STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Sumter County
George C. James, Jr., Circuit Court Judge

Opinion No. 2018-UP-187 (S.C. Ct. App. filed May 9, 2018)
Indictment No. 2014-GS-43-0524

THE STATE,

RESPONDENT,

V.

RODNEY R. GREEN,

PETITIONER

APPELLATE CASE NO. 2015-002443

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on June 21, 2018. App. 22-23.

QUESTIONS PRESENTED

I. Where Petitioner was charged with murder and attempted murder, did the trial judge err by instructing the jury on the doctrine of transferred intent, which improperly allowed the jury to (1) substitute the general intent of murder for the specific intent of attempted murder, (2) equate malice with a specific intent to kill, and (3) find Petitioner guilty of attempted murder of an unintended person?

II. Did the trial judge err in failing to grant Petitioner's motion for mistrial, or instruct the jury to disregard expert testimony regarding ballistics, where the police officer who found the shell casings at the scene did not testify and no other witnesses could testify that the shell casings introduced at trial or tested by the expert were the shell casings found at the scene, which violated Petitioner's rights under the Sixth Amendment's Confrontation Clause?

STATEMENT OF THE CASE

During its July 2014 term, a Sumter County grand jury indicted Petitioner for murder of Tyrus Archie, attempted murder of Ray'Quann Jenkins, possession of a weapon during the commission of a violent crime, and possession of a stolen handgun (2014-GS-43-0524). R. 706-707. The state, represented by Ernest A. Finney, III, called the case to trial before the Honorable George C. James, Jr., and a jury on November 9, 2015. R. 1. Charlie Johnson represented Petitioner. R. 1.

During the trial, the state introduced shell casings and ballistics test results without establishing a proper chain of custody, thereby denying Petitioner of his cross-examination rights. Further, the judge instructed the jury regarding transferred intent, permitting the jury to use general intent and malice of murder to satisfy the specific intent element of attempted murder and allowing the jury to find Petitioner guilty of attempted murder of an unintended person.

Ultimately, the jury found Petitioner guilty as charged. R. 688, ll. 7-19. The judge sentenced Petitioner to life imprisonment without the possibility for parole for murder, to thirty years imprisonment for attempted murder, to five years imprisonment for possession of a weapon during the commission of a violent crime, and to time served for possession of a stolen pistol. R. 696, ll. 9-17; R. 708-711.

On November 16, 2015, Petitioner served his notice of appeal, which was perfected by undersigned counsel. On May 9, 2018, without the benefit of oral argument, the Court of Appeals affirmed Petitioner's convictions and sentences. State v. Green, 2018-UP-187 (S.C. Ct. App. filed May 9, 2018); App. 1-2. On May 24, 2018, Petitioner filed a petition for rehearing asking the Court of Appeals to rehear two issues. App. 4-21. On June 21, 2018, the Court denied the petition for rehearing. App. 22-23. This petition for writ of certiorari follows.

ARGUMENT

I. Where Petitioner was charged with murder and attempted murder, the trial judge erred by instructing the jury on the doctrine of transferred intent, which improperly allowed the jury to (1) substitute the general intent of murder for the specific intent of attempted murder, (2) equate malice with a specific intent to kill, and (3) find Petitioner guilty of attempted murder of an unintended person.

Reasons to grant certiorari

Petitioner was charged with murder and attempted murder. Over objection, the judge instructed the jury regarding the doctrine of transferred intent. The erroneous instruction violated Petitioner's substantial constitutional right to require the state to prove every element of the attempted murder offense, and the resolution of the issue by the Court of Appeals conflicts with decisions by the United States Supreme Court regarding the federal question presented. See Rule 242(b)(4) & (5), SCACR. By holding "South Carolina's criminal laws require imposition of the doctrine of transferred intent," the Court of Appeals rendered an opinion in direct conflict with this Court's recent decision in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2018). See Rule 242(b)(3), SCACR.[1] Finally, the Court of Appeals' opinion addressed novel questions of law regarding specific intent crimes. See Rule 242(b)(1), SCACR.

Relevant facts

The state alleged Petitioner killed Tyrus Archie with malice aforethought. R. 706-707. Additionally, the state alleged Petitioner "did with intent to kill, attempt to kill another person,

[1] To affirm Petitioner's convictions, the Court of Appeals cited its own case of State v. Williams, Op. No. 5540 (S.C. Ct. App. filed Feb. 28, 2018) (Shearouse Adv. Sh. No. 9 at 112). State v. Green, 2018-UP-187 (S.C. Ct. App. filed May 9, 2018); App. 2.

