating), there you go.

14 ANTWON MICHELE BAKER, having
15 been first duly sworn, testified as follows:

16 THE COURT: Okay, you just take a seat, please, sir, and
17 state your full name for the record.

18 THE APPLICANT: My name is Antwon Baker.

19 DIRECT EXAMINATION BY MS. ROSS:

20 Q. Hey there, Mr. Baker, um, I always ask this first in
21 post-conviction cases: Do you know what's gonna happen if you
22 prevail here today and you win this post-conviction relief
23 that you're requesting?

24 A. Yes, I am.

25 Q. What's gonna happen?

1 A. They say I'll face a murder charges all over again.

2 Q. All right, are are you willin' to do that and go forward
3 today?

4 A. Yes, ma'am.

5 Q. And and why are you willin' to do that?

6 A. I feel like, feel like I can, I mean, I wouldn't, I I
7 didn't murder nobody, self-defen [sic].

8 Q. And, uh, you've alleged, I guess the first allegation,
9 um, you've alleged ineffective assistance of counsel,
10 correct?

11 A. Yes, ma'am.

12 Q. Okay, a and do ya think that might have affected the
13 outcome of your trial?

14 A. Yes, ma'am.

15 Q. And, uh, one allegation ya had is did you want a
16 manslaughter charge in your case given?

17 A. No, ma'am.

18 Q. And that did you, um, tell that to your lawyer?

19 A. Yes, ma'am.

20 Q. And did your lawyer object to, um, a manslaughter charge
21 which was requested by the solicitor?

22 A. No, ma'am, he took exception but he never, uh, simply
23 object to the charge.

24 Q. So there was nothin' preserved on the record of that?

25 A. No, ma'am.

1 Q. And, um, what did the -- did the solicitor argue anything
2 in its closing that that ---

3 A. He ---

4 Q. --- you felt affected that?

5 A. --- he argued that, uh, when the jury deliberated they
6 want, they're movin' like by by malice ---

7 Q. Um-hum.

8 A. --- so he requested a less 'clude offense.

9 Q. Do you feel like he essentially argued, um, manslaughter
10 to the jury ---

11 A. Yes, ma'am.

12 Q. --- rather than murder?

13 A. Yes, ma'am.

14 Q. And, um, let's talk about your, that stand your ground
15 was an issue in your case, is that correct?

16 A. Yes, ma'am.

17 Q. Do you understand what that is?

18 A. Yes, ma'am, everybody got right defend themselves.

19 Q. And, um, do you realize that there's a specific statute
20 that applies to that?

21 A. Yes, ma'am.

22 Q. And do do you recall a hearing before the trial
23 addressing that statute?

24 A. Yes, ma'am.

25 Q. And what did you say in that hearing?

1 A. That I need testify.

2 Q. And why did you not testify?

3 A. He didn't call, that my, uh, trial counsel didn't call
4 upon me to testify durin' my pretrial hearing.

5 Q. Were you willin' to testify?

6 A. Yes, ma'am.

7 Q. Did you want to testify?

8 A. Yes, ma'am.

9 Q. Why didn't you?

10 A. He told me we was at, uh, a good state, it was up here
11 (indicating), if I testify it would knock us down to here
12 (indicating).

13 Q. Alright. What kinda prior record do ya have or did ya
14 have at the time?

15 A. Um, drivin' under suspension, a public disorder conduct.

16 Q. Alright. And if ya had testified just briefly what did
17 you, uh, what would you have said about shooting and I can't
18 remember, I'm sorry, I can't remember the victim's name in the
19 case, but about the shooting that that you were, um, bein'
20 tried for?

21 A. I'd a told her, I woulda got on the stand and told I fear
22 for my life.

23 Q. And why was that?

24 A. 'cause I was, I was outnumbered and there was multiple
25 people out there with guns, I was by myself and they try to

1 hurt me.

2 Q. Um, was there any background, uh, to that, who's "they?"

3 A. It was, it was Brandon, Brandon Glover, Justin Davis and,
4 uh, uh, Anthony Young.

5 Q. And how did ya -- and Anthony Young was the victim,
6 correct?

7 A. Yes, ma'am.

8 Q. And how did you know them?

9 A. From a prior altercation like two months before.

10 Q. What had happened then?

11 A. They had said some to a a mother of my child situation,
12 they try to jump on her and he said sumtin' to me and try jump
13 on me then that that happed [sic] two months prior to the
14 altercation.

15 Q. Okay. And what did he say to you?

16 A. Called all kinda names, um, 'fanity [sic].

17 Q. Were any threats made?

18 A. He say he was gonna hurt me whenever he catch me, that
19 what he basically said.

20 Q. Okay. And, um, when you went to the Waffle House that
21 day a lot was made of the fact that you carried a gun into the
22 Waffle House, is that your regular habit to carry a gun all
23 the time?

24 A. Yeah, ma -- yes, ma'am, 'cause I would be ganged multiple
25 times my life so I always carried a gun for protection.

1 Q. Okay. And when, um, you went in at that time that, uh,
2 who did you see?

3 A. Alright, when I, when I pulled up in the Waffle House, I
4 didn't see nobody at at first, I didn't recognize the car, so
5 I take it upon myself that that wasn't them, that somebody
6 might have a car similar to the situation ---

7 Q. Alright.

8 A. --- so I went in and I ain't seen them till they notice
9 me and try to call me outside.

10 Q. Okay, and how did that happen, do you recall?

11 A. When I, when I was in there orderin' my food, that's I
12 seen they came in sayin' then he's talkin' about, That's him
13 over there, uh, such and such ---

14 Q. Now speak clearly, I didn't understand what you just
15 said.

16 A. When I had, when I ordered my food, ---

17 Q. Uh-huh (affirmative).

18 A. --- they had came in, he had said, "That's him" and kept
19 pointin' sayin, "That's him," but they ran back outside and
20 came back, they had told me to come outside 'cause I had a
21 problem with one his cousins.

22 Q. Now, uh, did you, um, have any suspicion that they,
23 someone might have a gun?

24 A. Yes, ma'am, they were, they they say they they known for
25 carryin' guns.

1 Q. So you knew, you knew them personally for carrying guns
2 in the past?

3 A. I seen it when, I seen it when we had two, a two month,
4 our prior altercation that he had one.

5 Q. Alright. And then, uh, so how were you feeling at that
6 time?

7 A. I was tryin' to diffuse situation and try not to have no
8 problem that night 'cause it been too much 'cause I thought he
9 let it go and I was tryin' tell him let it go.

10 Q. And when it it it escalated, how did it escalate?

11 A. When I try to, when I see would, it would, it would get
12 to him that I try and tell him let it go, I try and turn my
13 back to get back in the Waffle House that I know that it was
14 gonna get outta hand, they weren't tryin' to hear that ---

15 Q. Um-hum.

16 A. --- and it's known that I was out outnumbered.

17 Q. Now at some point you're outnumbered, you were also hit,
18 correct, ---

19 A. Yes, ma'am.

20 Q. --- and, um, and that's what led to the shooting that
21 eventually happened.

22 A. Yes, ma'am.

23 Q. And would you, um, have testified to that if you
24 testified?

25 A. Yes, ma'am.

1 Q. And is that the truth?

2 A. Yes, ma'am.

3 Q. Now, um, you also didn't testify during the trial, did
4 you?

5 A. No, ma'am.

6 Q. And that's, uh, on page 439 of the, of the transcript and
7 I'll hand it to ya, you've marked page 440 but 439 the judge
8 talks you about you have a right to testify, et cetera, and
9 and you say, No, you agree not to, right?

10 A. Yes, ma'am.

11 Q. And why was that?

12 A. 'cause I had, me and my lawyer had, my trial counsel had
13 discussed it, that he told me that he don't want me to
14 testify.

15 Q. Did he bring up impeachment in any way, ---

16 A. No, ma'am.

17 Q. --- any way? Um, did he talk to you about whether the
18 State could cross you about prior ---

19 A. No, ma'am.

20 Q. --- incidents? So none a that was mentioned at all?

21 A. No, ma'am.

22 Q. Now, um, just goin' on, were there other places that you
23 think your lawyer could have objected where he did not?

24 A. Uh, far as my know, I know he could object to a instruct
25 amendment.

1 Q. Okay. And was that the part where the State asked for
2 manslaughter charge, ---

3 A. Yes, ma'am.

4 Q. --- he didn't object to that? Okay, I will refer you to
5 page 372, line 23, can you you, can you get to that and I'll
6 be happy just to or I'll show you mine, 320 --72, line 23.

7 Now this is, the context is questioning, uh, uh, one a your
8 witnesses who was in the Waffle House who saw one a the guys
9 who ganged you with a gun, right, ---

10 A. Yes, ma'am.

11 Q. --- that's where we are. What does it say on line 23
12 goin' on, can you read that?

13 A. "I don't mean to belabor this point but we have the man
14 that shot somebody, somebody tryin' to infer that this guy
15 couldn't [sic] have done it."

16 Q. Okay. And he's means when he just said this guy could
17 have done it, the one that the man the Waffle House saw with
18 a, says he saw with a gun, right?

19 A. Yes, ma'am.

20 Q. And was there any objection to that?

21 A. No, ma'am.

22 Q. And then the solicitor goes on to question, um, the guy
23 in the Waffle House, his eyewitness testimony, by showing one
24 of multiple camera angles ---

25 A. Yes, ma'am.

1 Q. --- and do you recall that in the courtroom?

2 A. Yes, ma'am.

3 Q. And there was no objection to that testimony by the
4 solicitor sayin' sayin' what he just said that ---

5 A. Uh, no, ma'am.

6 Q. --- he's tryin' to say we've got the right guy and he's
7 tryin' to say there's another guy with a gun.

8 A. Yes, ma'am.

9 Q. Okay. And, um, I'll refer you to page 487, line line 1,
10 during the closing the solicitor, I can get that in through
11 him, but, um, sorry I'm poor phrase it, what does he starts
12 talking about opposing counsel during the closing, what does
13 he say on line 24?

14 A. "Mr. Rono -- oh, how you say his name?

15 Q. Ianuario.

16 A. Ianuario has all the -- those questions 'bout the laser,
17 apparently he had some fatnason ---

18 Q. Fascination.

19 A. --- fascination with firearms and I don't believe that
20 you have insight of gun to shoot it, especially if you don't
21 have a close range, if you have it close range.

22 Q. Alright, so he's commenting directly on opposing
23 counsel's bizarre finas -- fascination with guns, wa -- was
24 there any objection to that?

25 A. No, ma'am.

ANTWON MICHELE BAKER, JR. - DIRECT EXAMINATION BY MS. ROSS

1 Q. And now there's one more. Okay, and on page 417, um, the
2 State puts up in reply a witness, a doctor that they put in,
3 Dr. Wren who is their forensic expert and witness, and, um,
4 that's put up in reply, um, is there any objection to that?

5 A. No, ma'am.

6 Q. And that's on page 417, line 22. Does your attorney
7 object to, um, reply evidence that doesn't respond to anything
8 that was part a your defense?

9 A. No, ma'am.

10 Q. And, in fact, it was used just to clear up an error it
11 seems like.

12 A. Yes, ma'am.

13 Q. Hm. Now on page 441, and and you'll notice, did your
14 lawyer request any jury instructions?

15 A. No, ma'am.

16 Q. And, um, did he object to the judge's jury instructions
17 on self-defense ---

18 A. No, ma'am.

19 Q. --- or on the right, of your right to act on appearances?

20 A. No, ma'am.

21 Q. Now, um, you've also alleged that he failed to
22 investigate, what investigation, um, do you feel he should
23 have done?

24 A. I feel that he shoulda done, um, that in, um, interview
25 witnesses, suppress statements 'cause there's another, there's

1 another witness that they had called Hunter with a gun and he
2 he took, he wrote a statement against me so he shoulda called
3 him to the stand too, it's multiple people they didn't call
4 you understand that wrote statements in my case.

5 Q. How many people you think were there at the scene?

6 A. I seen 'bout m -- like thirty.

7 Q. Okay. And you think that if there was more investigation
8 those people would support that there were lots of guns there
9 at that ---

10 A. Yes, ma'am.

11 Q. Okay. Now, um, how old are you?

12 A. I'm 30, thir -- I'm 31, be 32 next month.

13 Q. And on page 542 they read in your prior record and and
14 like you said at -- what was that prior record on line 6?

15 A. Defendant his ch -- prior record constitutes public di --
16 disorder conduct in 2009, drivin' under spension [sic] 2006.

17 Q. Okay. Um, were ya living' with anyone at the time?

18 A. I had, well I was livin' by myself.

19 Q. Okay. And, um, did ya have a job?

20 A. Yes, ma'am.

21 Q. Where was that?

22 A. I I workin' at, um, drugs, Smith drugstore warehouse but
23 I had got hired on a temp at the time.

24 Q. Alright. And how long you been workin' there? Uh, ---

25 A. Like eight -- eighteen months.

ANTWON MICHELE BAKER, JR. - CROSS-EXAMINATION BY MS. OLIVE

1 Q. Oh. That's all the questions I have in the case, is
2 there anything you'd like to testify to for the judge to hear
3 in your PCR?

4 A. No, ma'am.

5 Q. Okay, I've got nothing further.

6 THE COURT: Okay, Ms. Olive.

7 MS. OLIVE: Thank Your Honor.

8 CROSS-EXAMINATION BY MS. OLIVE:

9 Q. Mr. Baker, your testimony -- you testified as to how you
10 would have testified had your attorney presented you to
11 testify during your stand your ground hearing, ---

12 A. Yes, ma'am.

13 Q. --- is this testimony that you've given today consistent
14 with what you have been, with with your prior discussions with
15 your attorney prior to trial?

16 A. Yes, ma'am.

17 Q. Okay. So your testimony was that you walked into the
18 Waffle House to order your meal and that you saw these folks,
19 did you grab your gun before you saw these folks in the
20 parking lot or did you grab your gun after you saw these folks
21 in the parking lot?

22 A. When I pulled in the parking lot I seen a, like, um,
23 majority a people out in the parking lot they they were fit to
24 leave but, you know, I just grab it just in case, I always
25 grab it every time I get out the car in case.

1 Q. You grabbed it just in case.

2 A. Yes, ma'am.

3 Q. Did you recognize these people in the parking lot before,
4 after you grabbed your gun but before you walked into the
5 Waffle House?

6 A. No, ma'am.

7 Q. Okay. And what -- so when you walked into the Waffle
8 House you said someone came in and approached you?

9 A. Yeah, Brandon Glover.

10 Q. And you said that you told him you didn't want to, you
11 didn't want any part of it?

12 A. Yes, ma'am.

13 Q. Okay. Did you walk out into the parking lot?

14 A. He told me, when I told him I ain't want no part of it,
15 he told me to go tell Anthony that he want no part of it
16 'cause he did some type a way, that's why I walked outside the
17 Waffle House.

18 Q. Okay. And did you tell Anthony you didn't want any part
19 of it?

20 A. Yes, ma'am.

21 Q. Okay. Anthony was victim in this case?

22 A. Yes, ma'am.

23 Q. Okay. And then you turned around and walked back into
24 the Waffle House?

25 A. I tried. Before I could, you know, when I grabbed the

1 door then I got hit from behind.

2 Q. Okay, but you couldn't have just kept walking into the
3 Waffle House?

4 A. The door was pulled, I couldn't, I couldn't get out
5 unless I had to jerk back, I can't push it in, it's pulled.

6 Q. The door was "pulled" you said?

7 A. Yes, ma'am.

8 Q. Were there, were there multiple doors, was there just one
9 door?

10 A. It's two doors.

11 Q. Two doors. Which door was pulled?

12 A. Both of 'em, both are. If you on the outside
13 comin' -- goin' in, you gotta pull to get in the Waffle House.

14 Q. So both of them were closed at that point?

15 A. Yes, ma'am.

16 Q. So you had a choice to either walk outside or walk back
17 into the Waffle House?

18 A. Really I -- what you mean? I tried, I tried to walk back
19 in the Waffle House but I had to pull the door, that's how
20 they ran up beside me, hit me, attacked me for goin' back in.

21 Q. Okay. So at that point you couldn't have just opened the
22 door and gone back in?

23 A. No, ma'am.

24 Q. Why is that?

25 A. 'cause they were comin' up, well rushin' me, it was five

1 people rushin' me at one time.

2 Q. So all Mr. Glover did was punch you in the back a the
3 head?

4 A. Yes, ma'am.

5 Q. Okay. And then you started firing?

6 A. Yes, ma'am, after I got hit twice, it was Brandon Glover
7 and another gentleman ran up beside the buildin' hit me.

8 Q. Okay, but you just said it was just Brandon Glover?

9 A. That's the one that ca -- only reason his name came out
10 'cause I aint know nobody's names, he wrote a statement.

11 Q. Beg the Court's indulgence, Your Honor.

12 THE COURT: Sure.

13 BY MS. OLIVE:

14 Q. And in your testimony that you just gave,⁷ you didn't
15 testify that you saw a gun on anyone, right?

16 A. I testi -- I wrote in my statement that I seen somebody
17 holdin' their waistband like they had a gun.

18 Q. But you just testified as to what you would have
19 testified to in your stand your ground hearing and all you
20 said was that somebody hit you in the back a the head.

21 A. But and when I, when I was te -- when I was talkin' to
22 him, if I woulda had my stand ground hearin', I woulda told
23 'em right when they, when they approached me that somebody
24 holdin' their waistband like they had a gun in it.

25 Q. Okay, but you didn't actually see a gun?

1 A. It, I seen, I really see through his shirt but I can't
2 say I seen a gun.

3 Q. Okay. Okay, and again, all this occurred at a Waffle
4 House, not in a residence or in your vehicle.

5 A. Yes, ma'am.

6 Q. You testified -- the judge advised you of your right to
7 testify at your trial and you ultimately did not testify,
8 right?

9 A. Yes, ma'am.

10 Q. Okay. Did you decide not to testify based on your
11 discussions with your attorney?

12 A. I went and talked to him and I told him I wanna testify
13 but he told me right now we up here (indicating), if I testify
14 it'll knock us down here (indicating).

15 Q. Say that again, I'm sorry.

16 A. I would, I would, they gave me like a day to testify and
17 talk it over to my attorney ---

18 Q. Um-hum.

19 A. --- so when came back next mornin' he told me was I gonna
20 testify, I said yes, but he's like, Mr. Baker, but if you
21 testify, we up here (indicating) right now, if you testifies
22 knock it down to here (indicating).

23 Q. What what do you mean by "we're up here right now" or
24 "we're --

25 A. I guess in his word we were lookin' good at the time.

1 Q. Did he say -- was he concerned about whether you were
2 gonna be a good witness for yourself?

3 A. I don't know, I don't know he even discuss that with
4 me.

5 Q. So you told him that you wanted to testify but you didn't
6 insist on testifying? You didn't ask him for more of an
7 explanation?

8 A. No, ma'am.

9 Q. So all he told you was that, We're here right now and if
10 you testify we're gonna be down here?

11 A. Yes, ma'am.

12 Q. But he, did he tell you it was ultimately your
13 decision?

14 A. No, ma'am.

15 Q. But the judge told you it was your decision, did he
16 not?

17 A. Yes, ma'am.

18 Q. You testified there were thirty people in the parking
19 lot?

20 A. Yes, ma'am.

21 Q. And your testimony today is that you believe your
22 attorney should have investigated those people?

23 A. Yes, ma'am.

24 Q. But your attorney, your attorney went over the discovery
25 with you in this case?

1 A. No, ma'am, I ain't see no motion till the day of trial
2 where he say we're gonna start our trial. Every time he came
3 to see me the county he came with a a yellow tablet, ask me
4 how to shoot a gun and situations like that.

5 Q. Your testimony is your attorney never went over the
6 evidence with you?

7 A. No, ma'am, until we're about to go to trial.

8 Q. When you say you were about to go to trial, what what,
9 exactly when do you mean?

10 A. 'cause he he had, 'cause week before he came to me in the
11 county, he was like he wanna receive payment if I had a
12 payment by by We, uh, Wednesday he gonna do sumtin', he go to
13 solicitor and they will talk out a lessen the charge, uh, do
14 such and such but I won't be able to afford it so Sunday he
15 came with the case file and he said we're goin' to trial
16 Monday mornin'.

17 Q. And you -- so your testimony is that the first time your
18 attorney reviewed the discovery with you was a week before the
19 trial?

20 A. Well the day before the trial really.

21 Q. Day before the trial?

22 A. Yes, ma'am.

23 Q. Do you have any of these statements of these witnesses
24 here today?

25 A. No, ma'am.

1 Q. Okay. And these witnesses are not here today, correct?

2 A. No, ma'am.

3 Q. Do you recall how many times you met with your attorney
4 prior to trial?

5 A. Three times.

6 Q. Were you out on bond or were you, uh, being held in
7 county?

8 A. Being held in the county, I aint never -- they denied my
9 bond twice.

10 Q. Your attorney represented you in those bond hearings?

11 A. Yes, ma'am.

12 Q. The three times that you met was that in addition to when
13 you saw your attorney when he represented you at your bond
14 hearings or was that including the times that he represented
15 you in those bond hearings?

16 A. That was like, uh, I seen him 'bout three times he came
17 to the county, well twice, my my trial come -- came to the
18 county, one time his assistant came.

