STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Chesterfield County

Honorable Michael S. Holt, Circuit Court Judge

GARY MOORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000459

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED

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

STATEMENT OF THE CASE

A Chesterfield County grand jury indicted Petitioner on December 1, 2015, for attempted murder. App. 658-659. On February 17, 2016, a hearing was held before the Honorable Roger E. Henderson on Petitioner's motion for immunity pursuant to the Protection of Persons and Property Act. Larry Knox represented Petitioner. Kernard Redmond and Mary Thomas Johnson Lee represented the state. App. 2.

At the conclusion of the hearing, the judge said: "Alright. I will let you hear from me hopefully tomorrow, if not by the end of the week anyway. So I will contact counsel and they can come over so I can put it on the record." App. 121, ll. 1-4. However, the judge's ruling was never put on the record and no written order was ever issued. Consequently, no findings of fact or conclusions of law were ever made as a reason for denying Petitioner immunity.

Petitioner's case was called for trial on April 5, 2016, before the Honorable Paul M. Burch, and a jury. Petitioner was represented by Larry Knox. Kernard Redmond and Mary Thomas Johnson Lee represented the state. App. 123.

On April 6, 2016, the jury found Petitioner guilty as indicted. App. 354, ll. 18-22. Judge Burch ordered a presentence investigation, and on April 11, 2016, the judge sentenced Petitioner to eighteen years' imprisonment. App. 371, ll. 21-24.

Petitioner was represented on appeal by Tricia Blanchette. Petitioner's conviction was affirmed in State v. Gary Moore, 2019-UP-234 (S.C. Ct. App. filed June 26, 2019). In the unpublished opinion, the Court of Appeals affirmed the denial of immunity, although there were no findings of fact or conclusions of law to review. The Court also held Petitioner was not entitled to a directed verdict and found no reversible error in the judge's redefinition of premeditation to the jury. App. 374-376.

On January 27, 2020, Petitioner filed an application for post-conviction relief (PCR). App. 378-388. The state filed a return to this application on December 21, 2020. App. 389-418. With the assistance of counsel, Petitioner filed an amended application on August 20, 2021. App. 420-430. An evidentiary hearing was convened on March 14, 2022, before the Honorable Michael S. Holt. Dayne Phillips represented Petitioner, and Chelsey Marto represented the state. App. 431.

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

Petitioner filed a petition for writ of certiorari with the Supreme Court on October 18, 2024. The state filed a return to this petition on February 3, 2025. By order filed February 21, 2025, the Supreme Court transferred the appeal to this Court pursuant to Rule 243(l), SCACR. By order filed December 5, 2025, this Court granted certiorari as to Petitioner's Question 3, but denied certiorari as to Petitioner's Questions 1, 2, and 4.

This brief of petitioner follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue raised on appeal. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The appellate court must defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law de novo, with no deference to the PCR court. Id. at 180-81, 810 S.E.2d at 839 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

ARGUMENT

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

Introduction

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

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

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

Relevant Facts

Charles Wallace was the state's key witness as the "victim" in this case. Wallace testified at trial that when he arrived at the convenience store that day "he [Petitioner] was running his mouth to me so I reached and grabbed him. Me and him went to struggle and the little boy [Steve Hooks]—me and him [Petitioner] went to the ground and then there was this little boy, broke us up, and he come, commencing to stabbing somebody." App. 161, ll. 18-23.

Wallace claimed that Petitioner walked right by him near the beer cooler when he entered the store while he was "running his mouth." Wallace did not say exactly what Petitioner was allegedly saying. He claimed only that Petitioner was "mumbling stuff to me." App. 162, l. 8 – 163, l. 13. Wallace grabbed Petitioner and "he fell to the floor." App. 163, ll. 14-22. Wallace added that Petitioner "fought back" and "slapped back at me." Wallace "confirmed" to the solicitor that they then engaged in "mutual combat" and that Petitioner "struck me [on the] side of the head here." App. 134, ll. 3-6.

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

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

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

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

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

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

weapon involved. App. 232, ll. 3-19. Hooks termed himself just a "good Samaritan." App. 233, ll. 18-25.

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

The following occurred when the trial judge instructed the jury on the law:

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

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

As stated, the jury returned during deliberations asking: "What is the attempted murder statute? What qualifies a person to be charged with attempted murder? What is the difference

between premeditation [and] intent?" App. 348, ll. 12-20. The solicitor argued the real issue was not premeditation, but "malice aforethought." App. 348, l. 21 – 349, l. 6. Defense counsel only objected to a recharge on premeditation. App. 350, ll. 5-16. The judge then repeated his instruction that "malice does not necessarily mean an actual intent to kill." App. 351, ll. 7-8.

Discussion

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

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

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

The trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "The purpose of instructions is to enlighten the jury and to aid at arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987) (quoting State v. Hewitt, 305 S.C. 207, 31 S.E.2d 257 (1944)).

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

More importantly, when the judge recharged the jury, he again told them that "malice does not necessarily mean an actual intent to kill." App. 351, ll. 7-8. This was significant in this case because it was undisputed that Wallace started the fight by slapping Petitioner and pulling him to the ground. While Petitioner did not testify during the trial as he did during the pretrial immunity hearing, the evidence at trial nonetheless showed that Petitioner was swinging his knife because he had been taken to the ground. Wallace, and not Petitioner, was the person with a deep seated hate or strong dislike for the other man, Petitioner. A jury properly instructed on the specific intent to kill being an element of attempted murder the state had to prove beyond a reasonable doubt would have found it very difficult to find that Petitioner had a specific intent to kill Wallace. Therefore, this error, particularly given its repetition when the jury had focused its "critical attention" on the meaning of attempted murder during deliberations was highly prejudicial. See State v. Blassingame, 271 S.C. 44, 46-47, 244 S.E.2d 528, 530 (1978) (When

the jury submits a question to the court during deliberations following a jury charge, it is reasonable to assume the jury has focused its "critical attention" on the specific question asked.).

Defense counsel was ineffective for failing to object to this misleading or hopelessly confusing jury instruction on specific intent or actual intent to kill not being a necessary element of attempted murder that the state had to prove beyond a reasonable doubt. See State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *aff'd as modified* State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). This Court's opinion in King was published almost a year before Petitioner's jury trial. Consequently, defense counsel should have been aware that attempted murder requires a specific intent to kill. At best, the jury instruction given in this case was very confusing since specific intent is an element of attempted murder that the state was obligated prove beyond a reasonable doubt. There is a reasonable probability that if the jury had been correctly instructed on a specific intent to kill, it would have acquitted Petitioner of attempted murder. Petitioner should be granted a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectively requests this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of March, 2026.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

Honorable Michael S. Holt, Circuit Court Judge

GARY MOORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000459

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 Brian H. Gibbs, Esquire, at his primary email address listed in the Attorney Information System (AIS), this 6th day of March, 2026.

Lara M. Caudy

Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR PETITIONER

From: Mcinnis, Sara
To: Brian Gibbs
Cc: Grace Sommer; Caudy, Lara
Subject: 2024-000459 Gary Moore v. State Brief of Petitioner
Date: Friday, March 6, 2026 10:53:00 AM
Attachments: 2024-000459 Gary Moore v. State Brief of Petitioner.pdf

Good Morning Mr. Gibbs,

Attached for service in the above-referenced case is the Brief of Petitioner, which will be filed with the Court of Appeals today, March 6, 2026, via email filing.

Thank you,

Sara McInnis
Administrative Assistant
South Carolina Commission on Indigent Defense
Appellate Division
(803) 734-1330