Tyrus Archie, with malice aforethought, either express or implied, by shooting Rayquann Jenkins." R. 706-707.

Charge conference

The state requested a jury instruction on "transferred intent." R. 605, ll. 5-11. Specifically, the state requested "that either if the jury thought that he was - - that the shooter was trying to kill Mr. Archie or harm Mr. Archie, and that he shot and hit Mr. Jenkins." R. 605, ll. 8-11. The judge responded that "a general intent to kill" would cover such a scenario. R. 605, ll. 12-13. Petitioner objected, explaining there was no evidence that Jenkins was shot by the gun allegedly connected to Petitioner. R. 605, l. 20 – R. 606, l. 3.

After reviewing State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), the trial judge indicated he could not instruct the jury on transferred intent based upon the requirement of a specific intent to kill for attempted murder. R. 608, l. 11 – R. 609, l. 2. Undaunted, the state continued to argue for the transferred intent instruction. R. 609, ll. 14-18. The solicitor candidly admitted the evidence did not show "what was in the shooter's mind about whether he wanted to kill Mr. Archie, Mr. Jenkins, or both." R. 609, ll. 18-20.

After a short break, the judge ruled that although the Court of Appeals "said that a specific intent to kill is necessary," the court had not said "there has to be a specific intent to kill any certain person." R. 610, ll. 12-17. The judge ruled a "transferred intent charge in some fashion would be appropriate" as "common sense has to prevail at some point." R. 610, ll. 17-20. The judge espoused his belief that it would "quite frankly ... defy common sense that someone could shoot. Just in any given case, shoot into a crowded room of people meaning to kill person A, but hits person Z. And you can't be found guilty of that crime by the reason of transferred intent." R. 612, ll. 1-6. Petitioner reiterated his objection, and noted there was no

evidence Petitioner "was aiming at Mr. Archie." R. 610, ll. 20-24; R. 612, ll. 7-10. The judge clarified that he intended to charge the jury that "if a person with malice aforethought attempts to kill another person, but by mistake injures or kills a different person, and the defendant still has the specific intent to kill." R. 610, ll. 15-20.

Jury instructions

Charging the jury with the elements of murder, the judge explained that state must present "proof beyond a reasonable doubt, that the defendant killed another person with malice aforethought." R. 663, ll. 9-14. He defined malice as "hatred, ill will or hostility towards another person." R. 663, ll. 14-16. He further denied malice as "the intentional doing of a wrongful act without just cause or excuse, and with an intent to inflict an injury or under circumstances that the law would infer an evil intent." R. 663, ll. 16-19. The judge explained that malice aforethought could be "either express or it can be implied." R. 664, ll. 1-2. "Express malice may be shown when a person speaks words that express hatred or ill will for another person. Or when the person prepared beforehand to do the act which was later accomplished." R. 664, ll. 7-11. Additionally, the judge told the jurors, malice "may be implied from conduct showing a total disregard for human life." R. 664, ll. 12-13. "Implied malice may also arise when the act is done with a deadly weapon," including a pistol. R. 664, ll. 13-23.

Thereafter, the judge instructed the jury on attempted murder, explaining, the state was required to prove Petitioner "with the intent to kill, attempted to kill another person with malice aforethought express or implied." R. 665, ll. 4-10. He reiterated his earlier instruction regarding malice, including the instruction permitting an inference of malice from the use of a deadly weapon. R. 665, l. 11 – R. 666, l. 10. The judge then instructed the jury regarding specific intent:

> Now, ladies and gentlemen, on the issue or the count of attempted murder, proof of attempted murder requires proof of a specific intent to kill. *Specific intent does not mean an intent to kill a specific person*, but rather that the defendant consciously intended the completion of acts that comprise the act of attempted murder. And the word intent as I will tell you in more detail later, means intending the result which actually occurs and not accidentally or involuntary.

R. 666, l. 11-20 (emphasis added). Turning to transferred intent, the judge instructed:

> Now, ladies and gentlemen, I further charge you that if a person with malice aforethought attempts to kill another person, but by mistake injures or kills a different person, then that person based on your view of the evidence, has the specific intent to kill. The intent to kill in that regard would be merely transferred from the original person the defendant attempted to kill, to the person who was actually killed or injured.