19 Q. And, Mr. Baker, you're here today asking for ---

20 A. Um-hum.

21 Q. --- a new trial on your murder charge?

22 A. Yes, ma'am.

23 Q. Okay.

24 MS. OLIVE: Thank Your Honor, that's all the questions I
25 have for Mr. Baker.

1 THE COURT: Redirect, ma'am?

2 MS. ROSS: Thank Your Honor.

3 REDIRECT EXAMINATION BY MS. ROSS:

4 Q. Okay, Mr. Baker, when, um, that you testified earlier
5 that Brandon Glover said go tell Anthony Young that you wanted
6 no part of it, was your testimony earlier that you did tell
7 him that, that you said let's defuse the ---

8 A. Yes, ma'am.

9 Q. --- situation?

10 A. Yes, ma'am.

11 Q. And then what happened right after that?

12 A. When I walk outside and tell Anthony, it's like the whole
13 parkin' lot had went against me, they was like, He outside,
14 let's get him.

15 Q. Alright, and you were hit from behind?

16 A. Yes, ma'am.

17 Q. And there were people behind you at that point.

18 A. Yes, ma'am, five of 'em had rushed me.

19 Q. And you couldn't get into the Waffle House because the
20 doors opened out and you couldn't back up.

21 A. Yes, ma'am, they pull out.

22 Q. And that the doors pulled out.

23 A. Yes, ma'am.

24 Q. And how did that make you feel about your ability to get
25 inside the Waffle House?

1 A. Scared, fear for my life.

2 Q. Alright, and and could you open the doors to get in the
3 Waffle House?

4 A. If I didn't get shot or hurt, beat up, was anything.

5 Q. Alright. And you said at the time you were scared and
6 you fear for your life?

7 A. Yes, ma'am.

8 Q. Um, would you have pulled out a gun and shot if you were
9 not scared and feared for your life?

10 A. No, ma'am.

11 Q. Okay. And, um, if you were not scared and fearing for
12 your life would you have shot in direction of Anthony Young at
13 all?

14 A. No, ma'am.

15 Q. When you were shooting, were you at -- attempting to a
16 dead, a kill shot?

17 A. No, ma'am.

18 Q. Um, what were you doing?

19 A. Shootin' to get away from the crowd.

20 Q. Okay. Did you feel like there was any other way you
21 could get away without gettin' hurt?

22 A. No, ma'am.

23 Q. And what kinda harm did you think would happen to ya?

24 A. But I end up dead.

25 Q. Okay, I've got no further questions.

ROBERT IANUARIO - DIRECT EXAMINATION BY MS. OLIVE

1 THE COURT: Okay, any recross, ma'am?

2 MS. OLIVE: No, Your Honor.

3 THE COURT: Okay. Alright, thank you, Mr. Baker, you can
4 step down, sir, I appreciate it, sir.

5 THE APPLICANT: Okay.

6 THE COURT: Anything further from the applicant?

7 MS. ROSS: No, Your Honor.

8 THE COURT: Okay. Alright, anything from the State?

9 MS. OLIVE: Yes, Your Honor, we would call Robert
10 Ianuario.

11 THE COURT: Oh. You come forward, place your left hand
12 on the Bible and raise your right, sir.

13 (Whereupon, the witness came forward.)

14 THE COURT: Alright, take a seat, state your full name
15 for the record, please.

16 (Indiscernible cross-talk.)

17 THE WITNESS: Yes, Robert Ianuario and that's spelt
18 I-A-N-U-A-R-I-O.

19 ROBERT IANUARIO, having been
20 first duly sworn, testified as follows:

21 DIRECT EXAMINATION BY MS. OLIVE:

22 Q. Good morning, Mr. Ianuario.

23 A. Morning.

24 Q. Do you recall at what point you were retained? Excuse
25 me, were you retained or appointed in this case?

1 A. Uh, I was retained.

2 Q. Do you recall at what point you were retained to
3 represent Mr. Baker?

4 A. Uh, not long after the incident, I'd say 'bout a month or
5 two.

6 Q. Did you file motions for discovery?

7 A. Yes, ma'am.

8 Q. Did you receive that discovery?

9 A. Yes, ma'am.

10 Q. Do you recall how many times you met with Mr. Baker?

11 A. Uh, certainly more than three. I met with him on several
12 occasions as did my associate lawyer.

13 Q. Do you recall how long after he was charged that he went
14 trial?

15 A. Um, the trial was on the one year anniversary of the
16 incident.

17 Q. Did you review, in these meetings that you had with
18 Mr. Baker, did you re -- review the discovery with him?

19 A. Yes, and more than just before the trial.

20 Q. Do you recall at what point you were made aware that
21 Mr. Baker's case was going to be called for trial?

22 A. Uh, I don't remember at which point but there is a
23 constant contact 'tween myself and the solicitor's office so
24 there's plenty of notice that it was coming.

25 Q. And was Mr. Baker made aware of the fact that the trial

ROBERT IANUARIO - DIRECT EXAMINATION BY MS. OLIVE

1 was coming up?

2 A. Yes.

3 Q. Okay. You heard Mr. Baker's testimony that you did not
4 review discovery with him until a day before trial, is that
5 correct?

6 A. That's not correct. We reviewed several several times
7 leading up to it, um, discovery especially in a case like this
8 came in I'd say couple different batches, um, we also had some
9 videos that I had to review and I had to get, uh, permission
10 to bring in my iPad so I could play the videos from the
11 surveillance footage.

12 Q. So you reviewed those videos yourself as well as with
13 Mr. Baker?

14 A. Yes, ma'am.

15 Q. Did you do any independent investigation in this case?

16 A. Uh, did a fair amount, yes.

17 Q. And what did that entail?

18 A. Um, spoke with as many a the witnesses that would return
19 calls, um, interviews with the Waffle House employees, um,
20 see, looked around at the crime scene, um, speaking with
21 ballistics experts, gunshot residue experts, medical
22 examiners, um, a lot of independent research.

23 Q. Okay. And you say you spoke to as many witnesses as you
24 could, were those witnesses who were included, that how did
25 you find the names of those witnesses, was that in the

1 discovery that was provided with you ---

2 A. Yeah, it ---

3 Q. --- to you.

4 A. Yes, those requested in discovery.

5 Q. And were those witnesses cooperative with you?

6 A. Some were, some were not. Some would readily meet with
7 me, some wouldn't return the phone calls.

8 Q. You said you consulted with experts?

9 A. Yes, ma'am.

10 Q. Ultimately you chose not to call any expert to testify?

11 A. Um, we did not have the budget for experts.

12 Q. Speaking of budget you heard Mr. Baker testified
13 something, uh, testify regarding, uh, a a discussion that
14 ya'll had about payment, did did his ability to pay you or not
15 have any affect on your representation of Mr. Baker?

16 A. Um, it did not affect the work that I put into it but
17 affected the resources that I had. I charged 15,000 for this
18 case plus further 5,000 for trial, I received less than a
19 thousand in payment so I didn't have the finances or the
20 resources to hire independent experts, uh, made this known on
21 multiple occasions and the discussion that was referenced in
22 Mr. Baker's testimony I believe a more accurate statement
23 would be if we could hurry up and get some money in, I might
24 be able to find an expert and then we could move for
25 continuance or if the expert had a favorable opinion we could

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1 get a better offer but it wasn't put as a quid pro quo per se.

2 Q. There was a stand your ground hearing prior to trial, is
3 that ---

4 A. Yes.

5 Q. --- correct?

6 A. Yes, ma'am.

7 Q. Okay. And as Mr. Baker testified you chose not to
8 present him as a witness in that hearing?

9 A. Yes, ma'am.

10 Q. What sort of things did you do to prepare for the stand
11 your ground hearing?

12 A. Um, specifically and nothing saying this is gonna be a
13 stand your ground but you're going through all the evidence
14 and the theory of the case being self-defense, uh, pretty much
15 overlapped so all the self-defense preparation would have
16 applied for the preparing for a stand your ground.

17 Q. Would you have done research pertaining to the stand your
18 ground statute?

19 A. Yes, uh, and also into the case law for self-defense and
20 stand your ground.

21 Q. Do you recall Judge Cole's ruling on the stand your
22 ground?

23 A. Um, he he denied the or he declined to dismiss the case
24 on the stand your ground, he failed to find valid self-defense
25 argument.

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1 Q. Did he comment at all about whether the statute applied
2 to this situation at all?

3 A. Uh, I do not specifically recall, I'd have to see the
4 transcript.

5 Q. Okay. Beg the Court's indulgence a moment, Your Honor.

6 THE COURT: Um-hum.

7 MS. OLIVE: Your Honor, I'm, for the record I'm referring
8 to the judge's ruling in the trial transcript which is on
9 pages 55 through 56, ---

10 THE COURT: Okay.

11 MS. OLIVE: --- I just ask that the record speak for
12 itself on that issue.

13 THE COURT: Okay, I'll take judicial notice of the same.

14 BY MS. OLIVE:

15 Q. Mr. Ianuario, how did you determine whether or not you
16 were going to present Mr. Baker's testimony during the stand
17 your ground hearing?

18 A. Um, honestly I don't specifically recall exactly what the
19 nuances were of it, um, I thought that I'd be s -- able to
20 establish everything as necessary through the detective's
21 investigation, um, except for Mr. Baker's personal fear but I
22 thought I could establish that, you know, in the situation
23 where s -- he believed he had a gun which he indicated in the
24 statement that he would have had a fear. Um, looking back I'm
25 sure it's one a the screw ups I've made in this case and I'm

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1 not denying I screwed up some things in this case but I'm
2 gonna leave it to His Honor determine whether or not that
3 amounts to ineffective assistance.

4 Q. You heard Mr. Baker's testimony today regarding what
5 testimony he would have provided had he testified during the
6 stand your ground hearing?

7 A. Yes.

8 Q. Okay. Is that, is his testimony, is the testimony that
9 he provided today consistent with the discussions that you had
10 had with him and with your understanding about what he would
11 have testified to had he testified during the stand your
12 ground hearing?

13 A. The the subject matter of what have he would have
14 testified to, yes, that was consistent.

15 Q. Okay. Did you have any concerns about presenting
16 Mr. Baker as a witness in that stand your ground hearing?

17 A. Uh, I did not wanna subject him to cross-examination at
18 that point in time I didn't know how ell he would do under
19 cross-examination plus at that point we've been working on
20 this case for several weeks leading up to the trial and the
21 days leading up to it almost every hour of the day, uh, so we
22 had a pretty sound case that we had outlined we were gonna
23 work forward with and everything that could have gotten
24 through Detective Foster who was the witness in the stand your
25 ground I believe would have, um, satisfied all the

1 requirements and just built onto what Antwon would have said
2 so at that point in time I didn't see it may have been an
3 error of judgment at the the added benefit of having Antwon
4 testify and subjecting cross-examination versus what I thought
5 would be a sufficient establishment of the elements through
6 Detective Foster's testimony.

7 Q. What specifically were you concerned about in presenting
8 him as a witness and subjecting him to cross-examination?

9 A. Um, any particular key details that maybe hadn't been
10 reviewed, um, any any statements, um, I'm not saying that he
11 said this but just an example, you know, it was either him or
12 me or he may a had it coming or anything like that I didn't
13 want somethin' like that I didn't want any false senses of
14 bravado that carry over, um, I, actually I think Antwon
15 Baker's a good man and I do believe that this is a valid
16 self-defense case so I didn't wanna project him as for lack of
17 respect seeming more of a thug than he really is 'cause
18 'cause, uh, he's a good man.

19 Q. What was your overall theory going into this, I know
20 we've talked about self-defense a lot, um, other than
21 self-defense what, um, theories were you proceeding on at
22 trial?

23 A. Um, self-defense was the the biggest one, um, you know,
24 the self-component of that to have some mistake in fact but,
25 um, there was no possible alibi theory for example 'cause it

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1 was established that he was there, it was they found the
2 murder weapon many or tied it to him so the basic defense was
3 or our self-defense were mistake of fact leading to the
4 self-defense.

5 Q. Did you discuss with Mr. Baker his right to testify in
6 his defense?

7 A. Yes, ma'am.

8 Q. Do you feel that he was giving -- given sufficient time
9 to consider that decision?

10 A. We discussed it in the, our meetings leading up to trial
11 in addition to we broke for the final day and the judge gave
12 him the the instruction on right to testify and we actually
13 took over night to sleep on it so to speak.

14 Q. Had you previously spoken with Mr. Baker about what the
15 nature of his testimony would be if he did present testimony
16 at trial?

17 A. Yes, essentially it would be the same story that he told
18 today and would have told it at stand your ground.

19 Q. And you spend time preparing him for the possibility of
20 testifying?

21 A. Uh, we spoke about it, I do not recall that he was keenly
22 intent on testifying, I believe it was willing if he had to
23 but preferred not to, again this was four years ago so that
24 may be incorrect but I do not recall he was adamant about
25 testifying.

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1 Q. Okay. Do you recall what your advice was to him with
2 respect to whether or not you recommended that he testify?

3 A. Uh, I'm fairly certain I recor -- recommended he not
4 testify, things were going well or appeared to be going well
5 for us, I thought we had, um, ended ended on a high note
6 especially with the issue with Dr. Wren, uh, being recalled so
7 in that regards, um, I felt very positive about it, I didn't
8 see much added benefit that would come from his testimony but
9 I could see a lot of risks in gettin' subjectin' him to
10 cross-examination how he might get tongue-tied or cornered in
11 something that would damage the case.

12 Q. Did you discuss those concerns specifically with
13 Mr. Baker?

14 A. Um, I don't recall how specifically we talked about it
15 but I do recall saying or whenever I meet with a client and
16 we're noting at trial and deciding whether or not to testify
17 and make certain they understand that I can, you know, through
18 the course of my examination get them to tell a story but then
19 I have to sit down and they're subject to the pummeling of
20 cross-examination and everything that goes with it and there's
21 not much that can be done to backtrack if it's properly
22 brought out.

23 Q. Had you explained that to him prior to trial?

24 A. I do not specifically recall so but I believe I would
25 have, it's practice with every case I go to trial I have a

ROBERT IANUARIO - DIRECT EXAMINATION BY MS. OLIVE

1 discussion with my clients and usually spend a few minutes
2 talking just about how you would answer questions if you're
3 testifying, things of that nature.

4 Q. You heard Mr. Baker's testimony that and I'm going to try
5 to repeat what he said but that he, that in your advice to him
6 about whether to testify after the judge advised him of his
7 right, um, you said that you were here and if you testify we
8 could be down here, do you recall making that statement?

9 A. Not specifically but that's kind of a phrase I've used
10 before, um, I know it's in my common vernacular so I'd say
11 that was the point where, you know, we're feelin', I was
12 feelin' very good about the case, I thought we had a strong
13 case and I saw only marginal benefit from his testimony in in
14 exchange for that significant risk.

15 Q. Okay. Do you recall whether you made any specific
16 statement to him about why you thought he should or should not
17 testify?

18 A. I can't recall the specifics of any statement, uh, I do
19 know it was more than you're not gonna testify, um, but I
20 don't recall the specifics of it, uh, . . .

21 Q. So you don't recall whether you explained to him why you
22 thought he should not testify.

23 A. I'm certain I would have addressed it, um, again, the
24 explanation may have been the extent of I feel good about the
25 case where we stand, um, I have some concerns about the

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1 cross-examination portion of things and how you come off as a
2 witness and, you know, the the explanation likely would have
3 been I don't see the benefit being worth the risk, that's
4 about as specific as I believe I can recall.

5 Q. As he stated you were concerned about how he was gonna
6 perform on cross-examination?

7 A. Yes, ma'am.

8 Q. And did his prior record factor into your advice not to
9 testify?

10 A. No, ma'am, he had a sub -- substantially clean prior
11 record aside from believe driving offenses.

12 Q. Did you develop an opinion about whether or not he was
13 going to be a good witness for himself?

14 MS. ROSS: I'd object to asked and answered at this
15 point.

16 THE COURT: Okay, I, uh, I'm satisfied regarding that
17 that issue, you can move on now.

18 MS. OLIVE: Thank Your Honor, I apologize, didn't mean to
19 belabor the ---

20 (Indiscernible cross-talk.)

21 THE COURT: It's okay.

22 MS. OLIVE: Beg the Court's indulgence, Your Honor.

23 THE COURT: Sure.

24 BY MS. OLIVE:

25 Q. Do you recall whether you objected to the voluntary

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1 manslaughter charge?

2 A. Um, according to the record, I did not object on the
3 record. Um, it was discussed in chambers, I believe the, uh,
4 if I recall correctly we wrapped up this trial on the
5 afternoon and then we came back in the morning to do closings
6 and jury instructions, ---

7 Q. Um-hum.

8 A. --- uh, at that point in time I do know that⁷ it was
9 discussed in judge's chambers, um, Judge Cole heard my
10 objection or heard my, um, taking exception to it but he
11 stated that as it was a lesser included he was going to give
12 voluntary instruction.

13 Q. Do you recall whether you asked just for murder, ---

14 A. Uh, ---

15 Q. --- even if you didn't use the words "I object," whether
16 on the record you asked just for the murder charge?

17 A. On the record I believe not.

18 Q. I'm sorry, can you repeat.

19 A. I said I do not believe I asked for a murder charge only
20 on the record ---

21 Q. Okay.

22 A. --- but I can't recall, it's a, like a 600-page
23 transcript.

24 Q. (Sighed.)

25 THE COURT: Ms. Olive, I'll take judicial notice of page

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1 440 and 441 of the transcript.

2 MS. OLIVE: Thank Your Honor.

3 THE COURT: Okay.

4 BY MS. OLIVE:

5 Q. Mr. Ianuario, did you request a self-defense charge in
6 this case, ---

7 A. Yes, ---

8 Q. --- are you ---

9 A. --- there was ---

10 Q. I'm sorry.

11 A. Uh, yes we did. There is, um, several proposed charges
12 that that I use for jury instructions that were presented to
13 Judge Cole in chambers before the instruction phase, um,
14 during that time he reviewed them, agreed to give some, not
15 others.

16 Q. Did Judge Cole give the specific self-defense charge that
17 you requested?

18 A. Um, I don't know if it was word-for-word but
19 substantially similar -- similar if not.

20 Q. Thank you, that's all the questions I have.

21 A. Thank you.

22 THE COURT: Cross?

23 CROSS-EXAMINATION BY MS. ROSS:

24 Q. Okay. And, Mr. Ianuario, um, how many prior trials,
25 criminal trials had you, uh, defended prior to this one?

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1 A. Maybe four or five.

2 Q. Okay, and this was your first murder.

3 A. Yeah, this is my first and today only murder.

4 Q. Okay, and then, um, that just briefly, I'm jumpin' around
5 here, as far as no budget for experts, do you realize that you
6 can go to office of Indigent Defense and request funding for
7 experts if a client can't, if if if you find it necessary even
8 as a private lawyer?

9 A. No, at the time I was not aware of that ---

10 Q. Okay.

11 A. --- so . . .

12 Q. Um, now let's go to just the proposed charges, um, so
13 you're saying you had pro -- proposed charges that the judge
14 never put on the record or request to charge?

15 A. Um, if I recall correctly we discussed in chambers, um,
16 the specifics of the charges, I have and I have a copy of 'em,
17 um, he reviewed 'em, compared 'em to the standard charges and
18 then well it was decided which ones he's gonna issue, I
19 believe that they were all issued.

20 Q. Alright, but you'll agree and there's no discussion of
21 that on the the record except for the fact that he made a
22 determination he was gonna charge ma -- voluntary
23 manslaughter.

24 A. Listen, I believe that's correct, I would not disagree
25 with the transcript.

1 Q. Did, um, you request a charge, and I should have made
2 copies, but, um, request a charge that the State has a duty to
3 disprove self-defense beyond a reasonable doubt in that
4 wording and that's, uh, I would refer to *State v. Addison*, 540
5 S.E. 2d 449 and that's just for the record, but did you, did
6 you request and that's a, um, 2000 case, um, did you request a
7 specific charge ---

8 (Whereupon, the witness left the stand.)

9 (Whereupon, the witness returned to the stand.)

10 A. May I review my file?

11 Q. Sure.

12 (Pause.)

13 A. Uh, it appears I drafted a motion or I, um, for a
14 charging instruction as to the burden of self-defense, um,
15 quoting *State v. Wiggins*, um, Current law requires the State
16 to disprove self-defense, once raised by a defendant beyond a
17 reasonable doubt and it's clear the defendant need not
18 establish self-defense by a preponderance of the evidence but
19 must merely produce the evidence which causes the jury to have
20 a reasonable doubt regarding his guilt.

21 Q. Okay, and, um, on 527 the, sort of the top of page 527,
22 the transcript and mine has now fallen apart, the, um, is
23 where the judge gives his jury instruction, um, on
24 self-defense, um, now is that the one that you requested? It
25 states the burden burden of proof is not on the defendant to

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1 prove the existence of self-defense, I've instructed you the
2 burden's always on the State to prove the defendant's
3 commission of the crime alleged against the defendant beyond a
4 reasonable doubt and this would therefore necessarily require
5 that the State prove beyond a reasonable doubt the absence of
6 self-defense.

7 A. Um, no, not specifically, that was not in the charging
8 instruction that I read on the record, the proposed charging
9 instruction I read on the record. Um, ---

10 Q. Okay.

11 A. --- if I recall correctly in chambers that when I
12 presented my charging instructions, the judge also, uh, went
13 through and compared with his charging instructions and there
14 was some discussion as to whether or not they were adequate
15 and so I would have to say I would have agreed that the
16 judge's instruction (a) was adequate, I was more concerned
17 about getting a charge on the actual instruction of the
18 burden.

19 Q. Okay, but you didn't object at that time or after after
20 the charges were made to having the exception to the charge on
21 self-defense that was given?

22 A. It does not appear so, no.

23 Q. And you never argued that that was maybe more confusing
24 than the blatant the State must prove self-defense, uh, must
25 disprove self-defense beyond a reasonable doubt?

1 A. I guess not, I don't believe so.

2 Q. Okay. Now, um, also and that, um, it -- so you had a
3 proposed, um, charge as well on defendant's right to act upon
4 appearances?

5 A. Correct.

6 Q. And, um, and that's on, that charge that the judge gave
7 is on page 529 and you you didn't have any objection to the
8 charge he gave on the right to act upon appearances?

9 A. Um, I did not object on the record and no, I did not.

10 Q. Alright. And then, um, just going back to the having the
11 failure that that ya didn't have the defendant testify at the
12 pretrial hearing, the stand your ground hearing, now at that
13 point there's no jury, is there, correct, ---

14 A. No.

15 Q. --- right, and so whatever cross-examination the
16 defendant would be exposed to would not, um, affect a jury's
17 decision, um, at all because they wouldn't be there.

18 A. Correct, um, at this point I was more concerned 'bout
19 Solicitor Bulsa, um, he's been doing this for a while, he's a,
20 you know, definitely capable and topnotch prosecutor so but I
21 also didn't want him to have kind of an idea of Antwon t --
22 um, his person and again, I was concerned about any nuances or
23 small, what might seem irrelevant facts that could then be
24 latched in and turned into something else which as lawyers we
25 look for the small ---

1 (Indiscernible cross-talk.)

2 Q. However, if you didn't have him testify at the trial he
3 wouldn't be exposed to Mr. Bulsa's cross-examination such that
4 none of that information could come out, could it?

5 A. It, can you say that again, please.

6 Q. Well he couldn't -- it -- since it's not in front of a
7 jury Mr. Bulsa couldn't use any information that came out in
8 cross-examination in a pretrial hearing.

9 A. Not necessarily, um, again, he could have, there may have
10 been some light shined upon a piece of evidence that now
11 becomes relevant, um, again, I freely admit I should have put
12 Antwon on the stand and leave it to Your Honor's, uh, or not
13 that was ineffective, I at the time thought I could get all
14 the necessary elements established through Detective Foster's
15 testimony without havin' to expose Antwon to any
16 cross-examination and expose the case to anything that was
17 beyond the knowledge that was already inside discovery.

18 Q. Okay, and, um, you did not immediately appeal, uh, the
19 judge's decision on stand your ground at that time, did you?

20 A. Correct.

21 Q. And, um, I I went through this and I asked, were you in
22 the courtroom when I asked the, uh, applicant some questions
23 about some objection he alleges you failed to make, um, were
24 you here ---

25 A. I ---

1 Q. --- in the courtroom?

2 A. --- I believe I was, yes.

3 Q. So on page 372 when Mr. Bulsa's cross-examining, um, a
4 man from the Waffle House, Daniel Monie (phonetic) I think, do
5 you recall that testimony?

6 A. Um, I recall that he testified and the general context of
7 it but I don't recall word-for-word.

8 Q. Alright, I'll just, will call you to page, uh, three
9 twe -- 372, this I already had in my hand.

10 A. I got it.

11 Q. Got it? Thank you. Line 23, at this point this is part
12 a cross-examination and, um, Mr. Bulsa says, "We have the man
13 that shot someone and someone's trying to infer that this guy
14 could have done it," um, did you object at that point?

15 A. It does not appear that I did.

16 Q. And were you making some kind of argument of third-party
17 guilt with -- were you making that argument that the other guy
18 was the one who shot Anthony Young?

19 A. Um, there was another person at the scene before the
20 incident that somebody saw something that they thought was a
21 gun, ---

22 Q. Um-hum.

23 A. --- uh, part of my argument was that the other person
24 with the gun wa -- that aspect was not investigated by the
25 police.

ROBERT IANUARIO - CROSS-EXAMINATION BY MS. ROSS

1 Q. Okay.

2 A. I wasn't per se trying to say that there is another
3 shooter but we have from a credible witness there was somebody
4 in the parking lot with a gun right before a shooting occurred
5 so I would have thought it relevant to investigate that
6 person.

7 Q. Alright, and, um, so you weren't trying to do some kind
8 of underhanded thing or cheating thing by bringing in an
9 eyewitness from the Waffle House.

10 A. Uh, no, ma'am.

11 Q. Alright. Um, to just go into the gunshot residue
12 evidence, can you clarify, um, what was goin' on about that.

13 A. Um, there were I recall five particles of gunshot residue
14 on Mr. Baker and one particle of gunshot residue on the
15 deceased. Uh, the State did not call the, um, gunshot residue
16 expert from SLED as a witness and, um, therefore I couldn't
17 adequate cross-examine but there, uh, were couple of
18 advantages to that as well.

19 Q. Okay. And, um, that before, on page 487 in closing
20 argument, the solicitor commented on your fascination with a
21 gun or something to that effect, did you make any objections
22 to his personal comments against you made during the soli --
23 State's closing?

24 A. Uh, no, I did not. Um, one of my client, business
25 clients is a firearms manufacturer, I've repremend --

1 represented several members in the military so just through
2 general horse trading and hanging out with 'em I've know a lot
3 about firearms. Um, there was I believe a Marine on the jury
4 and, uh, at least one other person had military experience and
5 I didn't particularly care about the argument my fascination
6 of guns because if you know anything about firearms to run
7 around a parking lot and pull the trigger five times and hit
8 somebody five times requires almost an act of God, um, so I
9 knew I even saw one of the members of the jury kinda roll the
10 eyes a little bit so I was not concerned 'bout my fascination
11 with guns, if anything I thought it proved that I knew more
12 about a shooting and firearm situation ballistics than the
13 State did.

14 Q. Okay, and just go into that. When -- why was Mr. Wren or
15 Dr. Wren recalled to the stand?

16 A. Um, because in the diagram of the body, the the picture
17 where he drew the bullet holes he had diagrammed them on the
18 wrong side of the body, um, given that they were diagrammed on
19 the wrong side of the body we also then had an issue of
20 whether their diagram did in the right proximate location, was
21 it a mirrored image or is it totally off and when you're
22 looking at the bullet paths of five separate shots and the
23 possibility that there may have been a third shooter in the
24 parking lot, you'd wanna know the angles and everything
25 accurately so you could establish that perhaps there was an

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1 incident of crossfire striking the decedent.

2 Q. Okay. And and was that -- to you did the fact that the
3 doctor couldn't even get the bullet where they went in and
4 out, did that suggest more that there was multiple shooters,
5 that these were coming from multiple directions?

6 A. Um, to me it suggested we could not elim -- we could not
7 conclusively eliminate all other possibilities of another
8 shooter and made it very hard to specifically say that all
9 five bullets would have come from the same firearm.

10 Q. Okay. And, um, you tried to get in some photos showin'
11 some other potential bullet holes or things that the State
12 might have missed in their investigation, were you able to get
13 in those photos?

14 A. Um, I don't recall I was able to get in every photo but I
15 was able to get in a substantial amount of photos, yes.

16 Q. Alright, and that was on pa -- page 387 for the record.
17 Um, did you, uh, communicate any kind of plea offer to Mr.,
18 um, I'm I'm sorry, to Ms. Baker?

19 A. Um, I'm certain that I would have. A plea was discussed,
20 I don't recall what the details are. Um, ---

21 Q. Okay.

22 A. --- I'm wanting to say 10 years on voluntary manslaughter
23 but that could be a total shot in the dark.

24 Q. Um, and why'd you end up goin' to trial?

25 A. Um, because the offer that was made I don't remember the

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1 exact number of years but it was a substantial number of years
2 and it was, given the facts of the case and what we were
3 working with thought we had a s -- a substantial self-defense
4 argument that we could make and I did not disagree with his,
5 uh, reasoning for taking it to trial.

6 Q. Alright, so he wanted to take it to trial, he was
7 alleging that he's -- wasn't guilty.

8 A. Yes, ma'am.

9 (Attorney/client discussion held off the record.)

10 MS. ROSS: Beg the Court's indulgence.

11 THE COURT: Sure.

12 BY MS. ROSS:

13 Q. Okay. I'm sorry, that this is part of the record but
14 page, um, on page 55 of the transcript the judge gives his
15 reasoning for, um, denying stand your ground, um, and he
16 basically says based on the evidence that was produced, that's
17 his finding. Okay, thank you. I've got no further questions.

18 THE COURT: Okay. Alright, any redirect, ma'am?

19 MS. OLIVE: Briefly, Your Honor.

20 REDIRECT EXAMINATION BY MS. OLIVE:

21 Q. Mr. Ianuario, you testified that the fact the State did
22 not call the gunshot residue expert as a witness, um, produced
23 some advantages, what were those advantages?

24 A. Uh, one a the theories that we had was the decedent had a
25 firearm tucked in his waistband, uh, without the gunshot

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1 residue expert I couldn't ask whether or not there's actual
2 gunshot residue on the inside of his pants or his boxer shorts
3 but also without the gunshot expert I was free to argue that
4 had we done a better investigation we would have known if
5 there was gunshot residue on the inside of his pants
6 indicating that he had his own firearm.

7 Q. Would that have gone to support your theory of
8 self-defense?

9 A. Yes, I believe it would have.

10 Q. And did you recall whether you objected to the State's
11 introduction of evidence during, um, Mr. Wren's testimony when
12 he was recalled?

13 A. I believe that I did.

14 Q. Alright. You testified that you don't recall the details
15 of whether, uh, you don't recall, 'scuse me, you're testimony
16 was that a plea offer was made in this case, ---

17 A. Yes, ma'am.

18 Q. --- but you don't recall the details of that offer?

19 A. Um, that I remember it was a substantial amount of time
20 and it was more so than, ya know, Antwon was willing to take.

21 Q. Did he indicate to you that he wished to accept a plea
22 offer?

23 A. Uh, he indicated he wished to proceed to trial.

24 Q. Okay, so he wanted to go to trial.

25 A. Yes, I certainly did not take this to trial on the

1 bravado of being a young attorney.

2 Q. You testified this was your first murder case?

3 A. Yes, ma'am.

4 Q. And you were retained?

5 A. Yes, ma'am.

6 Q. Did you feel you were capable of handling this trial?

7 A. Uh, yes.

8 Q. If you felt you were not capable of handling this trial,
9 would you have, would you have, uh, handled the trial?

10 A. No, I would have handed it off and I have handed off
11 other cases that have gotten too complicated since then or
12 associated with other counsel on those cases.

13 Q. Thank you, that's all the questions I have.

14 THE COURT: Any recross, ma'am?

15 MS. ROSS: No, Your Honor.

16 THE COURT: Okay. Alright, you may step down.

17 THE WITNESS: Thank you.

18 THE COURT: Thank you, sir, I appreciate it.

19 (Whereupon, the witness left the stand.)

20 THE COURT: Got anything further from the State?

21 MS. OLIVE: Your Honor, may I just have a brief moment?

22 THE COURT: Sure.

23 (Pause.)

24 MS. OLIVE: Your Honor, the State would call Solicitor
25 Derrick Bulsa.

DERRICK BULSA - DIRECT EXAMINATION BY MS. OLIVE

1 THE COURT: Okay. Bulsa, you approach. Please place
2 your left hand on the Bible, raise your right.

3 (Whereupon, the witness came forward.)

4 DERRICK BULSA, having been
5 first duly sworn, testified as follows:

6 THE COURT: Okay, please take a seat s -- uh, state your
7 full name for the record if you will please.

8 THE WITNESS: Derrick Bulsa, B-U-L-S-A.

9 DIRECT EXAMINATION BY MS. OLIVE:

10 Q. Good afternoon, Mr. Bulsa, were you the prosecutor on
11 this case?

12 A. I was.

13 Q. And are you still currently employed with the Spartanburg
14 Solicitor's Office?

15 A. I am.

16 Q. You heard Mr. Baker's testimony concerning what he would
17 have testified to in the stand your ground hearing had he been
18 called to testify, ---

19 A. I did.

20 Q. --- were you prepared to cross-examine him in that
21 hearing had he been called to testify?

22 A. I I was. Um, I recall the defendant actually gave a
23 statement to the police, he made an admission when they first
24 found him and there was ample material to cross-examine him
25 on.

DERRICK BULSA - DIRECT EXAMINATION BY MS. OLIVE

1 Q. Do you recall, uh, specifically with regard to the facts
2 that he testified to what what would you have cross-examined
3 him on?

4 A. The defendant left the scene, um, claimed he was going
5 home to call the police yet he did not call the police. He
6 hid the weapon, um, that was his main action, uh, but the
7 police, um, were fortunate enough to have a good
8 identification on him and were able to track him pretty
9 quickly and then he made an admission that, um, I'm the guy
10 that did that thing at the Waffle House. Um, in a stand your
11 ground case it's the ju -- judge makin' a decision and
12 credibility's important and I don't believe he would have made
13 a good witness, was ample material to to go after him on.

14 Q. In terms of his testimony that someone came behind him
15 and hit him on the back a the head, did you have any questions
16 prepared as to how you would have, um, cross-examined him on
17 that particular statement that he was acting in self-defense
18 as a result of that.

19 A. Well, um, that actually goes towards the manslaughter,
20 um, the fact that he was just merely struck doesn't give you
21 the right to pull a gun and shoot and and the facts also
22 showed that the defendant chased the victim 'cross the parking
23 lot while shooting him in the back, um, so just based on the
24 forensics we also had and, uh, I don't remember how I argued
25 it in in the stand your ground but, uh, it it was clear that

DERRICK BULSA - CROSS-EXAMINATION BY MS. ROSS

1 he was not acting in self-defense.

2 Q. And and you did make that argument during the stand your
3 ground hearing?

4 A. Uh, I don't recall, I don't have the transcript.

5 Q. Thank you, that's all the questions I have.

6 THE COURT: Yes, ma'am.

7 CROSS-EXAMINATION BY MS. ROSS:

8 Q. Hey there. On on page 303, around 303 to 307, you put in
9 three different statements made by the defendant, didn't
10 you?

11 A. Is this during the trial?

12 Q. During the trial, ---

13 A. Uh, ---

14 Q. --- not the ---

15 A. --- probably ---

16 Q. --- pretrial.

17 A. --- did.

18 Q. And those statements were referred to in the, it was 303
19 startin' that the the the statements were just read into the
20 record, his his statements, right?

21 A. I I don't remember the process but I do recall
22 introducing his statements.

23 Q. Alright. And didn't ya argue in closing that those
24 statements were inconsistent at length?

25 A. Of course.

DERRICK BULSA - CROSS-EXAMINATION BY MS. ROSS

1 Q. And you argued they were self-serving?

2 A. Of course.

3 Q. And was he able to reply to those arguments Mr. Baker?

4 MS. OLIVE: Your Honor, I'm gonna object, this is outside
5 the scope of my questioning regarding the stand your ground
6 hearing.

7 THE COURT: But it's cross-examination, right, and I I'm,
8 and I, I'm I'm asking that truly, is it?

9 MS. OLIVE: Yes, Your Honor.

10 THE COURT: Okay, alright, well then it's wide open and I
11 I respectfully overrule your objection.

12 BY MS. ROSS:

13 Q. So all those statements, all of the information that
14 you ---

15 A. That's right.

16 Q. --- knew was already in trial and in front of the jury, ---

17 A. Yeah, he ---

18 Q. --- right?

19 A. --- could have testified, ma'am. Yes, ma'am, he could
20 have testified.

21 Q. And then he could have replied to maybe inconsistencies
22 in those statements that were before the jury already.

23 A. Uh, if you're asking for trial strategy, um, I think
24 that's a main reason why ---

25 Q. No, ---

DERRICK BULSA - CROSS-EXAMINATION BY MS. ROSS

1 A. --- a lot of ---

2 Q. --- I ---

3 A. --- defendants ---

4 Q. --- I'm not sayin' ---

5 A. --- don't testify ---

6 Q. Yeah, but now I'm not ---

7 A. --- is ---

8 Q. --- sayin' that, ---

9 A. --- because ---

10 Q. --- I'm just ---

11 A. --- they have inconsistent statements and a lotta times
12 they stand on those statements ---

13 Q. Okay, ---

14 A. --- so . . .

15 Q. --- but you put those statements in the record and they
16 went back ---

17 A. Course.

18 Q. --- to the jury for deliberations, right?

19 A. Course I did, yes, ma'am.

20 Q. Okay. And with those statements in front of 'em the jury
21 wasn't allowed to see what, how he would have replied to
22 inconsistencies, right?

23 MS. OLIVE: Your Honor, uh, I object, I think she's
24 asking him to reach a legal conclusion regarding the prejudice
25 in this case which he's not not competent to do, Y -- that's a

MOTIONS AND MATTERS

1 decision for Your Honor.

2 THE COURT: I I I'll I'll let her ask the question. I I,
3 uh, I've been involved in one or two of these cases both as an
4 attorney, as a judge both at the trial phase and at the PCR
5 phase, I know what your arguments are, I get it.

6 MS. ROSS: Do you ---

7 THE COURT: I ---

8 MS. ROSS: --- know what I'm s, uh, what I'm ---

9 THE COURT: --- I ---

10 MS. ROSS: --- tryin' to say?

11 THE COURT: --- understand exactly what you're sayin'.

12 MS. ROSS: Okay, well then I have no further questions.

13 THE COURT: Okay. Alright, and any recross?

14 MS. OLIVE: No, Your Honor. Okay. Thank you, Mr. Bulsa,
15 I appreciate it.

16 MR. BULSA: Yes.

17 (Whereupon, the witness left the stand.)

18 THE COURT: Okay, anything further from the State?

19 MS. OLIVE: No, Your Honor.

20 THE COURT: Okay. Alright, uh, anything further from the
21 applicant?

22 MS. ROSS: No. No, Your Honor, just a summation.

23 THE COURT: Sure, I'd, uh, be happy to hear from ya.

24 MS. ROSS: Um, that as far as whether Mr. Baker coulda
25 been cross-examined or not, he was cross-examined some here,

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1 the statements that he gave as you heard were put in the
2 record, the jury saw 'em, um, arguments was that
3 inconsistencies were made at length by the solicitor at that
4 time, um, Mr. Baker couldn't respond to them, um, because he
5 wasn't put on the stand. Clearly, pretrial at the hearing if
6 he was put on the stand, yes, he would be open to
7 cross-examination but the jury would hear none of that and if
8 anything the defense attorney would be prepared for what to
9 argue or what might come up later in the trial. Um, now after
10 there's a *State v. Isaac* case that came out 2013 and now it
11 says that stand your ground 16-11-450 is not immediately
12 appealable, at the time of this trial it was, it should have
13 been appealed and it was not, um, that would be our first
14 issue.

15 Um, as far as call -- failing to call him as a witness,
16 um, Mr. Baker, I did not prep him for trial or go over
17 anything with him, I wanted him to just be himself and tell
18 what he ha -- what happened and, um, I think his testimony
19 brings up real questions, um, of self-defense and then
20 arguably he had a strong self-defense case even under
21 cra -- cross-examination that held on, um, duty to retreat is
22 always a problem in a public place, he explained that, um, and
23 you heard that testimony. Going to that I'd find that looking
24 at the judge's instructions on, um, self-defense on page, uh,
25 527 and the duty, the right to act on appearances on page 529,

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1 those instructions to me were very, um, confusing and not very
2 direct as to, uh, the State's burden, um, and in given that
3 and the fact that Mr. Baker did not testify I think that, uh,
4 that certainly he was, he was prejudiced by that and you heard
5 what his testimony would be, um, other arguments that I put on
6 the record, um, I'd also preserve, they're in my application
7 but that's essentially my summation.

8 THE COURT: Alright, thank you, Ms. Ross, I appreciate
9 it. Ms. Olive.

10 MS. OLIVE: Thank Your Honor, may it please the Court.
11 Your Honor, with regard to, it's it's the State's position
12 with respect to the stand your ground hearing that that that
13 that he would not have been entitled to immunity under that
14 statute anyway because he was not in his residence, in a
15 vehicle or in his place of employment, um, and Judge Cole sort
16 of alluded to that when he did make his ruling although he
17 made his ruling based on the facts that were presented;
18 however, even in Mr., even if that were not the case and even
19 if Mr. Baker had testified in the stand your ground hearing,
20 it's the State's position that he still has not presented
21 evidence that would have caused the judge to dismiss his case
22 nor would the outcome have been different on appeal had, and
23 well it was preserved but had he testified just requires too
24 much speculation to come to the conclusion that it would have
25 resulted in a different outcome, um, ultimately on appeal had

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1 the, um, the motion to dismiss still been denied even if he
2 had testified, he still only testified that he was hit on the
3 back of the head, he did not even testify that he saw a gun,
4 um, Your Honor, it's our position that he has not shown enough
5 to, that there's no prejudice resulting from counsel's not
6 calling him to testify at the stand your ground hearing and
7 counsel did testify that he chose not to call him during the
8 stand your ground hearing because he did not want to open him
9 up to cross-examination, not because he was concerned about
10 how Mr. Baker was gonna be perceived by the jury but by the
11 possibility that, um, the solicitor could rattle him and
12 potentially affect the the rest of the trial, Your Honor.