R. 667, ll. 9-18.[2]

Discussion

"Criminal liability normally is based upon the concurrence of two factors: the defendant's criminal intent and the actual, physical act constituting the offense." State v. Fennell, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000). "A defendant may not be convicted of a criminal offense unless the state proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for that particular offense." Id.

Recently, the South Carolina General Assembly created the crime of attempted murder. Lawmakers defined the offense as: "A person who, *with intent to kill*, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (emphasis added). In its first, and only, case interpreting the statutory offense, this Court held the Legislature intended to require the state prove the defendant had a

[2] During the deliberations, the jury requested written statements of witnesses and transcripts of the trial testimony. R. 677, ll. 12-16; R. 680, ll. 9-12. The jury also wanted "the legal definition for murder." R. 680, ll. 9-12. The judge re-charged the jurors with definition of murder, including an instruction on general criminal intent and malice. R. 684, l. 12 – R. 687, l. 4. Shortly after this instruction, the jury returned its guilty verdicts. R. 688, ll. 7-19.

specific intent to commit murder as an element of attempted murder. State v. King, 422 S.C. 47, 55, 810 S.E.2d 18, 22 (2017).

*Implied malice is **not** specific intent to kill*

In King, this Court addressed the "implications of the phrase 'malice aforethought, either express or implied'" as used in the statute. Id. at 56, 810 S.E.2d at 22. Citing Keys v. State, 766 P.2d 270 (Nev. 1988), this Court explained how the Nevada Supreme Court clarified how to distinguish between attempted murder and murder by analogizing express malice to a specific intent to kill. Id. at 57, 810 S.E.2d at 23. To explain the interplay between express malice and specific intent to kill, this Court quoted the Nevada Court: "'Attempted murder can be committed only when the accused's acts are accompanied by express malice, malice in fact. One cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result.'" Id. (quoting Keys, 766 P.2d at 273) (internal quotation omitted) (emphasis in original). Further, this Court explained that "one cannot ... attempt to have the general malignant recklessness contemplated by the legal concept, 'implied malice.'" Id. (internal quotation omitted). In short, "[o]ne cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill." Id. However, "[a]n attempt to kill with express malice is" "completely consistent with the specific intent requirement of the crime of attempt." Id. (emphasis in original). "Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill." Id. (internal quotation omitted).

This Court explained that assault and battery with intent to kill (ABWIK), which was supplanted by the codification of attempted murder, required "the same general intent as murder." Id. at 59, 810 S.E.2d at 24. After recounting prior law interpreting ABWIK, this Court noted that

our appellate courts had interpreted malice aforethought and general intent to kill, as required under ABWIK, as the equivalent of each other. Id. at 60-61, 810 S.E.2d at 25. In sharp contrast, statutory attempted murder required "intent to kill" *and* "malice aforethought," which this Court interpreted to mean the Legislature intended to "elevate[] the required mental state above a general-intent crime." Id. at 61, 810 S.E.2d at 25.

In Fennell, this Court permitted the application of the doctrine of transferred intent where the defendant intended to kill one person, which he did, but the defendant also killed a second unintended person. Fennell, 340 S.C. at 272, 531 S.E.2d 515. This Court recognized that "the defendant did not act with malice toward the unintended person," but allowed the defendant's "mental state of malice" to be transferred to the unintended person to support a conviction for assault and battery with intent to kill, which only required a showing of malice. Id. This Court held "the doctrine of transferred intent may be used to convict a defendant of ABIK when the defendant kills the intended victim and also injures an unintended victim." Id. at 276, 531 S.E.2d at 517. Transferred intent could apply where the *mens rea* for the two offenses was the same. After all, "it is the *mens rea* which is determinative of whether transferred intent should be applied in the appropriate case." Pettigrew v. State, 927 A.2d 69, 79 (Md. 2007); see also People v. Slater, 924 N.E.2d 1039, 1047 (Ill. App. Ct. 2009) (calling "transferred intent" a "misnomer" and finding "transferred mental state" to be a more accurate term).

However, "[i]n the context of an attempt crime, specific intent means the defendant intended to complete the acts comprising the underlying offense." State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011). "The act constituting the attempt must be done with intent to commit that particular crime." State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)

(internal quotation omitted). The defendant must "consciously intend" the completion of acts comprising the offense. Id.