13 With respect to the argument that this issue of the the
14 denial of the stand your ground, excuse me, the denial of the
15 motion to dismiss pursuant to stand your ground was
16 immediately appealable, it, that's a moot point, um, it was
17 raised in his direct appeal, the Court made no finding that it
18 was, you know, should have been immediately appealable or
19 anything, it it simply affirmed his conviction.

20 With respect to the allegation that Mr. Ianuario was
21 ineffective for not calling Mr. Baker to testify in his
22 defense at trial, it's the State's position that he's shown
23 neither deficiency nor prejudice, um, Mr. Ianuario gave a
24 strategic reason for not choosing to call him at trial, he
25 felt that they had presented enough in their care to show that

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1 he had acted in self-defense and he was concerned not about
2 Mr. Baker being cross-examined based on his record but he was
3 concerned that he was going to be a bad witness for himself
4 and Your Honor has to look at counsel's point of view at the
5 time that decision was made, not based on, uh, how Mr. Baker
6 represented himself here today, um, there are other, obviously
7 they were in the middle of a trial when this decision was
8 made, um, Mr., that Mr. Ianuario was advising him based on the
9 evidence that had come out on the case that they had presented
10 and his advice to him was that he did not think he, um, that
11 his testimony was not going to be helpful and may actually
12 hurt their case; furthermore, he still has not testified that
13 he saw a gun, um, he testified he was hit on the back of the
14 head, um, which would not have been enough to show
15 self-defense and furthermore self-defense was charged, it's
16 our position that the charge was appropriate, um, there was
17 no, there's no deficiency, that he requested a self-defense
18 charge, there's no deficiency in the charge itself or that
19 there's no deficiency in him not objecting to the self-defense
20 charge, um, it's our position that was sufficient, it said,
21 um, the judge said in his charge that the State would have to
22 prove beyond a reasonable doubt the absence of self-defense,
23 um, so, Your Honor, it's our position there's no, um,
24 deficiency or prejudice with respect to the allegation and,
25 uh, that would be our argument, thank you.

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1 THE COURT: Okay. Alright, good enough. Alright, um,
2 I've listened closely to the testimony that's been been
3 presented and durin' the conduct and before, I've read the
4 transcript, I've read almost all a the transcript and at least
5 the salient portions of the transcript, skimmed those that
6 that were not, um, looking at the record and the evidence in
7 its totality, um, Mr. Baker, I'm gonna respectfully deny your
8 post-conviction relief application but I'm gonna tell you why
9 I will 'cause I'm, I'm not just gonna send ya outta here and
10 might give you the impression that I didn't consider it
11 carefully 'cause I have and I've looked at all the particular
12 points and I've looked at the relevant portions of the
13 transcript, you you you have first a question about s -- the
14 stand your ground defense. Well I don't think it necessarily
15 matters what I think about the stand a ground defense, um,
16 what matters is whether, um, counsel was deficient in
17 presenting the stand your ground defense. Counsel did what
18 was reasonable and what would have been expected under the
19 circumstances in asking for a pretrial hearing, the judge made
20 a decision that the case wasn't appropriate for a stand your
21 ground, now I happen to agree with that, it doesn't matter,
22 but I've read enough a the, of the, uh, evidence to know this
23 was not a stand your ground case. I know that there's a
24 general belief among citizens that stand your ground stands
25 for the proposition that, you know, you can effect misala --

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1 vigilante justice and that gunplay is okay as long as you're
2 threatened, that's not what it says, it's not what it says at
3 all. Under the facts and circumstances in this case if you
4 were in a Waffle House with a gun you didn't have a permit for
5 and you accepted an invitation to walk outside then you're not
6 really, you can't really take the or you don't have the luxury
7 of, uh, of immunity under that statute, you just don't and I
8 don't, I think ten times outta ten you're gonna lose that case
9 and I'm probly confident enough to say a hundred times out of
10 a hundred you're gonna lose that case but regardless, um, um,
11 uh, Mr. Ianuario did exactly what he was supposed to do: he
12 put up the evidence that was relevant, asked for a
13 determination from the judge, he just ruled against ya and
14 that that's that's, you take exception to the judge's, uh,
15 ruling I understand that, if I were in your shoes I probly
16 would too but, um, but, uh, that's not Mr. Ire -- Ianuario's
17 fault.

18 Um, the question of whether it was immediately appealable
19 or not, um, just because there hadn't been a case at the time
20 that said it wasn't immediately appealable doesn't mean that
21 it wasn't, as a matter a fact, it wasn't immediately
22 appealable, there just wasn't, hadn't, hadn't been a public
23 published case at that point that said it wasn't appealable
24 and even if it had been appealed at the time that wouldn't a
25 changed the case, it woulda just delayed when you actually

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1 went to trial on that case.

2 Um, your failure to testify, you know, in each and every
3 case, uh, attorneys and defendants have to make a decision as
4 to whether they should testify or not, generally among defense
5 attorneys there's two schools of thought and two camps and
6 those are the s -- the the school of thought that I don't want
7 my defendant to testify because then the State's gonna be able
8 to impeach him or her and it's gonna be more problematic, that
9 is, that the risks outweigh the benefits and then there's
10 another school a thought that says always put your client on
11 the stand, I happen to prescribe to that notion when I
12 practiced law, um, and I always put my client on the stand,
13 um, but, you know, you really don't know if you're right or
14 wrong until after you get the jury verdict and that's always
15 subject to being second-guessed, um, there are a lot of
16 attorneys out there who are a lot more successful and smarter
17 than I ever hope to be who never put their clients on the
18 stand, it's just a tactical decision at the time of trial
19 based on all of the outstanding evidence and you make that
20 decision in context with the trial. It's not, um, it is not
21 deficient legally to decide not to testify, you may regret it
22 after the fact, um, you also may have regretted testifying as
23 well because again, I heard your testimony and I also read the
24 transcript and the facts, I'm not so certain that your
25 testimony would have changed the jury's decision in any

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1 meaningful way because that there are certain facts in the
2 record that are absolutely uncontrovertible, um, and, uh,
3 there is a question, there was a question of fact whether it
4 was self-defense or not and whether you exercised a duty to
5 retreat and whether you were at fault in bringing about the
6 difficulty, you know, you can go either way, the jury actu --
7 get the, obviously looked at the evidence and decided that you
8 you weren't acting in self-defense, that's the jury's decision
9 but Mr. I -- Ianuario did what he could to put that before,
10 uh, the jury.

11 The judge's charges, I I looked at the charges, I've read
12 the charges, they are correct and accurate statement of the
13 law, whether or not they're confusing enough is a or confusing
14 is is a s -- is a subjective perspective but objectively
15 looking at it they are an accurate and appropriate, uh,
16 statement of the law and I don't think it was incumbent upon
17 Mr. Ianuario to object to the same, um, and had he objected to
18 the same I can tell you for a fact that the judge woulda
19 denied, uh, or overruled the objection.

20 With respect to, uh, the charge for, uh, manslaughter,
21 um, Mr. Ianuario on the record very clearly stated that he
22 ha -- took exception to a lesser included charge, he didn't
23 want the lesser included charge. The reason he didn't want
24 the lesser included charge, and I've read the whole
25 transcript, is because it was a great case for voluntary

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1 manslaughter, it was not a good case for self-defense, that's
2 the one place where I do disagree with Mr. Ianuario, it wasn't
3 a good self-defense case, it was a good voluntary manslaughter
4 case and the jury pretty much bore that out, um, that they
5 goated ya into it, ya'll had a fight, ya acted in the heat a
6 passion, I read it, that's what it looks like to me too, um,
7 but Mr. Ianuario did actually ask for simply a murder charge,
8 I woulda done the same thing because I wouldn't have wanted
9 ha -- want 'em to have that fallback position, I'd want 'em to
10 have only murder to consider but the judge made that decision,
11 he argued on your behalf, the judge made that decision, uh,
12 and the exception that you take is not to your counsel but to
13 the judge's decision, um, and for, so for all those cases,
14 Mr. Baker, I I'm gonna deny your request, I do not find that
15 Mr. Ianuario's, uh, conduct was deficient, um, and I don't
16 find, uh, that you were prejudiced by any any mistakes that he
17 may have made, he may have missed a few objections here or
18 there although I don't see that he subs, uh, substantially
19 missed any objections that would have made a difference at all
20 if in fact he did. Alright, good luck to ya, Mr. Baker, I
21 wish you well, sir.

22 MS. ROSS: Thank Your Honor.

23 THE COURT: Okay.

CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on March 21, 2017 at the time and place heretofore set forth; and that the foregoing pages numbered from 3 through 67, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

August 3, 2017

Margaret A. Woods 10-16-18

Margaret A. Woods, Court Reporter
in and for the State of South Carolina at Large.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Antwon M. Baker, Jr., #355673
Applicant,

V.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

2015-CP-42-5198

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief filed on December 21, 2015, by Antwon M. Baker, Jr. (Applicant). Respondent made its Return on July 12, 2016, moving for a more definite statement by Applicant and requesting an evidentiary hearing. On December 30, 2016, Applicant submitted an Application Addendum to add additional allegations. An evidentiary hearing was convened on March 21, 2017, at the Spartanburg County Courthouse in Spartanburg, South Carolina.

Applicant was present and represented by Susannah C. Ross, Esquire. Respondent was represented by Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office. At the evidentiary hearing, Applicant testified on his own behalf. Respondent called Robert Ianuario, Esquire, and Derrick Bulsa, Esquire, as witnesses. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies the application for post-conviction relief.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of confinement of the Spartanburg County Clerk of Court. In July 2012, the Spartanburg County Grand Jury indicted Applicant for

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murder (2012-GS-42-3668). In July 2013, Applicant was indicted for unlawful carrying of a pistol (2013-GS-42-2013) based on the same incident. Robert E. Januario, Esquire, and Matt Canady, Esquire, represented Applicant at trial. Assistant Solicitors Derrick B. Bulsa and Lindsey Overby prosecuted the case on behalf of the Seventh Circuit Solicitor's Office. On June 3-6, 2013, Applicant proceeded to trial before the Honorable J. Derham Cole. A jury found Applicant guilty of the lesser included offense of voluntary manslaughter and as indicted for the unlawful carrying of a pistol. Judge Cole sentenced Applicant to eighteen years for voluntary manslaughter and one year for unlawful carrying of a pistol. The terms were ordered to run concurrently.

Applicant filed a timely notice of appeal. Wanda H. Carter, Appellate Defendant of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Baker, Op. No. 2015-UP-178 (S.C. Ct. App. filed April 8, 2015). Applicant filed a Petition for Rehearing, which was denied by the South Carolina Court of Appeals on May 21, 2015. On June 22, 2015, Applicant filed a Petition for Writ of Certiorari to review the Court of Appeals' opinion. The South Carolina Supreme Court denied the petition in an order dated October 8, 2015. The Remittitur was returned on November 20, 2015.

FACTUAL HISTORY

Applicant was convicted of murder and unlawful carrying of a pistol, arising out of the shooting death of Anthony Young (Victim) in Spartanburg County, June 3, 2012. The Victim and Applicant were both present at a Waffle House, located on Highway 29 in Spartanburg, SC. (Tr. p. 93). There was a history of prior physical altercations between the Applicant and Victim. (Tr. p. 98). On the night of the shooting, Applicant drove into the parking lot of Waffle House at

the same as Victim was standing outside the restaurant. (Tr. p. 98). Applicant witnessed Victim and a group of friends standing, and before exiting his vehicle, Applicant placed a loaded pistol in his waistband. (Tr. p. 98). After exiting the restaurant, Applicant encountered Victim and a group of friends and an argument began. (Tr. p. 98). Applicant turned to walk back inside the Waffle House and is struck in the back of his head. (App. p. 99). Evidence presented at trial indicated it was not the Victim who struck the Applicant in the head. Applicant removed the loaded pistol from his waistband and began firing into the group of people outside of Waffle House. (Tr. p. 99). As Victim was running away, Applicant shot Victim in the back. (Tr. p. 94). Applicant fled the scene, changed clothes, and placed the pistol in the trunk of Applicant's girlfriend's vehicle. (Tr. p. 229-246). Law enforcement officers located Applicant and his vehicle at an apartment complex and Applicant was then placed under arrest. (Tr. p. 229-242).

ALLEGATIONS

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

Ineffective assistance of counsel:

- a. "Failing to object to the voluntary manslaughter charge
- b. "Due Process violations"
- c. "lack of subject matter jurisdiction because the murder indictment was true billed July 19, 2012, when the Grand Jury was not convened until July 23, 2012."
- d. "failing to investigate"
- e. "failing to make proper objections to State's attacks on opposing counsel"
- f. "failing to request charges on appearances and State's burden to disprove self-defense"

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

Applicant Testimony

At the evidentiary hearing, Applicant testified on his own behalf. Applicant testified that he had discussed testifying during a "stand your ground" hearing, but his attorney advised

against it. Applicant. Had he testified at a hearing, Applicant stated he would have explained how he feared for his life. Applicant admitted to arming himself before leaving his car, but that he always carries a weapon for protection. Applicant testified that he attempted to walk away, but was struck in the head and "rushed" by many people. Applicant testified he witnessed around thirty people in the parking lot that night, but his attorney did not investigate any of them for potential witness statements. Applicant alleged that had his attorney investigated these witnesses, they would have been able to provide potentially exculpatory evidence. Applicant testified that his attorney did not discuss and review the discovery file with him until the day before trial.

Trial Counsel Testimony

At the evidentiary hearing, Applicant's trial attorney, Robert Ianuario, testified on behalf of the State. Mr. Ianuario testified that he was retained by Applicant within two months of Applicant being charged with murder. According to Mr. Ianuario, he met with Applicant on several occasions and reviewed Applicant's discovery file multiple times. Mr. Ianuario testified that he conducted an extensive investigation of Applicant's case, including contacting witnesses, ballistic experts, gunshot residue experts, and medical examiners.

Mr. Ianuario testified that no experts were available to testify at trial, because Applicant's resources were limited. Mr. Ianuario testified that during the stand your ground hearing, he did not call Applicant to testify in order to avoid having Applicant subjected to cross-examination. Mr. Ianuario testified that while in chambers, the charge of voluntary manslaughter was discussed with Judge Cole. Mr. Ianuario testified that he took issue with the lesser included offense, but that Judge Cole included it during his charge to the jury.

Mr. Ianuario testified that he did not object to the self-defense charge as it was read to the jury. Mr. Ianuario also testified that he did not object to Judge Cole's jury charge of a

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"defendant's right to act upon appearances." During his testimony, Mr. Ianuario stated "I freely admit I should have put Antwon on the stand." Mr. Ianuario testified that he did not object to the Solicitor's comments during closing arguments¹, because he thought it made him more credible on his knowledge of firearms than the State. Finally, Mr. Ianuario testified that a plea offer was made and discussed with Applicant, but Applicant wished to proceed to trial.

Assistant Solicitor Bulsa's Testimony

At the evidentiary hearing, Assistant Solicitor Derrick Bulsa testified on behalf of the State. During the hearing, Mr. Bulsa testified that he was prepared to cross-examine Applicant had he been called as a witness. Mr. Bulsa testified that the State was prepared to offer evidence that Applicant chased down the victim and shot him in the back. Mr. Bulsa testified that he was able to read multiple statements by the Applicant into evidence during the trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and can weigh their testimony and credibility accordingly. These credibility findings have been applied to the Court's findings and conclusions set forth below. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2017):

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the

¹ During closing argument, the State commented that Mr. Ianuario "apparently he has some fascination with firearms." Tr. p. 486-487.

applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland v. Washington, 466 at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry her burden of proof and has not established any ineffectiveness of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant:

Failure to Object: Improper Jury Instruction

Applicant has alleged that based upon the jury instructions charged by Judge Cole, his trial counsel rendered ineffective assistance. Specifically, Applicant alleges that his trial counsel should have objected to the inclusion of "voluntary manslaughter" and trial counsel should have requested a charge on the self-defense burden of proof.

To warrant the court eliminating the charge of manslaughter, there must be *no evidence whatsoever tending to reduce the crime from murder to manslaughter*. State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)(citing State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009)). If there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 8112 (2005). Whether a voluntary manslaughter charge is warranted turns on the facts and if the facts disclose any basis for the charge, the charge must be given. (emphasis added) Starnes, 388 S.C. at 597. Trial counsel testified that while in chambers, he indicated to Judge Cole he disagreed with the inclusion of the manslaughter charge. Judge Cole disagreed and informed the jury of the lesser-included offense of voluntary manslaughter.

As for the self-defense burden, the record indicates that Judge Cole did charge the jury on self-defense. Judge Cole explained the burden of proof for self-defense as:

"Now, although the [Applicant] has raised the defense of self-defense, the burden of proof is not on the [Applicant] to prove the existence of self-defense. As I have previously instructed you, the burden is always upon the state to prove the [Applicant]'s commission of the crime alleged against the [Applicant] beyond a reasonable doubt, and this would therefore necessarily require that the state prove beyond a reasonable doubt the absence of self-defense."

Judge Cole gave a clear and proper charge as to the required burden of proof for self-defense, thus an objection by trial counsel was not warranted. Even if trial counsel's failure to object could be found as deficient representation, there is no evidence that Applicant was prejudiced by

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the inclusion of the jury charges as they were presented. Based upon a review of the record and the testimony presented at the evidentiary hearing, this Court finds the Applicant has failed to meet his burden of proof. This allegation is denied and dismissed with prejudice.

Lack of Subject Matter Jurisdiction

Applicant alleges that the trial court lacked subject matter jurisdiction, because the grand jury met on a date different than indicated on the face of the indictment. A grand jury may meet at any time ordered by a circuit judge. See S.C. Code Ann. §§ 14-5-910 to -940 (allowing for terms of court not provided for by law). Accordingly, a grand jury is not unlawfully impaneled simply because it does not meet during a term of court as provided for in sections 14-5-620 to -820. See State v. Jeffcoat, 26 S.C. 114, 1 S.E. 440, 441 (1887) ("[M]erely changing the time for holding the court did not make the grand jury illegal."). Furthermore, a presumption of regularity attaches to proceedings in the Court of General Sessions. Pringle v. State, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986). Absent evidence to the contrary, the court must presume that a properly returned indictment is valid. State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996) (citing Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995)); State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991). Applicant's indictments are valid on their face, because they state all the necessary elements of the crime, the date of the offense, and the name of the accused. Id. at 75, 472 S.E.2d at 40.

Additionally, Applicant's allegation regarding subject matter jurisdiction is without merit. Subject matter jurisdiction is the power of a court to hear a particular class of cases. State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). An applicant may challenge the subject matter jurisdiction of the trial court at any time. Id. However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Id. at 101, 610 S.E.2d at 499. Thus, an

applicant challenging subject matter jurisdiction must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant's trial involved criminal matters, which are well within the jurisdiction of the South Carolina Circuit Court. Applicant has failed to meet his burden of proof. This allegation is denied and dismissed with prejudice.

Failure to Investigate

Applicant alleges his trial counsel was ineffective for failing to investigate. To show ineffective assistance in this regard, Applicant must present evidence to show what counsel could have discovered had he more fully investigated. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

During the evidentiary hearing, Applicant's trial counsel testified credibly and in detail as to his investigation of Applicant's case. Trial counsel testified that he met with multiple expert witnesses and interviewed possible fact witnesses that were willing to speak with him. Trial counsel testified in detail to his trial strategy and attempts to enter evidence for Applicant's defense. This Court finds trial counsel reasonably investigated Applicant's case, and to the extent that trial counsel's investigation was deficient, Applicant has failed to establish that his trial counsel's deficiency prejudiced Applicant in any way. Applicant has failed to meet his burden of proof. This allegation is denied and dismissed with prejudice.

Failing to Object to State's Attacks on Opposing Counsel

Applicant alleges that his trial counsel was ineffective for failing to object to Assistant Solicitor Bulsa's comments during closing argument. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008).

Applicant's trial counsel testified that he was not concerned with the Solicitor's comments about trial counsel's "fascination with firearms." Applicant's trial counsel testified that he believed it may have been beneficial to the defense, since the jury may have been more sympathetic to Applicant's case based on the comments. Trial counsel's failure to object was a trial strategy and reasonable under the circumstances.

Additionally, Applicant has failed to present evidence that he was prejudiced by the failure to object. Therefore, Applicant has failed to meet his burden of proof. The allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, the allegations are denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 8 day of JULY, 2018.



Robin B. Stilwell
Presiding Judge
Seventh Judicial Circuit

GREENVILLE, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
ANTWON M. BAKER,	)	CASE NUMBER 2015-CP-42-5198
APPLICANT,	)	
	)	MOTION TO ALTER OR AMEND
VS.	)	THE JUDGMENT
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	

COMES NOW the Applicant and hereby moves pursuant to Rule 59(e), SCRC, to alter or amend the judgment of this Court filed on July 16, 2018. The Applicant takes issue with the findings of fact and conclusions of law set fourth resulting in the denial of post-conviction relief in his case. He argues each allegation set fourth amounted to undue prejudice. He further argues that if each allegation did not amount to ineffective assistance of counsel standing alone, the cumulative effect of counsel's performance was deficient and prejudiced him to the degree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 386 S.E.2d 624, 625 (1989)

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) and failing to immediately file an interlocutory appeal of the trial judge's ruling denying immunity as was allowed at the time of the trial. The Order also fails to address the related argument that the trial attorney was ineffective for advising the applicant not to testify at trial when he had no impeachable prior convictions. As stated in the Order at page five, trial council admitted

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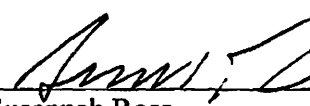
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he should have put applicant on the stand. The PCR judge denied both arguments at the hearing finding that the decision whether to testify is a tactical one. He agreed with the trial judge's ruling on regarding immunity and found no prejudice from trial counsel's failure to appeal it.

The order also fails to address the arguments of ineffective assistance of counsel for failing to make objections to the State's comment that trial counsel was trying to infer the wrong guy was the shooter and the recall of expert witness Dr. Wren to testify about items he failed to present in the case-in-chief. (Trial transcript p. 372, l. 23 & pp. 417-435) "Reply testimony should be limited to rebuttal of matters raised by the defense, rather than to complete the plaintiff's case-in-chief." State v. Huckabee, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Cl. App. 2010). Here the State's questioning of the witness went on for over fifteen pages of the transcript which restated autopsy description and entered an autopsy diagram and pictures onto evidence. (Trial transcript p. 417)

For the foregoing reasons, the Applicant requests this Court to alter or amend its Order of Dismissal.

Respectfully submitted,


 Susannah Ross
 Attorney for the Applicant
 333 E. Coffee Street,
 Greenville, SC 29601
 (864) 242-0029

FILED
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 MASHOP BL ACKLEY

Greenville, South Carolina
 This 20 day of July, 2018.

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Antwon M. Baker,)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

SEVENTH JUDICIAL CIRCUIT

**ORDER DENYING APPLICANT'S
MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59(e)**

C. A. No.: 2015-CP-42-5198

This matter comes before the Court pursuant to the Applicant's Motion to Alter or Amend the Judgment dated July 20, 2018, and filed July 23, 2018, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. After having had the opportunity to carefully review the Motion, this Court respectfully denies the same.

AND IT IS SO ORDERED.

 ROBIN B. STILWELL

August 12, 2018
 Greenville, South Carolina

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 M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

ORIGINAL

RECEIVED

MAR 26 2019

ANTWON M. BAKER, JR.

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001531

PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

1.

Whether the PCR court erred in finding defense counsel was not ineffective, where counsel admitted he “screwed up” in not calling petitioner to testify during the “stand your ground” immunity hearing, where petitioner was attacked at a place he had the right to be, the Waffle House, where petitioner fired his gun in fear for his life after he was hit in the back of the head and trapped in the small doorway of the Waffle House, since defense counsel’s expectation that a police investigator as the only witness could carry petitioner’s burden of proof on immunity, including that petitioner was in fear of losing his life. was objectively unreasonable?

2.

Whether the PCR court erred in finding defense counsel was not ineffective in failing to object to the self-defense charge, where the instruction was confusing and it did not clearly convey that the state had to disprove Petitioner acted in self-defense beyond a reasonable doubt, and it did not directly impart petitioner’s right to act on appearances, especially where the PCR court incorrectly found the judge’s self-defense instructions were clear and correct?

ARGUMENT

1.

The PCR court erred in finding defense counsel was not ineffective, where counsel admitted he “screwed up” in not calling petitioner to testify during the “stand your ground” immunity hearing, where petitioner was attacked at a place he had the right to be, the Waffle House, where petitioner fired his gun in fear for his life after he was hit in the back of the head and trapped in the small doorway of the Waffle House, since defense counsel’s expectation that a police investigator as the only witness could carry petitioner’s burden of proof on immunity, including that petitioner was in fear of losing his life if he did not shoot, was objectively unreasonable.

Relevant Facts

Petitioner went to a Waffle House, where he had a right to be, when he was attacked, and shot in self-defense. At his trial for murder before the Honorable J. Derham Cole, and a jury, petitioner asserted he was immune from prosecution pursuant to S.C. Code § 16-11-440(c), which provides “a person who is not engaged in an unlawful activity and who is attacked in another place where has the 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 or to prevent the commission of a violent crime as is defined in § 16-1-60.” The immunity from prosecution therefore lies in S.C. Code § 16-11-450(A). App. 15, l. 17 – 16, l. 19.

Petitioner was represented by Robert Ianuario. App. 1. Derrick Bulsa was the assistant solicitor. App. 1. Petitioner was convicted of voluntary manslaughter and sentenced to eighteen

years imprisonment. App. 539, l. 22 – 540, l. 4; app. 546, ll. 2-3. Petitioner raised on direct appeal the issue that the trial judge erred by ruling that S.C. Code §16-11-440 (C) did not apply because petitioner was not attacked in his vehicle, his residence or his place of business. Petitioner also argued he was entitled to a directed verdict on the murder charge. App. 548 – 584. The Court of Appeals affirmed in a summary opinion. App 585-587.

Petitioner filed an application for post-conviction relief on December 21, 2015. App. 589-604. The state filed a Return and Motion for a More Definite Statement dated July 12, 2016. App. 605-611. After an application addendum was filed an evidentiary hearing was held on March 21, 2017 before the Honorable Robin B. Stillwell. Susannah Ross represented petitioner. Alicia Olive represented the state. App. 613.

Ianuario would later admit not calling appellant as a witness at the “stand your ground” hearing was “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 (sic) leave it to His Honor [to] determine whether or not that amounts to ineffective assistance.” App. 644, l. 15 – 645, l. 3. Counsel also said this at the PCR hearing explaining this, his first murder trial: “I freely admit that I should have put Antwon on the stand and leave it to Your Honor’s , uh, or not [whether] that was ineffective, I at the time thought I could get all the necessary [of immunity] established through Detective Foster’s testimony without havin’ (sic) to expose Antwon to any cross-examination and expose the case to anything that was beyond the knowledge that was already inside discovery.” App. 657, ll. 9-20.

During the immunity hearing, Ianuario asked the judge, “Can you take the police reports without the witness being present, or the witness statements?” The judge responded, “Well, I

mean, I think you've got the burden of proof." Ianuario then asked for permission to speak "to the prosecutor." App. 17, l. 16 – 18, l. 8.

Defense counsel then called Investigator Richie Foster as a witness. App. 24, ll. 17-21. 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?" 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 defense 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. 13-25.

Foster then said that during his investigation, he was unable to determine whether anyone else at the Waffle House that early morning had a firearm. App. 26, ll. 2-5. Foster offered that he understood there was "a crowd of folks outside. Mr. Baker 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 onetime, *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. 24 – 27, l. 11. (emphasis added).

Foster described the area petitioner was attacked in, which also was 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 indication that petitioner started the altercation or difficulties. “He kept telling the individuals . . . to “leave it alone.” App. 29, ll. 20-24. “Leave it alone,” was said on more than one occasion by petitioner to the agitators at the Waffle House before he was attacked.

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 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 did refuse to fight, and according to statements and his 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 testified that he was told that petitioner was hit on the back of the head when he came into the Waffle House. App. 33, ll. 4-8. Foster 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 Assistant Solicitor Balsa, Foster said he understood six or seven shots were fired. App. 36, l. 10 – 37, l. 1. Foster related in petitioner’s first statement to the police he said, “The boys didn’t say nothing at first, so I went on in and ordered my food.” App.

38, l. 16 – 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 that he did not think petitioner had a concealed weapons permit, but that only one victim was shot when petitioner fired his gun that morning. App. 42, l. 4 – 43, l. 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 appellant 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, defense counsel told the judge he had no further witnesses. Counsel then argued that the “stand your ground law applies.” He noted petitioner was not engaged in unlawful activity. He argued there was no indication petitioner was at fault and that petitioner “even attempted to walk away.” “Once you enter into the Waffle House, the only way he would have any sort of cover that would have stopped a bullet would have been to jump over the counter. . . . Also I believe there is evidence that there was another firearm present.” App. 51, l. 2 – 52, l. 20.

Counsel argued, “Based on that I don’t see that there’s enough to disprove that Antwon Baker 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 defense counsel, “Well, I don’t have that statement.” App. 51, l. 2 – 52, l. 20.

Assistant solicitor Balsa argued that “by stepping out of the car and arming himself he was not engaged in unlawful activity (sic) -- he 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 assistant solicitor argued that self-defense was a jury decision.

The judge then ruled, “I’m not satisfied that this statute applies to these circumstances.” The judge said that 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 then argued under subsection (C), that the statute applied because petitioner was acting lawfully in a place that he had a right to be. The judge asked the solicitor and defense counsel then if they were aware of any case under S.C. Code § 16-11-440 and 450 that did not involve a person’s home, vehicle, or place of business. The attorneys said they could not think of or find such a case. App. 55, ll. 4-19. The judge then ruled that the statute was not applicable to these circumstances and that even if it was, petitioner had failed to prove by a preponderance of the evidence that he was entitled to immunity. The judge therefore denied the immunity motion. App. 55, l. 20 – 56, l. 6.

During the PCR hearing, petitioner testified that he wanted to testify at the immunity hearing and if he had testified he would have told the judge he feared for his life after he was attacked in the Waffle House. “I was outnumbered and there [were] multiple people out there with guns, I was by myself and they try to hurt me.” Petitioner named Brandon Glover, Justin Davis, and Anthony Young as the people who were trying to harm him. Anthony Young was the person shot. 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. 620, l. 16 – 622, l. 6.

Petitioner said when he first pulled up at the Waffle House he did not notice the troublemakers. When he went inside, he heard one of them say, "That's him," and petitioner said he knew the men carried guns. Nonetheless, "I 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 the immunity hearing. App. 622, l. 1 – 623, l. 25.

At the PCR hearing, petitioner also explained how he was trapped in a small doorway inside the Waffle House and that he could not push or pull his way out of being trapped. App. 630, l. 3 – 632, l. 7. Glover was the man who punched petitioner in the back of his head. Again, petitioner thought one of the men was armed. Petitioner finally said he did not even remember defense counsel discussing with him whether he thought petitioner would make a good witness at the immunity hearing or before the jury. App. 632, l. 2 – 634, l. 4.

Petitioner testified he was trapped by the men inside the Waffle House doorway, that he was in fear of his life, and that is why he pulled the gun out and shot in self-defense. App. 637, l. 3 – 638, l. 19. Petitioner said if he did not shoot that evening that "I'd end up dead." App. 638, ll. 22-24.

Again, defense counsel Ianuario said that looking back, "It's 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" in not calling petitioner as a witness during the immunity hearing. App. 644, l. 15 – 645, l. 2. Counsel also added, "I freely admit I should have put Antwon 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 havin' to expose Antwon to any cross-examination and expose the case to anything that was beyond the knowledge that was already inside discovery." App. 656, l. 15 – 657, l. 20.

The order of dismissal did not address the issue of defense counsel's ineffectiveness for admitting committing an error by not advising petitioner not to testify, and not calling him as a witness during the immunity hearing. Thus, PCR counsel file a Rule 59 (e) SCRPC, motion to alter or amend on this issue which was denied. App. 692-694.

Discussion

Petitioner's only prior record was a driving under suspension and a disorderly conduct conviction. App. 620, ll. 13-15. Petitioner did not testify before the jury either in his self-defense case, so defense counsel's preoccupation with how petitioner would present as a witness was objectively strange particularly since it seems intuitive that only the person under attack could testify whether he or she was in fear of losing their life or suffering great bodily harm.

In State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), this Court similarly dealt with a stand-your-ground case under subsection (C) of 16-11-440. This Court found that Jones' residence qualified as "another place" where she had a right to be under the immunity statute. Subsection (C) states, "A person who is (1) not engaged in an unlawful activity and (2) who is attacked in another place where he as a right to be, including, but not limited to, his place of business, (3) has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, (4) if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60." State v. Jones, 416 S.C. 283, 297, 786 S.E.2d 132, 139 (2016).

Here, respectfully, the trial judge erred by finding that S.C. Code § 16-11-440(C), did not apply to petitioner being attacked in a Waffle House, since it was a place he had a right to be even though it was not *his business*. However, defense counsel belatedly realized that he could not establish the elements of self-defense, and most specifically that petitioner was in fear of great bodily harm or death, without petitioner's testimony. See State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013).¹

Not surprisingly, Investigator Foster would testify he thought petitioner could have escaped the danger without shooting when defense counsel pressed him on the subject. Further, Foster's reasoning that petitioner could have avoided that Waffle House on that night misses the point on his right to stand his ground once he was attacked since (1) he was not engaged in an unlawful activity and (2) he was attacked in another place where he as 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. . . S.C. Code §16-11-440(C).

Petitioner's PCR testimony clearly shows he would have testified that he was in fear of great bodily harm, 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

¹ The fact that Curry was not decided until six months after the immunity hearing in this case does not add to the analysis. This Court in Curry wrote that "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." This Court then explained that the defendant in Curry misunderstood the Immunity 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 defense counsel to be clairvoyant in this case. Rather, counsel simply bungled his handling of the immunity hearing in this case, and he admitted it at the PCR hearing.

weapons permit has not been interpreted as him not having a right to act in self-defense. See State v. Scott, 424 S.C. 463, 819 S.E.2d 116 (2018) (Scott did not own a gun and “borrowed” his roommate’s gun to return fire. This Court found Scott was entitled to immunity under the statute).

It is evident from the record that defense counsel did not understand that he had the burden of proof at the immunity hearing -- and he even spoke of the state disproving self-defense at the immunity hearing -- which showed counsel did not understand the difference between a jury charge on self-defense, and an immunity hearing burden. 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 was scared for his life was by having petitioner testify.

2.

The PCR court erred in finding defense counsel was not ineffective in failing to object to the self-defense charge, where the instruction was confusing and it did not clearly convey that the state had to disprove Petitioner acted in self-defense beyond a reasonable doubt, and it did not directly impart petitioner's right to act on appearances, especially where the PCR court incorrectly found the judge's self-defense instructions were clear and correct.

The PCR court found that the trial judge's self-defense instruction on the burden of proof was "clear and proper." App. 687. The judge's instruction was, "Now, although the [applicant] has raised the defense of self-defense, the burden of proof is not on the [applicant] to prove the existence of self-defense. As I previously instructed you, the burden is always on the state to prove the [applicant's] commission of the crime alleged the [applicant] beyond a reasonable doubt, and this would therefore necessarily require the state prove beyond a reasonable doubt the absence of self-defense." App. 687.

Respectfully, this charge is far from clear that the state has the burden of disproving self-defense beyond a reasonable doubt. App. 526, l. 24 – 527, l. 7.

At the PCR hearing, defense counsel said this was "my first and today only murder [case]." App. 652, l. 24 – 653, l. 9. Counsel said the matter of the self-defense instruction was discussed in chambers and counsel admitted he did not remember ever arguing to the judge that the self-defense instruction was confusing, and that it was not clear that the state had the burden of disproving self-defense beyond a reasonable doubt. Defense counsel said he did have his own proposed self-defense instruction which quoted State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998) on the state disproving self-defense, "once raised by a defendant beyond a reasonable doubt and it's clear the defendant need not establish self-defense by a preponderance of the

evidence but must merely produce the evidence which causes the jury to have a reasonable doubt regarding his guilt.” App. 654, l. 1 – 656, l. 9.

In State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998), this Court stated, “The current law requires the state to disprove self-defense once raised by the defendant, beyond a reasonable doubt. See State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989).” State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-493 (1998). See also, State v. Addison, 343 S.C. 290, 540 S.E.2d 449 (2000).

The judge’s instruction that “the burden is always on the state to prove the defendant’s commission of the crime alleged against the defendant beyond a reasonable doubt, and this would therefore necessarily require that the state prove beyond a reasonable doubt the absence of self-defense” was not clear in imparting to the jury the essential principle that the state had disprove appellant was not acting in self-defense beyond a reasonable doubt. While the judge’s jury instruction, while a purely academic matter, states, “the absence of self-defense” it is far from a clearly worded instruction that the state had the burden of disproving petitioner acted in self-defense beyond a reasonable doubt. Clear language in this situation, respectfully, was not difficult.

Further, the judge’s instruction that, “The defendant has a right to act on appearances. He may be mistaken. The law does not hold someone to a refined assessment of the danger as might be accomplished having an adequate time to reflect, provided however that he has acted as a person of ordinary reason, firmness and courage would have acted or should have acted in meeting the appearance of the danger. In other words, he does not have to wait until his assailant gets an advantage, for one always has the right to act under the law of self-preservation and to prevent an assailant from getting an advantage over him. There is however a requirement of

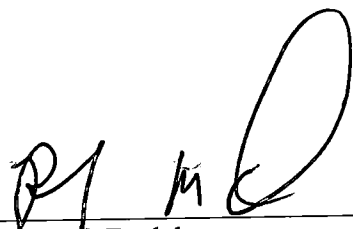
objectivity. The belief must be reasonable, that is that a reasonable and prudent person if acting under the same or similar circumstances would so believed or would have been warranted in so acting.” App. 529, ll. 4-19.

The objectively reasonable language superimposed over the supposed right to act on appearances instruction made it hopelessly confusing. This jury instruction did not clearly instruct the jury on a defendant’s right to act on appearances. Further, it mixed in vaguely that the defendant also does not have to allow his assailant “to get the drop on him,” along with the language about objectivity and reasonableness. The purpose of jury instructions is to enlighten the jury on the legal concepts, so it will reach a correct verdict, and not to confuse. See State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987).

Defense counsel admitted, as he must, that while the self-defense instructions were discussed in chambers, he did not object or take exception to the jury instruction not clearly conveying to the jury that the state had to disprove petitioner was not acting in self-defense beyond a reasonable doubt. Similarly, the jury instruction on petitioner’s right to “act on appearances” was not clear, it was confusing in a case where the right to act on appearances was critical, and defense counsel also failed to take exception to that jury instruction on that element of self-defense. The judge erred by denying relief on these grounds, and by incorrectly reasoning the jury instructions on self-defense were clear and correct. App. 687 – 688.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be granted so that full briefing is allowed on both Issues 1 and 2.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of March, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

ANTWON M. BAKER, JR.

PETITIONER

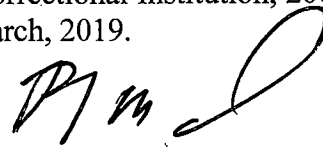
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Antwon M. Baker, #355673, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 26th day of March, 2019.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of March, 2019.

Courtney Powers (L.S.)

Notary Public for South Carolina

My Commission Expires: May 2, 2027.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County
Hon. Robin H. Stilwell, Circuit Court Judge
Appellate Case Tracking No. 2018-001531

RECEIVED

JUN 18 2019

S.C. SUPREME COURT

Antwon M. Baker, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

- I. This Court should affirm the PCR court's ruling that trial counsel was not deficient for not presenting Baker as a witness in his pretrial immunity hearing because the decision was based on reasonable trial strategy. Furthermore, Baker was not entitled to relief because he was not in a "place he had a right to be" within the meaning of the immunity statute.
- II. Trial counsel was not deficient for not objecting to the court's self-defense charge because the charge was substantially correct and adequately covered the law.

STATEMENT OF THE CASE

In July 2012, the Spartanburg County Grand Jury indicted Antwon Baker for murder (2012-GS-42-3668). In July 2013, Baker was indicted for unlawful carrying of a pistol (2013-GS-42-2013) based on the same incident. Robert E. Ianuario, Esquire, and Matt Canady, Esquire, represented Baker at trial. Assistant Solicitors Derrick B. Bulsa and Lindsey Overby prosecuted the case on behalf of the Seventh Circuit Solicitor's Office. On June 3-6, 2013, Baker proceeded to trial before the Honorable J. Derham Cole. A jury found Baker guilty of the lesser included offense of voluntary manslaughter and as indicted for the unlawful carrying of a pistol. Judge Cole sentenced Baker to eighteen years for voluntary manslaughter and one year for unlawful carrying of a pistol. The terms were ordered to run concurrently.

Baker filed a timely notice of appeal. Wanda H. Carter, Appellate Defendant of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Baker on appeal. The South Carolina Court of Appeals affirmed Baker's conviction. State v. Baker, Op. No. 2015-UP-178 (S.C. Ct. App. filed April 8, 2015). Baker filed a Petition for Rehearing, which was denied by the South Carolina Court of Appeals on May 21, 2015. On June 22, 2015, Baker filed a Petition for Writ of Certiorari to review the Court of Appeals' opinion. The South Carolina Supreme Court denied the petition in an order dated October 8, 2015. The Remittitur was returned on November 20, 2015.

Baker filed a PCR application on December 21, 2015. Respondent made its Return on July 12, 2016, moving for a more definite statement by Baker and requesting an evidentiary hearing. On December 30, 2016, Baker submitted an Application Addendum to add additional allegations. An evidentiary hearing was convened on March 21, 2017, at the Spartanburg County Courthouse in Spartanburg, South Carolina. Baker was present and represented by Susannah C.

Ross, Esquire. Respondent was represented by Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office. At the evidentiary hearing, Baker testified on his own behalf. Respondent called Robert Ianuario, Esquire, and Derrick Balsa, Esquire, as witnesses. The PCR court found Baker failed to meet his burden of proof and denied his application in a written order dated July 8, 2018. Baker now appeals this order.

STATEMENT OF FACTS

Baker was convicted of murder and unlawful carrying of a pistol, arising out of the shooting death of Anthony Young (Victim) in Spartanburg County, June 3, 2012. Victim and Baker were both present at a Waffle House, located on Highway 29 in Spartanburg, SC. (App. p. 93). There was a history of prior physical altercations between the Baker and Victim. (App. p. 98). On the night of the shooting, Baker drove into the parking lot of Waffle House at the same time as Victim was standing outside the restaurant. (App. p. 98). Baker witnessed Victim and a group of friends standing, and before exiting his vehicle, Baker placed a loaded pistol in his waistband. (App. p. 98). After exiting the restaurant, Baker encountered Victim and a group of friends and an argument began. (App. p. 98). Baker turned to walk back inside the Waffle House and was struck in the back of his head. (App. p. 99). Evidence presented at trial indicated it was not the Victim who struck the Baker in the head. Baker removed the loaded pistol from his waistband and began firing into the group of people outside of Waffle House. (App. p. 99). As Victim was running away, Baker shot Victim in the back five times. (App. p. 94). Baker fled the scene, changed clothes, and placed the pistol in the trunk of his girlfriend's vehicle. (App. p. 229-246). Law enforcement officers located Baker and his vehicle at an apartment complex and Baker was then placed under arrest. (App. p. 229-242).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed de novo, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

I. Trial counsel was not deficient for not presenting Baker as a witness in his pretrial immunity hearing because the decision was based on reasonable trial strategy. Furthermore, Baker was not entitled to relief as a matter of law because he was not in a “place he had a right to be” within the meaning of the immunity statute.

A. The issue is not preserved for review.

This issue is not preserved for review. Baker did not raise the issue in his application or his amended application. (App. 589–604; 612). Although Baker did testify at the PCR hearing that he wanted to testify at the immunity hearing, App. 620, PCR counsel did not clearly argue this ground in her summation to the PCR court. (App. 670–71). She vaguely mentioned the pretrial hearing at the beginning of her summation, but quickly moved on to trial counsel’s failure to file an interlocutory appeal, referring to this as her “first issue.” (App. 671). In his ruling from the bench, the PCR court did not explicitly rule on trial counsel’s decision not to present Baker as a witness at the hearing, but ruled generally that this “was not a stand your ground case.” (App. 675, line 23). He went on to address trial counsel’s decision not to present Baker as a witness at trial, but did not address counsel decision not to present Baker’s testimony at the pretrial hearing. (App. 677–78). This was not a specific ruling on the issue as presented on appeal. The judge did not address the issue in his written order. Because Baker did not raise this issue in his application, PCR counsel did not argue this as an independent ground at the PCR hearing, and the judge did not rule on the issue, it is not preserved for review. See Mangal v. State, 421 S.C. 85, 95, 805 S.E.2d 568, 573 (2017) (finding PCR court did not abuse its discretion by refusing to address an issue in a 59(e) motion because it was not raised in the PCR application and not argued with specificity at hearing).

B. Trial counsel's decision not to present Baker as a witness was based on reasonable trial strategy.

Trial counsel testified that he decided not to present Baker as a witness at the immunity hearing because he “did not want to subject him to cross-examination” because he believed his sense of “bravado” would come off as disrespectful, and the solicitor would be able to use Baker’s testimony and insights about his demeanor to prepare for trial. (App. 645–46; 656). Trial counsel believed he could elicit sufficient evidence from the State’s investigator to make a valid self-defense case. (App. 645). Trial counsel further stated Baker preferred not to testify. (App. 647, lines 21–25). Thus, counsel’s decision not to present Baker as a witness at the immunity hearing was reasonable trial strategy. Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (explaining “when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel”).

C. Baker was not entitled to immunity as a matter of law because he was not in a place where he had a right to be.

The Protection of Persons and Privacy Act begins with an unequivocal statement of legislative intent: “It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business.” S.C. Code §16-11-420(A). Baker claims the act applies to his actions at a Waffle House restaurant. His argument fails because the common law castle doctrine only applies to homes and businesses, and the PPPA only extended the doctrine to occupied vehicles. Accordingly, the act does not apply to the facts of this case and Baker was not entitled to immunity as a matter of law.

§16-11-440(A) establishes a presumption of reasonable fear of death or serious bodily harm when a person is attacked in his residence,¹ dwelling,² or occupied vehicle³ by an intruder.⁴ Alternatively, §440(C) provides that a person who is not engaged in an unlawful activity and is attacked while in his business or “another place where he had a right to be” is not required to retreat from such an assault. §440(C) differs in three respects: 1) it does not require an intrusion, but only an attack, and 2) it is not limited to residences, dwellings, and occupied vehicles, but includes businesses and other places where the defendant “has a right to be”; and 3) it leaves the burden of proving reasonable fear with the defendant. §440(C) is broader than (A), and (consistently with the common law) includes scenarios where one is attacked on his property by an invitee or cohabitant.⁵ Under subsection (C), Defendant must prove to the court by a

¹ §16-11-430(2): “Residence” means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.

² §16-11-430(1): “Dwelling” means a building or conveyance of any kind, including an attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging there at night.

³ §16-11-430(4): “Vehicle” means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.

⁴ §440(A) is more akin to common law defense of habitation than true self defense. See State v. Bradley, 126 S.C. 528, 120 S.E. 240 (1923) (explaining “in ancient days habitations were necessarily converted into strongholds of defense, and the dwelling became a castle. The law crystallized the familiar principles: ‘While the man keeps the door of his house closed, no other may (unlawfully) break and enter it’; ‘The persons within the house may exercise all needed force to keep aggressors out, even to the extent of taking life.’”); see also State v. Green, 118 S.C. 279, 110 S.E.145 (1921) (spring gun case) (“There it is not simply the damage to the property which may result from the burglary that is involved, but, in addition thereto, is the question of the risk to the lives of the inmates. It is common knowledge that burglaries under such circumstances often result in the death of some of the inmates of the dwelling upon which the burglary is committed, and for that reason it might well be held that a burglary of that kind could rightfully be prevented by such means as might result in death. The undisputed facts showed that there was no person in this cabin whose life could have been endangered by a burglary committed thereon; hence, if what we have said is correct, it might not be prevented by means which might be expected to destroy the life of a human being.”).

⁵ Such scenarios do not qualify for the presumption in subsection (A). See §440(B).

preponderance of the evidence that he: 1) was acting lawfully; 2) killed Victim in self defense; and 3) was in his business or “another place where he had a right to be.”

The “right to be” language appears twice within the act. §440(B)(1) provides that the presumption of fear in §440(A) does not apply if the person “against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder.” This passage qualifies the broad “right to be” language with specific examples of scenarios (tied to property rights) appropriately within the reach of the act. §440(C) also qualifies the phrase with “including, but not limited to, his place of business.” This shows further intent to limit and contextualize the phrase.

The “place where he has a right to be” phrase has no settled meaning at common law. Variations of the phrase have been used by courts to connote property rights (such as those of an owner, lessor, or invitee). See State v. Cleland, 148 S.C. 86, 145 S.E. 628, 631 (1928) (“But, as to the house in which the deceased was living, the law is different. This house was the home of the deceased and his family; it was his castle, his place of refuge, where he had a right to go when seeking a place of safety”); State v. Kennedy, 143 S.C. 318, 141 S.E. 559, 561 (1928) (mill worker at his place of business was not required to retreat because he was “where he had a right to be”). But the phrase has also been used by defendants in arguments to refer to the right of law-abiding citizens to be present on public spaces, such as highways, where all have equal rights. But even in cases where the phrase refers to public places, the courts do not extend the castle doctrine to these areas. See State v. Rochester, 72 S.C. 194, 51 S.E. 685 (1905) (“Some courts have held that one assaulted in a public street is not bound to retreat before taking measures to defend himself, because he is where he has a lawful right to be. But this doctrine is not based upon sound principles, and it never has been recognized in this state.”) (citation

omitted); State v. Davis, 214 S.C. 34, 38, 51 S.E.2d 86, 87 (1948) (“In some jurisdictions the rule has been extended so as to relieve the defendant from the necessity of retreating if attacked in any place where he has a right to be, as when he is lawfully on a public street or highway. We have not gone that far.”); State v. McGee, 185 S.C. 184, 193 S.E. 303 (1937) (“It is contended that the defendant, being on a public street, in his automobile, where he had a right to be, did not have to retreat The fact that the defendant was on a public highway, where all men have equal rights, and in his automobile, did not constitute any one of those special privileges obviating the necessity of retreating before killing.”). Thus, Baker’s argument is directly contrary to common law.

The terminology of the act provides further proof that the act was intended to codify existing law on the duty to retreat, except where it is explicitly changed. The act could not more explicitly state that its intent is to codify the “common law castle doctrine.” Other terms of art featured prominently in the act, such as “stand your ground,” and “meet force with force,” have historically been associated with self defense which occurs on private property. Finally, the specific inclusion of the words “residence,” “home,” “dwelling,” “business,” and “vehicle” throughout the act shows that these enumerated areas and those recognized by the common law are the exclusive focus of the act. By contrast, the “Stand Your Ground” laws in Georgia, Florida, North Carolina, Alabama, and Tennessee do not purport to codify common law.

Baker’s interpretation of the Act would elevate every public street, sidewalk and restaurant to the special status of a person’s home, making each human being a castle unto himself. Such an interpretation would eviscerate the centuries-old and well-reasoned legal doctrine that a person must avoid deadly conflicts whenever possible. This extreme shift in public policy is not authorized by the Act, which states simply that its intent is to codify the

common law castle doctrine and extend it to a person's occupied vehicle and place of business. No case interpreting the act has held that it abrogates the duty to retreat in public places, or applied it to an area other than a home, business, or vehicle. Nor has any South Carolina case held that the castle doctrine's application is unconnected to property or possessory interests.

The true purpose of the Act is twofold: 1) to provide a pretrial procedure for worthy defendants to gain immunity from prosecution; and 2) to extend the castle doctrine to occupied vehicles. While these provisions do change the common law, they do so explicitly. If the legislature intended to abolish the law of retreat, it would have likewise done so explicitly. Defendant's interpretation of §440(C) ignores the remainder of the statute, particularly the declaration of intent. When read alongside §420, the only reasonable reading of the statute as a whole is that "another place where he has a right to be" refers to those places specifically enumerated in the act or recognized by common law as being immune from the duty to retreat.

D. Baker has not shown prejudice.

Because of the above, Baker has not shown prejudice from counsel's alleged deficiency in failing to call him as a witness at the immunity hearing. Even if the Act does apply to shootings at Waffle Houses, Baker testified he would have presented the same testimony at the pretrial hearing that he presented at the PCR hearing. App. 647, lines 17–18. This testimony showed he illegally armed himself with a handgun at 5:00 in the morning and walked into a fight. Instead of avoiding the conflict, he shot the victim five times in the back. He failed to prove he acted in self defense. Certiorari should be denied.

II. Trial counsel was not deficient for not objecting to the court's self-defense charge because the charge was substantially correct and adequately covered the law.

Baker's conclusory claim that the trial court's jury charge on self-defense was confusing gives new meaning to the expression "splitting hairs." There is no meaningful distinction between the charge as given and the statement of the law pronounced by this Court in State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492–93 (1998) (explaining "current law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt."). The trial court instructed the jury:

Now, although the defendant has raised the defense of self-defense, the burden of proof is not on the defendant to prove the existence of self-defense. As I have previously instructed you, the burden is always upon the state to prove the defendant's commission of the crime alleged against the defendant beyond a reasonable doubt, and **this would therefore necessarily require that the state prove beyond a reasonable doubt the absence of self-defense.**

This charge was substantially correct and adequately covered the law. A jury charge which is substantially correct and covers the law does not require reversal. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). "The substance of the law is what must be charged to the jury, not any particular verbiage." Id. There is no meaningful difference between "disproving" something and "proving the absence of" something.

Likewise, the court's "acting on appearances" instruction was a substantially correct statement of law. A person may act in self-defense when he reasonably believes he is in imminent danger of death or great bodily injury. The circumstances must be such that "a reasonably prudent man of ordinary firmness and courage would have entertained the same belief." State v. Douglas, 411 S.C. 307, 318, 768 S.E.2d 232, 238–39 (Ct. App. 2014). Thus, the standard is one of "objective reasonableness," just as the trial court explained to the jury. App. 529. Certiorari should be denied.

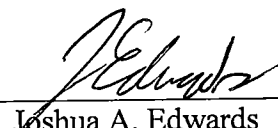
CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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PETITIONER,

v.

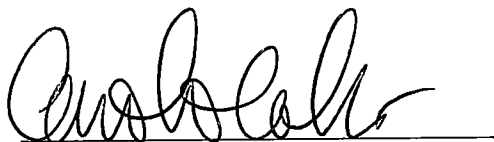
STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by sending two (2) copies via hand delivery addressed to:

Robert M. Dudek, Esquire
SC Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29211

This 18th day of June, 2019


CAROLINE COLLINS
 Administrative Coordinator

The Supreme Court of South Carolina

Antwon M. Baker, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-001531

ORDER

Pursuant to Rule 243(l) of the South Carolina Appellate Court Rules, this post-conviction relief appeal is hereby transferred to the South Carolina Court of Appeals.

FOR THE COURT

BY Drenda L. Shealy
Chief Deputy CLERK

Columbia, South Carolina
July 01, 2019

cc:

Robert Michael Dudek, Esquire
Joshua A. Edwards., Esquire
The Honorable Jenny A. Kitchings

The South Carolina Court of Appeals

Antwon M. Baker, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-001531

ORDER

This matter is before the court on a petition for a writ of certiorari. Based on the vote of the panel, the petition for a writ of certiorari is granted as to Question

1. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

FOR THE COURT

BY

V. Claire Allen

CLERK

Columbia, South Carolina

cc:

Robert Michael Dudek, Esquire

Joshua Abraham Edwards, Esquire

Alan McCrory Wilson, Esquire

The Honorable Robin B. Stilwell

Antwon M. Baker, Jr., 00355673

FILED
Nov 02 2021

Mar 07 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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. 2018-001531

BRIEF OF PETITIONER

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding defense counsel was not ineffective, where counsel admitted he “screwed up” in not calling petitioner to testify during the “stand your ground” immunity hearing, where petitioner was attacked at a place he had the right to be, the Waffle House, where petitioner fired his gun in fear for his life after he was hit in the back of the head and trapped in the small doorway of the Waffle House, since defense counsel’s expectation that a police investigator as the only witness could carry petitioner’s burden of proof on immunity, including that petitioner was in fear of losing his life. was objectively unreasonable?

STATEMENT OF THE CASE

Petitioner was indicted at the July 19, 2012, term of the Spartanburg County Grand Jury for the offense of murder. App. 696-697. His case was called to trial on June 3, 2013 before the Honorable J. Derham Cole, and a jury. App. 1. Petitioner was represented by Robert Ianuario and Matt Canady. App. 1. Derrick B. Bulsa and Lindsey Overby were the assistant solicitors. App. 1.

Petitioner was found guilty of voluntary manslaughter on June 6, 2013. App. 539, l. 22 – 540, l. Judge Cole sentenced petitioner to eighteen years imprisonment. App. 546, ll. 2-3.

Petitioner's conviction was affirmed by the Court of Appeals on direct appeal. State v. Antwon Baker, 2015-UP-178 (filed April 8, 2015). App. 585-587.

Petitioner filed an application for post-conviction relief on December 21, 2015. App. 589-604. The state filed a return and motion for a more definite statement dated July 12, 2016. App. 605-611. PCR counsel Susannah Ross filed an Application Addendum alleging ineffective assistance of trial counsel on January 25, 2017.

An evidentiary hearing was held before the Honorable Robin B. Stillwell on March 21, 2017. Susannah Ross represented petitioner. Alicia A. Olive was the assistant attorney general. App. 613.

An order of dismissal dated July 8, 2018 was issued. App. 681-691. PCR counsel Ross filed a motion to alter or amend the judgment arguing, inter alia, that “[t]he 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. 692-693. An order denying Applicant's Motion to Alter or Amend Pursuant to Rule 59 (e) dated August 12, 2018 was issued. App. 694.

Petitioner filed a petition for writ of certiorari with this Court on March 26, 2019. The state filed a return to this petition. Certiorari was granted on issue one in the petition for writ of certiorari on November 2, 2021.

This brief of petitioner follows.

STANDARD OF REVIEW

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The PCR court erred in finding defense counsel was not ineffective, where counsel admitted he “screwed up” in not calling petitioner to testify during the “stand your ground” immunity hearing, where petitioner was attacked at a place he had the right to be, the Waffle House, where petitioner fired his gun in fear for his life after he was hit in the back of the head and trapped in the small doorway of the Waffle House, since defense counsel’s expectation that a police investigator as the only witness could carry petitioner’s burden of proof on immunity, including that petitioner was in fear of losing his life if he did not shoot, was objectively unreasonable.

Introduction

Petitioner went to a Waffle House, where he had a right to be, when he was attacked, and he shot back in self-defense. At his trial for murder, petitioner asserted he was immune from prosecution pursuant to S.C. Code § 16-11-440(c), which provides “a person who is not engaged in an unlawful activity and who is attacked in another place where has the 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 or to prevent the commission of a violent crime as is defined in § 16-1-60.” App. 15, l. 17 – 16, l. 19.

Petitioner was convicted of voluntary manslaughter and sentenced to eighteen years imprisonment. App. 539, l. 22 – 540, l. 4; app. 546, ll. 2-3. Petitioner raised on direct appeal the issue that the trial judge erred by ruling that S.C. Code §16-11-440 (C) did not apply because petitioner was not attacked in his vehicle, his residence or his place of business. Petitioner also

argued he was entitled to a directed verdict on the murder charge. App. 548 – 584. The Court of Appeals affirmed in a summary opinion. App 585-587.

Relevant facts

Trial Counsel Ianuario would later admit at the PCR hearing that not calling petitioner as a witness at the “stand your ground” hearing was “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 (sic) leave it to His Honor [to] determine whether or not that amounts to ineffective assistance.” App. 644, l. 15 – 645, l. 3. Counsel also said this at the PCR hearing that this case was his first murder trial: “I freely admit that I should have put Antwon on the stand and leave it to Your Honor’s , uh, or not [whether] that was ineffective, I at the time thought I could get all the necessary [of immunity] established through Detective Foster’s testimony without havin’ (sic) to expose Antwon to any cross-examination and expose the case to anything that was beyond the knowledge that was already inside discovery.” App. 657, ll. 9-20.

During the immunity hearing, Ianuario asked the trial judge, Judge Cole: “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.” Ianuario then asked for permission to speak “to the prosecutor.” App. 17, l. 16 – 18, l. 8.

Defense counsel then called Investigator Richie Foster as a witness at trial. App. 24, ll. 17-21. 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 defense 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. 13-25.

Investigator Foster then said that during his investigation, he was unable to determine whether anyone else at the Waffle House that early morning had a firearm. App. 26, ll. 2-5. Foster offered that he understood there was "a crowd of folks outside. Mr. Baker 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 onetime, *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. 24 – 27, l. 11. (emphasis added).

Foster described the area petitioner was attacked in, which also was 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 indication that petitioner started the

altercation or difficulties. “He kept telling the individuals . . . to “leave it alone.” App. 29, ll. 20-24. “Leave it alone,” was said on more than one occasion by petitioner to the agitators at the Waffle House before he was attacked.

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 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 did refuse to fight, and according to statements and his investigation, petitioner came into the restaurant to escape the difficulties. However, the investigator 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 when he came into 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 Assistant Solicitor Balsa, Foster said he understood six or seven shots were fired. App. 36, l. 10 – 37, l. 1. Foster related in petitioner’s first statement to the police he said, “The boys didn’t say nothing at first, so I went on in and ordered my food.” App. 38, l. 16 – 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 that he did not think petitioner had a concealed weapons permit, but that only one victim was shot when petitioner fired his gun that morning. App. 42, l. 4 – 43, l. 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, defense counsel told the judge he had no further witnesses. Counsel then argued that the “stand your ground law applies.” He argued petitioner was not engaged in unlawful activity. He noted there was no indication petitioner was at fault and that petitioner “even attempted to walk away.” “Once you enter into the Waffle House, the only way he would have any sort of cover that would have stopped a bullet would have been to jump over the counter. . . . Also I believe there is evidence that there was another firearm present.” App. 51, l. 2 – 52, l. 20.

Counsel asserted, “Based on that I don’t see that there’s enough to disprove that Antwon Baker 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 defense counsel, “Well, I don’t have that statement.” App. 51, l. 2 – 52, l. 20.

Assistant solicitor Balsa argued that “by stepping out of the car and arming himself he was not engaged in unlawful activity (sic) -- he 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 assistant solicitor argued that self-defense was a jury issue or decision.

The judge then ruled, “I’m not satisfied that this statute applies to these circumstances.” The judge said that 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 then argued under subsection (C), that the statute applied because petitioner was acting lawfully in a place that he had a right to be. The judge asked the solicitor and defense counsel then if they were aware of any case under S.C. Code § 16-11-440 and 450 that did not involve a person's home, vehicle, or place of business. The attorneys said they could not think of or find such a case. App. 55, ll. 4-19.

The judge then ruled that the statute was not applicable to these circumstances and that even if it was, petitioner had failed to prove by a preponderance of the evidence that he was entitled to immunity. The judge therefore denied the immunity motion. App. 55, l. 20 – 56, l. 6.

During the PCR hearing, petitioner testified that he wanted to testify at the immunity hearing and if he had testified he would have told the judge he feared for his life after he was attacked in the Waffle House. "I was outnumbered and there [were] multiple people out there with guns, I was by myself and they try to hurt me." Petitioner named Brandon Glover, Justin Davis, and Anthony Young as the people who were trying to hurt him. Anthony Young was the person shot. 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. 620, l. 16 – 622, l. 6.

Petitioner said when he first pulled up at the Waffle House he did not notice the troublemakers. When he went inside, he heard one of them say, "That's him," and petitioner said he knew these men carried guns. Nonetheless, "I 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. 622, l. 1 – 623, l. 25.

At the PCR hearing, petitioner also explained how he was trapped in a small doorway inside the Waffle House and that he could not push or pull his way out of being trapped. App. 630, l. 3 – 632, l. 7. Glover was the man who punched petitioner in the back of his head. Again, petitioner thought one of the men was armed. Petitioner finally said he did not even remember defense counsel discussing with him whether he thought petitioner would make a good witness at the immunity hearing or before the jury. App. 632, l. 2 – 634, l. 4.

Petitioner testified he was trapped by the men inside the Waffle House doorway, that he was in fear of his life, and that is why he pulled the gun out and shot in self-defense. App. 637, l. 3 – 638, l. 19. Petitioner said if he did not shoot that evening that “I’d end up dead.” App 638, ll. 22-24.

Again, defense counsel Ianuario said that looking back, “It’s 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” in not calling petitioner as a witness during the immunity hearing. App. 644, l. 15 – 645, l. 2. Counsel also added, “I freely admit I should have put Antwon 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 havin’ to expose Antwon to any cross-examination and expose the case to anything that was beyond the knowledge that was already inside discovery.” App. 656, l. 15 – 657, l. 20.

The order of dismissal did not address the issue of defense counsel’s ineffectiveness for admitting committing an error by not advising petitioner not to testify, and not calling petitioner as a witness during the immunity hearing. Thus, PCR counsel filed a Rule 59 (e) SCRCP, motion to alter or amend on this issue which was denied. App. 692-694.

Discussion

Defense counsel in this case did not even understand the burden of proof prior to the immunity hearing. Respectfully, it does not get any more basic than that. Further, petitioner's only prior record was a driving under suspension and a disorderly conduct conviction so it would strain the limits of credulity to even suggest that could have been a factor in petitioner testifying before *the jury, much less at the immunity hearing* since the judge at that in camera hearing was not going to be concerned at all with this petty prior criminal record even if either seemingly summary court level crime was somehow admissible for impeachment purposes under Rule 609(a)(1), SCRE. App. 620, ll. 13-15. Petitioner also did not testify before the jury in his self-defense case after immunity was denied which was also strange since it seems intuitive that only the person under attack could actually testify whether he or she was in fear of losing their life or suffering great bodily harm to satisfy those two elements of self-defense. See State v. Light, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) (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, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life).

In State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), this Court similarly dealt with a stand-your-ground case under S.C. Code §16-11-440 (C). This Court found that Whitley Jones' residence that she shared with her decedent boyfriend and the adjoining parking lot qualified as

“another place” where she had a right to be under the immunity statute. Subsection (C) states, “A person who is (1) not engaged in an unlawful activity and (2) who is attacked in another place where he as a right to be, including, but not limited to, his place of business, (3) has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, (4) if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.” State v. Jones, 416 S.C. 283, 297, 786 S.E.2d 132, 139 (2016).

Here, respectfully, the trial judge erred by finding that S.C. Code § 16-11-440(C), did not apply to petitioner being attacked in a Waffle House, since it was a place he had a right to be even though it was not *his business*.¹ Petitioner submits that the position continuously urged by the state that “a place where he has a right to be” is strictly limited to a “home,” “[the defendant’s] business” or “vehicle” and that it cannot apply to any “public place” should be rejected. The state acknowledges other jurisdictions do not so limit the “stand your ground” immunity provisions in such a narrow fashion. Return to Petition for Writ of Certiorari at 11-12. Here, defense counsel correctly made a motion to obtain immunity from prosecution for petitioner. However, his preparation and legal reasoning were fatally flawed. Counsel belatedly realized that he could not establish the elements of self-defense necessary for immunity, and

¹ Petitioner sought certiorari from the state Supreme Court after this Court affirmed his conviction and rejected his claim of immunity in State v. Antwon M. Baker, 2015-UP-178 (filed April 8, 2015). See State v. Antwon Michele Baker, Jr., Appellate Case No. 2015-001332 (filed October 8, 2015). This denial of certiorari order by our Supreme Court obviously had no precedential meaning, and it could have simply been based on the lack of a trial record supporting immunity regardless of the trial judge’s legal reasoning on the applicability of the S.C. Code §16-11-440 (C) to the Waffle House shooting immunity claim.

most specifically that petitioner was in fear of great bodily harm or death, without petitioner's testimony. See State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013).²

Not surprisingly, Investigator Foster would testify he thought petitioner could have escaped the danger without shooting when defense counsel pressed him on the subject. Further, Foster's reasoning that petitioner could have avoided that Waffle House on that night misses the point on his right to stand his ground once he was attacked since (1) he was not engaged in an unlawful activity and (2) he was attacked in another place where he as 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. . . S.C. Code §16-11-440(C).

Petitioner's PCR testimony clearly shows he would have testified that he was in fear of great bodily harm, 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 has not been interpreted as him not having a right to act in self-defense. See State v. Scott, 424 S.C. 463, 819 S.E.2d 116 (2018) (Scott did not own a gun and "borrowed" his roommate's gun to return fire. This Court found Scott was entitled to immunity under the statute). This Court in the self-defense-accident context in State v. Burriss, 334 S.C. 256, 262,

² The fact that Curry was not decided until six months after the immunity hearing in this case does not add to the analysis. This Court in Curry wrote that "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." This Court then explained that the defendant in Curry misunderstood the Immunity 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 defense counsel to be clairvoyant in this case. Rather, counsel simply bungled his handling of the immunity hearing in this case, and he admitted it at the PCR hearing.

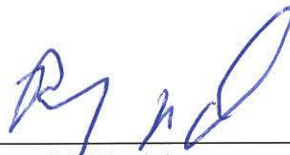
513 S.E.2d 104, 108 (1999) that the defendant being unlawfully in possession of a gun did not disqualify him from his right to act in self-defense.³

It is evident from the record that defense counsel did not understand that he had the burden of proof at the immunity hearing – and, as seen supra, he even spoke of the state *disproving self-defense* at the immunity hearing -- which showed counsel did not understand the difference between a jury charge on self-defense, and the immunity hearing burden of proof that was on the defendant by a preponderance of the evidence. 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 was scared for his life was by having petitioner testify. If petitioner had testified at the immunity hearing, as he did at the PCR hearing, and had defense counsel understood the burden of proof at the immunity hearing so he could also have made a competent argument entitling petitioner to immunity, there was a reasonable likelihood petitioner would have been granted immunity from prosecution at the trial level or prevailed on appeal with a proper trial level immunity record in existence. See Strickland v. Washington, 466 U.S. 690 (1984).

³ Burriss involved a defendant acting in self-defense and a claim of an accident defense.

CONCLUSION

Based on the foregoing arguments the ruling of the PCR court should be reversed and this case should be remanded to the Spartanburg County Court of General Sessions for a new immunity hearing.



Robert M. Dudek
Chief Appellate Defender

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ATTORNEY FOR PETITIONER

This 7th day of March, 2022.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Mar 07 2022
SC Court of Appeals

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. 2018-001531

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the brief of petitioner in the above-referenced case has been served upon Joshua Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 7th day of March, 2022.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

RECEIVED**May 02 2022****SC Court of Appeals**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Hon. Robin H. Stilwell, Circuit Court Judge
Appellate Case No. 2018-001531

Antwon M. Baker, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF QUESTIONS PRESENTED

Whether trial counsel was ineffective for not presenting Baker as a witness in his pretrial immunity hearing where counsel gave a valid strategic reason, and whether Baker has shown the result of the immunity hearing would have been different if he had testified.

STATEMENT OF THE CASE

In July 2012, a Spartanburg County grand jury indicted Petitioner Antwon Baker for murder (2012-GS-42-3668). In July 2013, Baker was indicted for unlawful carrying of a pistol (2013-GS-42-2013) based on the same incident. Robert E. Ianuario, Esquire, and Matt Canady, Esquire, represented Baker at trial. Assistant Solicitors Derrick B. Bulsa and Lindsey Overby prosecuted the case on behalf of the Seventh Circuit Solicitor's Office. On June 3-6, 2013, Baker proceeded to trial before the Honorable J. Derham Cole. A jury found Baker guilty of the lesser included offense of voluntary manslaughter and unlawful carrying of a pistol. Judge Cole sentenced Baker to eighteen years imprisonment for voluntary manslaughter and one year for unlawful carrying of a pistol. The terms were ordered to run concurrently.

Baker filed a timely notice of appeal. Appellate Defender Wanda H. Carter, Esquire, represented Baker on appeal. The South Carolina Court of Appeals affirmed Baker's conviction in an unpublished opinion. State v. Baker, Op. No. 2015-UP-178 (S.C. Ct. App. filed April 8, 2015). Baker filed a Petition for Rehearing, which was denied by the South Carolina Court of Appeals on May 21, 2015. On June 22, 2015, Baker filed a Petition for Writ of Certiorari. The South Carolina Supreme Court denied the petition in an order dated October 8, 2015. The Remittitur was returned on November 20, 2015.

Baker filed a PCR application on December 21, 2015. Respondent made its return on July 12, 2016, moving for a more definite statement and requesting an evidentiary hearing. On December 30, 2016, Baker submitted an Application Addendum with additional allegations. An evidentiary hearing was convened on March 21, 2017, at the Spartanburg County Courthouse in Spartanburg, South Carolina. Baker was present and represented by Susannah C. Ross, Esquire. Respondent was represented by Alicia A. Olive, Esquire, of the South Carolina Attorney

General's Office. Baker testified on his own behalf. Respondent called trial counsel Robert Ianuario and trial prosecutor Derrick Balsa as witnesses. The PCR court denied relief in a written order dated July 8, 2018. Baker petitioned for certiorari. This Court granted certiorari on the first issue presented on November 21, 2021. Baker filed a brief on March 7, 2022. This brief of respondent follows.

STATEMENT OF FACTS

Baker was convicted of murder and unlawful carrying of a pistol arising out of the shooting death of Anthony Young (Victim) in Spartanburg County, June 3, 2012. Victim and Baker were both present at a Waffle House, located on Highway 29 in Spartanburg, SC. (App. p. 93). There was a history of prior physical altercations between Baker and Victim. (App. p. 98). On the night of the shooting, Baker drove into the parking lot of Waffle House at the same time as Victim was standing outside the restaurant. (App. p. 98). Baker witnessed Victim and a group of friends standing and, before exiting his vehicle, Baker placed a loaded pistol in his waistband. (App. p. 98). Baker entered the restaurant but came back outside when the group Victim was with called him outside. After exiting the restaurant, Baker encountered Victim and a group of friends and an argument began. (App. p. 98). Baker turned to walk back inside the Waffle House and was struck in the back of his head. (App. p. 99). Evidence presented at trial indicated it was not Victim who struck Baker in the head. Baker removed the loaded pistol from his waistband and began firing into the group of people outside of Waffle House. (App. p. 99). As Victim was running away, Baker shot Victim in the back five times. (App. p. 94). Baker fled the scene, changed clothes, and placed the pistol in the trunk of his girlfriend's vehicle. (App. p. 229-246). Law enforcement officers located Baker and his vehicle at an apartment complex and Baker was then placed under arrest. (App. p. 229-242).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed de novo, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

Trial counsel provided competent representation even though he did not present Baker as a witness at the pretrial immunity hearing because his decision was based on reasonable trial strategy. Furthermore, Baker was not prejudiced because he failed to show he acted in self-defense.

A. Trial counsel's decision not to present Baker as a witness was based on reasonable trial strategy.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result. Id. at 692. The Sixth Amendment does not guarantee perfect representation, only a "reasonably competent attorney." Strickland, 466 U.S. at 687.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Even if there is reason to think that counsel's conduct "was far

from exemplary,” a court still may not grant relief if “[t]he record does not reveal that counsel took an approach that no competent lawyer would have chosen.” Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021).

Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” Strickland at 694. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” Id. at 693. Counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id. at 687.

At the evidentiary hearing, trial counsel testified he decided not to present Baker as a witness at the immunity hearing because he “did not want to subject him to cross-examination” because he believed his sense of “bravado” would come off as disrespectful, and the solicitor would be able to use Baker’s testimony and insights about his demeanor to prepare for trial. (App. 645–46; 656). Trial counsel believed he could elicit sufficient evidence from the State’s investigator to make a valid self-defense case. (App. 645). Trial counsel further stated Baker preferred not to testify. (App. 647, lines 21–25).

Trial counsel’s decision not to present Baker as a witness at the immunity hearing was based on reasonable trial strategy. Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (explaining “when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel”). Counsel’s articulation of valid trial strategy defeats a claim of ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992);

Stokes v. State, 308 S.C. 546; 419 S.E.2d 778 (1992). “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Strickland requires extreme deference to counsel’s strategic judgments that are adequately investigated: “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . .” Strickland, 466 U.S. at 690-91.

Trial counsel articulated a valid strategic reason why he did not call Baker as a witness at the immunity hearing. It was reasonable that trial counsel did not want to reveal the substance of Baker's testimony in the pretrial hearing, and that he preferred not to give the solicitor the opportunity to observe Baker's demeanor on the stand because it may have helped the solicitor prepare for cross-examination during trial. Given the availability of other evidence tending to support Baker's self-defense claim, such as the fact that he was outnumbered and was struck in the head, Baker's testimony was not necessary. Finally, counsel testified Baker himself preferred not to testify. The PCR court correctly applied the deferential Strickland standard of review and found trial counsel was not ineffective. This Court should affirm.

B. Baker has not shown prejudice because he failed to show he acted in self-defense.

Even if counsel was ineffective, Baker has not shown prejudice because he has failed to show his testimony would have changed the trial court's opinion that he did not act in self-defense. Baker testified that, had he been called as a witness at the immunity hearing, he would have presented the same testimony that he presented at the PCR evidentiary hearing. (App. 647, lines 17–18.) His testimony at the evidentiary hearing, viewed with the other evidence from the immunity hearing, showed he illegally armed himself with a handgun at 5:00 in the morning and walked into a situation he knew would likely result in violence. These facts establish that Baker

failed to meet his duty to retreat to avoid a deadly conflict.¹ When a conflict inevitably occurred, he shot Victim five times in the back. Baker chose not to testify at trial, suggesting he did not think it would be beneficial to his case, likely for the same reasons trial counsel chose not to call him at the evidentiary hearing. The jury rejected his self-defense claim under a much more favorable standard of proof.²

Baker's testimony at the PCR evidentiary hearing did not materially alter the facts adduced at trial. While Baker was able to explicitly testify to his state of mind, trial counsel was able to make substantially the same point via argument to the jury based on the other evidence presented. There is not a reasonable probability the trial court would have granted immunity on if Baker had testified at the immunity hearing. Because Baker failed to prove the result of the

¹ Baker was not in "a place he had a right be" within the meaning of the Protection of Persons and Property Act. See Code §16-11-420(A) ("It is the intent of the General Assembly to **codify the common law Castle Doctrine** which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business.") (emphasis added); Gilchrist v. State, 364 S.C. 173, 180, 612 S.E.2d 702, 706 (2005) (declining to elevate a dance club "to the possessory status of a home or place of business"); see also State v. Davis, 214 S.C. 34, 38, 51 S.E.2d 86, 87 (1948) ("In some jurisdictions the rule has been extended so as to relieve the defendant from the necessity of retreating if attacked in any place where he has a right to be, as when he is lawfully on a public street or highway. We have not gone that far."). However, he was still entitled to seek immunity under the common law of self-defense. Our Supreme Court has recognized that the common law of self-defense is "another provision of law" within the meaning of the Act that may entitle a defendant to immunity in certain circumstances. State v. Glenn, 429 S.C. 108, 117, 838 S.E.2d 491, 496 (2019) (citing S.C. Code Ann. § 16-11-450, which provides a "person who uses deadly force as permitted by the provisions of this article or **another applicable provision of law** is justified in using deadly force and is immune from criminal prosecution") (emphasis added). However, the common law of self-defense includes a duty to retreat unless the person is in their home or place of business. Accordingly, Baker was required to prove he had no probable means of avoiding the danger. In this case, Baker could have simply stayed inside the Waffle House instead of going outside to engage with Victim's group of friends.

² At the immunity hearing, Baker was required to prove the elements of self-defense by a preponderance of the evidence. State v. Glenn, 429 S.C. 108, 118, 838 S.E.2d 491, 496 (2019). By contrast, at trial the State was required to disprove self-defense beyond a reasonable doubt.

immunity hearing would have been different if he had testified, he has not shown prejudice. This Court should affirm.

CONCLUSION

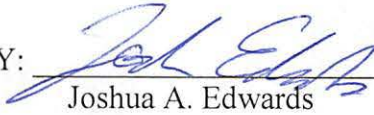
For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the decision of the lower court.

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General
S.C. Bar No. 101188

BY: _____


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ATTORNEYS FOR RESPONDENT

May 2, 2022

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Antwon M. Baker, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-001531

Appeal From Spartanburg County
Robin B. Stilwell, Circuit Court Judge

Unpublished Opinion No. 2024-UP-118
Submitted April 1, 2024 – Filed April 17, 2024

REMANDED

Chief Appellate Defender Robert Michael Dudek, of
Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, and Assistant
Attorney General Joshua Abraham Edwards, both of
Columbia, for Respondent.

PER CURIAM: Antwon M. Baker appeals the post-conviction relief (PCR) court's order denying his application for PCR. On appeal, Baker argues the PCR court erred in failing to find his trial counsel was ineffective for refusing to call

Baker to testify during the hearing on Baker's claim for immunity pursuant to section 16-11-440(C) of the South Carolina Code (2015). Because the PCR court did not make specific findings of fact and conclusions of law on this issue, we remand the matter to the PCR court for a supplemental order addressing the issue. *See* S.C. Code Ann. § 17-27-80 (2014) (stating a PCR court must "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented"); *Fishburne v. State*, 427 S.C. 505, 512, 832 S.E.2d 584, 587 (2019) ("The PCR court's general denial of all claims not specifically addressed in the PCR court's order 'does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law.'" (quoting *Simmons v. State*, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016))); *id.* at 517, 832 S.E.2d at 590 (remanding the matter "to the PCR court for the issuance of a supplemental order setting forth findings of fact and conclusions of law on the PCR ground that was not addressed in the original order"); *id.* at 516, 832 S.E.2d at 589 (explaining that "because the United States Constitution's Sixth Amendment guarantee to a defendant's right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party's procedural shortcoming . . . to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80").

REMANDED.¹

THOMAS, MCDONALD, and VERDIN, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
CHIEF DEPUTY CLERK

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May 06, 2024

The Honorable Amy W. Cox
PO Box 3483
Spartanburg SC 29304-3483

REMITTITUR

Re: Antwon M. Baker, Jr. v. State
Lower Court Case No. 2015CP4205198
Appellate Case No. 2018-001531

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

A handwritten signature in blue ink that reads "Catherine Harrison, deputy".

CLERK

Enclosure

cc: Robert Michael Dudek, Esquire
Joshua Abraham Edwards, Esquire
Alan McCrory Wilson, Esquire
Antwon M. Baker, Jr., 355673

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Antwon M. Baker, Jr #355673
Applicant,

2015CP4205198

v.

Order on Remand

State of South Carolina
Respondent.

This matter comes before the Court pursuant to an Order for Remand filed 1 April 2024 by the South Carolina Court of Appeals. The Court of Appeals remanded the case to the trial court to rule on the question of whether "trial counsel was ineffective for refusing to call Baker to testify during the hearing on Baker's claim for immunity pursuant to section 16-11-440(C) of the South Carolina Code (2015)." This Order is a supplement to that prior Order of the Court dated 8 July 2018 and relies upon the applicable legal standards articulated therein.

This Court finds that trial counsel was not ineffective for refusing to call Baker to testify during the hearing on Baker's claim for immunity. 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.

After a review of the record and evidence presented, this Court finds that the Applicant has failed to meet the requisite burden of proof that trial counsel was ineffective for refusing to call Baker to testify during the hearing on Baker's claim for immunity. The Applicant's Application is, therefore, denied.

AND IT IS SO ORDERED.

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SPARTANBURG COUNTY
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Robin B. Stilwell, Circuit Judge

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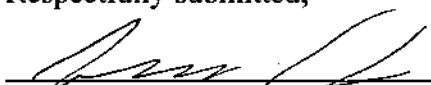
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
ANTWON M. BAKER,	)	CASE NUMBER 2015-CP-42-5198
APPLICANT,	)	
	)	MOTION TO ALTER OR AMEND
VS.	)	THE ORDER ON REMAND
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	

COMES NOW the Applicant and moves pursuant to Rule 59(e), SCRPC, to alter or amend the Order on Remand filed on November 14, 2024. The Order fails to address the fact that the trial counsel's PCR hearing testimony indicated that his failure to call the Applicant as a witness was not a strategic decision. Counsel admitted it was "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 (sic) leave it to His Honor [to] determine whether or not that amounts to ineffective assistance." App. 644, l. 15 - 645, l. 3. Applicant argues the finding that the decision was strategic one is in error.

For the foregoing and any other applicable reasons, the Applicant requests this Court to amend its Order of Dismissal and instead incorporate the proposed Supplemental Order Granting Post-Conviction Relief attached hereto as Exhibit A.

Respectfully submitted,


 Susannah Ross #11205
 Attorney for the Defendant
susannah@rossenderlin.com
 330 E. Coffee St.
 Greenville, SC 29601
 (864) 242-0029

This 22 day of November, 2024.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
ANTWON M. BAKER,	)	CASE NUMBER 2015-CP-42-5198
APPLICANT,	)	
	)	SUPPLEMENTAL ORDER
VS.	)	GRANTING POST-CONVICTION RELIEF
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	

The Court of Appeals remanded this matter for a supplemental order to address whether trial counsel was ineffective for failing to call the Applicant during a pre-trial hearing. The hearing was based on Baker's claim of immunity pursuant to a stand your ground defense pursuant to South Carolina Code § 16-11-440(C). See Baker v. State, Op. No. 2024-UP-118 (S.C. Ct. App. Filed April 17, 2024).

PROCEDURAL HISTORY

On June 6, 2013, Baker was found guilty following a trial where he asserted immunity and self-defense; he was sentenced to eighteen years for voluntary manslaughter and one year for unlawfully carrying a pistol. He appealed his conviction and sentence. The South Carolina Court of Appeals affirmed the Applicant's conviction and denied his Petition for Rehearing. State v. Baker, Op. No. 2015-UP-178 (S.C. Ct. App. Filed April 8, 2015). The Supreme Court denied Applicant's Petition for Writ of Certiorari October 8, 2015, and the Remittitur was returned on November 20, 2015.

The Applicant filed for post-conviction relief (PCR) on December 21, 2015. The PCR hearing was convened on March 12, 2017, at the Spartanburg County Courthouse. Susan H. C. Ross represented the Applicant and Assistant Attorney General Alicia A. Oliver represented the

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State. The Applicant, trial counsel Robert Ianuario, and Assistant Solicitor, Derrick Balsa testified at the hearing. An Order of Dismissal was filed July 16, 2018. The Applicant timely filed a Motion to Alter or Amend pursuant to Rule 59 (e) arguing that the Order of Dismissal failed to address the argument that the trial attorney was ineffective for advising the applicant not to testify during the immunity hearing. The motion was denied by Order signed August 16, 2018. The Applicant appealed the denial of post-conviction relief filing a petition of writ of certiorari on March 26, 2019. Certiorari was granted on the issue of:

“Whether the PCR court erred in finding defense counsel was not ineffective, where counsel admitted he “screwed up” in not calling petitioner to testify during the “stand your ground” immunity hearing, where petitioner was attacked at a place he had a right to be, the Waffle House, where petitioner fired his gun in fear for his life after he was hit in the back of the head and trapped in a small doorway of the Waffle House, since defense counsel’s expectation that a police investigator as the only witness could carry petitioner’s burden of proof on immunity, including that petitioner was in fear of losing his life, was objectively unreasonable?”

The Court of Appeals found the PCR court did not make specific findings of fact and conclusions of law on the issue and remanded for a supplemental order addressing the issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has considered the testimony that was presented at the PCR hearing and read the salient portions of the transcript, appellate briefs, the appellate appendix (used in citation herein) and opinions. Reviewing the case on remand and looking at the record and the evidence in its totality, this Court finds that counsel was deficient in presenting the stand your ground defense. Counsel should have called Mr. Baker as a witness. His failure to do so was not reasonable under the circumstances where Mr. Baker carried the burden of proof, did not have an impeachable record, and had made prior statements which were consistent with asserting his

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ARIZONA

right to stand his ground. Appellate Appendix pages 303, Line 25 to page 307, Line 22 (App. 303, l. 25 – 307, l. 22).

Trial Counsel Ianuario admitted at the PCR hearing that not calling Applicant as a witness at the "stand your ground" hearing was "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 (sic) leave it to His Honor [to] determine whether or not that amounts to ineffective assistance." App. 644, l. 15 - 645, l. 3. Counsel also said this at the PCR hearing that this case was his first murder trial: "I freely admit that I should have put Antwon on the stand and leave it to Your Honor's, uh, or not [whether] that was ineffective, I at the time thought I could get all the necessary elements [of immunity] established through Detective Foster's testimony without havin' (sic) to expose Antwon to any cross-examination and expose the case to anything that was beyond the knowledge that was already inside discovery." App. 657, ll. 9-20.

During the pretrial immunity hearing, Ianuario asked the trial judge, Judge Cole: "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." Ianuario then asked for permission to speak "to the prosecutor." App. 17, ll. 16- 25.

Defense counsel then called Investigator Richie Foster as a witness at trial. App. 24, ll. 17-21. 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 Baker 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 to what everybody else told him." App. 25, ll. 4-12.

The following then occurred between defense counsel and the judge:

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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. 13-25.

Investigator Foster then said he was unable to determine whether anyone else at the Waffle House that early morning had a firearm. App. 26, ll. 2-5. He testified:

"a crowd of folks outside. Mr. Baker 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 onetime, *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, ll. 24 - 27. (emphasis added).

Foster described where the Applicant was attacked as the front doorway of the Waffle House and 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 indication that Applicant started the altercation or difficulties. "He kept telling the individuals . . . to "leave it alone." App. 29, ll. 20-24. "Leave it alone," was said on more than one occasion by Baker to the agitators at the Waffle House before he was attacked.

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SPRINGTOWN COUNTY
MARY W. COX

Foster recalled, "I believe one of the females did say or was trying to also keep them [the men who wanted to fight Applicant] calmed down. Without reading through them again, I can't be exactly sure." Applicant told Foster that the men said they were going to rob him. App. 30, ll. 1-10. Foster testified that the Applicant did refuse to fight, and according to statements and his investigation, Applicant came into the restaurant to escape the difficulties. However, the investigator refused to admit that Applicant could not have avoided the difficulty, "given that we never found another weapon ... " App. 31, ll. 3-21. Foster was told that Applicant was hit on the back of the head when he came into the Waffle House. App. 33, ll. 4-8. Foster also related his understanding that Applicant felt trapped by the men at the time he fired his gun. App. 34, ll. 20-23.

On cross-examination by Assistant Solicitor Balsa, Foster said he understood six or seven shots were fired. App. 36, l. 10 - 37, l. 1. Foster related that in Baker's first statement to the police he said, "The boys didn't say nothing at first, so I went on in and ordered my food." App. 38, l. 16 - 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 that he did not think Baker had a concealed weapons permit, but that only one victim was shot when Applicant fired his gun that morning. App. 42, l. 14 - 43, l. 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 Applicant 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, defense counsel told the judge he had no further witnesses. Counsel then argued that the "stand your ground law applies." He argued Applicant was not

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SPRING JUDGE COUNTY
AL W. COX

engaged in unlawful activity. He noted there was no indication Applicant was at fault and that Applicant "even attempted to walk away." "Once you enter into the Waffle House, the only way he would have any sort of cover that would have stopped a bullet would have been to jump over the counter. ... Also, I believe there is evidence that there was another firearm present." App. 51, l. 2-52, l. 20.

Counsel asserted, "Based on that I don't see that there's enough to *disprove that Antwon Baker 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 defense counsel, "*Well, I don't have that statement.*" App. 51, l. 2- 52, l. 20. (emphasis added).

Assistant solicitor Balsa argued that "by stepping out of the car and arming himself he was not engaged in unlawful activity (sic) -- he 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. 15 - 53, l. 24. The assistant solicitor argued that self-defense was a jury issue or decision.

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

Defense counsel then argued under subsection (C), that the statute applied because Applicant was acting lawfully in a place that he had a right to be. The judge asked the solicitor and defense counsel then if they were aware of any case under S.C. Code § 16-1-140 and 450

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SPARTANBURG COUNTY
AMY V. COX

that did not involve a person's home, vehicle, or place of business. The attorneys said they could not think of or find such a case. App. 55, ll. 4-19.

The judge then ruled that the statute was not applicable to these circumstances and that even if it was, Applicant had failed to prove by a preponderance of the evidence that he was entitled to immunity. The judge therefore denied the immunity motion. App. 55, l. 20 - 56, l. 6.

During the PCR hearing, Applicant testified that he wanted to testify at the immunity hearing and if he had testified, he would have told the judge he feared for his life after he was attacked in the Waffle House. "I was outnumbered and there [were] multiple people out there with guns, I was by myself and they try to hurt me." Applicant named Brandon Glover, Justin Davis, and Anthony Young as the people who were trying to hurt him. Anthony Young was the person shot. Applicant testified that there was an altercation where Anthony Young tried to attack him about two months before the altercation at the Waffle House. Applicant said he regularly carried a gun for his own protection because he worried he would be attacked. App. 620, l. 16 - 622, l. 6.

Applicant said when he first pulled up at the Waffle House, he did not notice the troublemakers. When he went inside, he heard one of them say, "That's him," and Applicant said he knew these men carried guns. Nonetheless, "I 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' [to] tell him let it go." Applicant said he would have testified consistently with his PCR testimony if he had been called as a witness during his immunity hearing. App. 622, l. 1 - 623, l. 25.

At the PCR hearing, Applicant also explained how he was trapped in a small doorway inside the Waffle House and that he could not push or pull his way out of being trapped. App.

630, l. 3 - 632, l. 7. Glover was the man who punched Applicant in the back of his head. Again, Applicant thought one of the men was armed. Applicant finally said he did not even remember defense counsel discussing with him whether he thought Applicant would make a good witness at the immunity hearing or before the jury. App. 632, l. 2 - 634, l. 4.

Applicant testified he was trapped by the men inside the Waffle House doorway, that he was in fear of his life, and that is why he pulled the gun out and shot in self-defense. App. 637, l. 3 - 638, l. 19. Applicant said if he did not shoot that evening that "I'd end up dead." App 638, ll. 22-24. Had the Applicant testified at his trial, the outcome of his case would likely been different.

Again, defense counsel Ianuario said that looking back, "It's 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" in not calling Applicant as a witness during the immunity hearing. App. 644, l. 15 - 645, l. 2. Counsel also added, "I freely admit I should have put Antwan 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 havin' to expose Antwan to any cross examination and expose the case to anything that was beyond the knowledge that was already inside discovery." App. 656, l. 15 - 657, l. 20.

Counsel's reasoning for failing to have Applicant testify at the immunity hearing and advising him not to testify at trial was flawed and amounted to ineffective assistance of counsel which likely effected the outcome of the case. Applicant's prior convictions of driving under suspension and disorderly conduct were not admissible for impeachment purposes under Rule 609 (a)(1), SCRE. App. 620, ll. 13-15. Though he could be impeached with his prior statements,

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HARTSFORD COUNTY
JAY V. COX

they were not inconsistent with an immunity defense or self-defense as he said he thought they were trying to gang him and had a gun. App. 303-307. Applicant said that he wanted to testify but counsel advised him not to. App. 633. This was bad advice in this situation because only the person under attack could testify as to whether he was in fear of losing his life or suffering great bodily harm to satisfy the elements immunity or support a self-defense claim. See State v. Light, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) (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, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life).

State v. Jones dealt with a stand-your-ground case under S.C. Code §16-11-440 (C) finding that Whitley Jones' residence that she shared with her decedent boyfriend and the adjoining parking lot qualified as "another place" where she had a right to be under the immunity statute. See State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). Subsection (C) states, "A person who is (1) not engaged in an unlawful activity and (2) who is attacked in another place where he as a right to be, including, but not limited to, his place of business, (3) has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, (4) if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60." Id. at 139.

Here, S.C. Code § 16-11-440(C), applied to Applicant being attacked in a Waffle House, because it was a place he had a right to be even though it was not his business. Trial counsel correctly made a motion to obtain immunity from prosecution for Applicant but failed to realize that he should not and could not establish immunity through the testimony of Investigator Foster. It was ineffective for counsel to rely on Foster's testimony in the immunity hearing and objectively unreasonable for defense counsel to expect a law enforcement investigator's testimony to undercut the State's case and establish immunity from prosecution.

Foster testified that the Applicant illegally possessed a handgun. App. 43, l. 20. Yet, being in possession of a gun without a concealed weapons permit does not prevent an individual from being entitled to immunity under the statute. In State v. Burriss, the Court found that the defendant's unlawful possession of a gun did not disqualify him from his right to act in self-defense. State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). See also State v. Scott, 424 S.C. 463, 819 S.E.2d 116 (2018) (Scott did not own a gun and "borrowed" his roommate's gun to return fire and the Court found Scott was entitled to immunity under the statute). Foster testified he thought Applicant could have escaped the danger without shooting when defense counsel pressed him on the subject. Foster's testimony that Applicant could have avoided that Waffle House on that night misses the point that the Baker had the right to stand his ground once he was attacked because (1) he was not engaged in an unlawful activity and (2) he was attacked in another place where he as 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... S.C. Code§16-11-440(C).

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SPARTANBURG COUNTY
AMY VL COX

Counsel could not carry the burden of proof by calling Investigator Foster because Foster could not establish the elements necessary for immunity, most specifically that Applicant was in fear of great bodily harm or death. See State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013). While Curry was not decided until six months after the immunity hearing, it did not lay out the fundamental law of immunity for the first time. It did not require defense counsel to be clairvoyant to know that Baker's testimony was necessary to support his immunity argument under the statute. As he admitted it at the PCR hearing, counsel simply bungled his handling of the immunity hearing in this case which was ineffective assistance of counsel.

Applicant's PCR testimony clearly shows he would have testified that he was in fear of great bodily harm, and, indeed, death, if he did not act as he did when he was attacked and trapped at the Waffle House. It is evident from the record that defense counsel did not understand that he had the burden of proof at the immunity hearing and, as seen supra, he even spoke of the state disproving self-defense at the immunity hearing. This shows counsel did not understand the difference between a jury charge on self-defense, and the burden of proof requirement on the defendant in an immunity hearing. 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 that Applicant was scared for his life was by having Applicant testify at the immunity hearing. Failing to do so was ineffective. If Applicant had testified at the immunity hearing, as he did at the PCR hearing, and had defense counsel understood the burden of proof at the immunity hearing, the outcome of the proceeding would likely have been different. Had trial counsel advised Applicant to testify to support a competent argument for immunity, there was a reasonable likelihood Applicant would have been

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PARTLAND COUNTY
MAY 11, 2011

granted immunity from prosecution at the trial level or prevailed on appeal with a proper trial level immunity record in existence. See Strickland v. Washington, 466 U.S. 690 (1984).

IT IS THEREFOR ORDERED:

1. This application for post-conviction relief is granted; and
2. Applicant's sentence and conviction is vacated.

AND IT IS ORDERED this _____ day of _____, 2024.

Robin B. Stilwell
Circuit Court Judge

Greenville, South Carolina

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SPARTANBURG COUNTY
AMY W. COX

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

ANTWON M. BAKER,
APPLICANT,

VS.

STATE OF SOUTH CAROLINA,
RESPONDENT.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

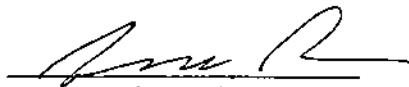
CASE NUMBER 2015-CP-42-5198

CERTIFICATE OF SERVICE

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by electronic mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Motion to Alter or Amend** on the above-captioned matter by electronic mail to:

ShaylaFlores@scag.gov

**Office of the Attorney General
PCR Division
P.O. Box 11549
Columbia, SC 29211**


Attorney for Defendant

This 22nd day of November, 2024

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CLERK OF COURT
SPARTANBURG COUNTY
AMY V. COX

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Antwon M. Baker, Jr #355673
Applicant,

v.

State of South Carolina
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

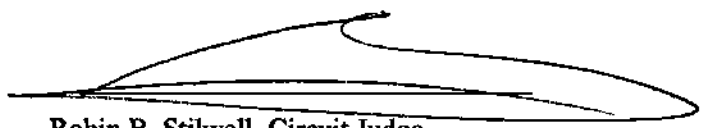
C.A. # 2015-CP-42-05198

Order on Applicant's Motion to Alter or Amend

This matter comes before the Court pursuant Applicant's Motion to Alter or Amend the Order on Remand dated 22 November 2024. The Court considered Trial Counsel's testimony together with all evidence presented at the hearing of this case. Having carefully considered the evidence, the Court finds that the Applicant has failed to meet the requisite burden of proof that trial counsel was ineffective for refusing to call Baker to testify during the hearing on Baker's claim for immunity.

The Applicant's Motion to Alter or Amend is, therefore, denied.

AND IT IS SO ORDERED.


Robin B. Stilwell, Circuit Judge

December 31, 2024

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2025 JAN -3 PM 4:09
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. GOX

WITNESSES

Spartanburg County Sheriff's Office

WITNESS

WITNESS

WITNESS

WITNESS

WITNESS

WITNESS

ARREST WARRANT NUMBER

M759470

ACTION OF GRAND JURY

JUL 19 2012

Foreperson of Grand Jury
Date:

VERDICT

Guilty of voluntary
manslaughter

James Foster
Foreperson of Petit Jury

Date:

June 6, 2013

DOCKET NO. -

12-GS-42-3668

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

JUL 23 2012

TERM

THE STATE

v

Antwon Michele Baker, Jr.

Indictment for

MURDER

SC Code 16-03-0010, 0020

CDR Code 116

Class FEL-EXM

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 JUL 25 AM 9:25
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

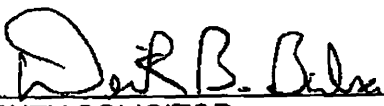
At a Court of General Sessions, convened on JUL 19 2012, the

Grand Jurors of Spartanburg County present upon their oath:

MURDER

That Antwon Michele Baker Jr., did in Spartanburg County on or about June 3, 2012, feloniously, willfully, and with malice aforethought, cause the death of Anthony Tecelle Young, by shooting the victim with a handgun, and he died as a proximate result thereof, all in violation of §16-3-0010, 0020, *The South Carolina Code of Laws*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


DEPUTY SOLICITOR

WITNESSES

Spartanburg County Sheriff's Office

INDEXED

INDEXED

INDEXED

CHECKED WARRANTS

CHECKED SIGNATURE

INDEXED

ARREST WARRANT NUMBER

ARREST VIOLATION

Direct Indictment

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date:

MAY 03 2013

VERDICT

Guilty

Foreperson of Petit Jury

Date:

June 6, 2013

DOCKET NO.

13-GS-42-2013

The State of South Carolina

County of Spartanburg

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

MAY 03 2013

TERM

THE STATE

vs.

Antwon Baker

Indictment for

WEAPONS/UNLAWFUL
CARRYING OF PISTOL

SC Code: 16-23-20, 0050(A)(2)

CDR Code: 0044

Class MIS-C

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SPARTANBURG COUNTY
2013 MAY -9 PM 3:46
M. HOPE BLACKLEY

108

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

MAY 03 2013

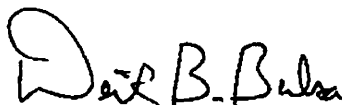
At a Court of General Sessions, convened on _____, the

Grand Jurors of Spartanburg County present upon their oath:

WEAPONS/UNLAWFUL CARRYING OF PISTOL

That Antwon Baker, did in Spartanburg County, on or about June 3, 2012, unlawfully carry about his person a pistol, in violation of §16-23-0020, 0050(A)(2), *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG
STATE VS.

Antwon Michele Baker Jr

AKA:

Race: BLACK Sex: M Age: 28

DOB: SS#:

Address:

City, State, Zip: Myrtle, SC 29379

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Manslaughter / Voluntary manslaughter

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2012GS4203668

A/W#: M759470

Date of Offense: 6/3/2012

S.C. Code §: 16-03-0010,

CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0050 of the S.C. Code of Laws, bearing CDR Code # 0217

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☐ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: B.B. Bulsa 15264 Antwon Baker Robert C. [Signature] 77203
BULSA, DERRICK SC Bar# Defendant Attorney for Defendant SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 18 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 86.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/cv	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

Clerk of Court/ Deputy Clerk

Court Reporter: Linda [Signature]

SCCA/217 (03/2011)

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code: _____

Sentence Date: June 1, 2013

FILED

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS **831**COUNTY OF SPARTANBURG
STATE VS.

Antwon Baker

AKA:

Race: BLACK Sex: M Age: 28

DOB: SS#: [REDACTED]

Address: [REDACTED] Rd

City, State, Zip: Moore, SC 29379

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Weapons / Unlawful carrying of pistol

INDICTMENT/CASE#: 2013GS4202013

A/W#: 2013GS4202013

Date of Offense: 6/3/2012

S.C. Code §: 16-23-0020,

CDR Code #: 0044

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-23-0020, of the S.C. Code of Laws, bearing CDR Code # 0044

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.ATTEST: Bulsa, Derrick 15264 Antwon Baker Robert E. [Signature] 77203
BULSA, DERRICK SC Bar# Defendant Attorney for Defendant SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 1 days/months/years or ☐ under the Youthful Offender Act not to exceed 1 years

and/or to pay a fine of \$ 0; provided that upon the service of 0 days/months/years and/or payment

of \$ 0; plus costs and assessments as applicable*; the balance is suspended with probation for 0

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ 0 plus 20% fee: \$ 0

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(B)(1) Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ca	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

PTUP

0 days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ 0 beginning

\$ 0 paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk

Court Reporter: Linda Moffitt

SCCA/217 (03/2011)

Presiding Judge

Judge Code:

Sentence Date:

2053

June 1, 2013