In State v. Bryant, 316 S.C. 216, 447 S.E.2d 852 (1994), this Court confronted a similar question. An officer attempted to arrest Bryant for failure to stop for a blue light. Id. at 218, 447 S.E.2d at 853. Bryant and the officer struggled. Id. at 218, 447 S.E.2d at 853-854. During the struggle, Bryant pushed the officer against the patrol car causing damage in excess of $200. Id. at 218, 447 S.E.2d at 854. At his trial for malicious injury to personal property – the police car, Bryant moved for a directed verdict because there was no evidence of intent to cause damage to the car. Id.

After explaining that the state was required to show "willful, unlawful and malicious damage" to the police car, the Court explained that willful was synonymous with intentional. Id. at 219, 447 S.E.2d at 854. Based on the evidence presented, the state failed to provide any evidence that Bryant intended to cause damage to the patrol car when he pushed the officer against it. Id. "The only reasonable inference form the evidence [was] that the damage to the patrol car was an unintended harm." Id. Bryant's "intent to assault and batter the police officer [could not] be transferred to the property damage since the harm caused was different from the type of harm intended." Id. There was no evidence that Bryant willfully caused harm to the car. Id.

When the judge incorrectly told the jurors that if a person with malice aforethought attempts to kill another person, but by mistake injures or kills a different person, then that person has the specific intent to kill the person injured, he conflated malice and general criminal intent with a specific intent to kill. See R. 667, ll. 9-18. He then compounded the error by permitting the jurors to transfer that "intent to kill," which he had effectively defined as malice, from the original person the defendant attempted to kill, to the person who was actually killed or injured. R. 667, ll. 9-18. See State v. Higgins, 826 A.2d 1126, 1141 (Conn. 2003) (explaining the bar to

application of the transferred intent doctrine when the *mens rea* requirements of the two offenses are different); State v. Robinson, 883 P.2d 764, 767-768 (Kan. 1994) (holding that the transferred intent doctrine does not permit transferring a lesser intent, such as recklessness or general intent, from one crime to a crime requiring proof of greater intent, such as specific intent); People v. Trinkle, 369 N.E.2d 888, 890 (Ill. 1977) (warning against commingling of crimes with different levels of *mens rea*, such as "attempted murder" with "other forcible felonies" because one cannot attempt to achieve an unintended result); People v. Smith, 124 P.3d 730, 739-40 (Cal. 2005) (explaining "[t]he mental state required for *attempted* murder is further distinguished from the mental state required for murder in that the doctrine of 'transferred intent' applies to murder but not to attempted murder"); Harrison v. State, 855 A.2d 1220, 1237 (Md. 2004) (rejecting application of the doctrine of transferred intent to attempted murder offense).

The judge's error in equating malice and specific intent was exacerbated by his instruction that malice could be implied, even for attempted murder, and permitting the jury to infer malice from the use of a deadly weapon. See State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) (finding error for a trial judge to instruct a jury that malice may be implied from the use of a deadly weapon where there is evidence that would reduce, mitigate, excuse, or justify the killing or assault and battery with intent to kill).

Unintended person

In Connecticut, like South Carolina, attempted murder requires specific intent. State v. Hinton, 630 A.2d 593, 601 (Conn. 1993). When analyzing attempted murder, the Connecticut Supreme Court explained that "[p]roof of an attempt to commit a specific offense requires proof that the actor intended to bring about the elements of the completed offense." Id. Regarding transferred intent and attempted murder, the Connecticut court held that "[i]f the completed

offense includes an intent to kill a particular person, the attempt to kill must also include an intent to kill that same person." Id. "Transferred intent is not needed, however, to insure that a defendant is prosecuted for attempted murder." Id. at 600-02. "A defendant can still be prosecuted for his intent to kill and conduct aimed at killing the intended victim whether a third party is killed or no one is even injured." Id. "The doctrine of transferred intent, generally considered a necessary fiction, is therefore not necessary to prosecute for attempted murder a defendant whose aim was poor." Id. According to the Hinton court, the rule of lenity also required this result. Id. See also State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (explaining a core rule of statutory construction that "when a statute is penal in nature, it must be construed strictly against the state and in favor of the defendant").

Tackling this issue, the Alabama Supreme Court concluded that its attempted murder statute did not "clearly evince a legislative intent to apply the doctrine of transferred intent – applicable only to the completed crime of murder – to punish as attempted murder the consequences of an unintended, nonfatal result." Cockrell v. State, 890 So.2d 174, 181 (Ala. 2004). A contrary holding "would be to rewrite the attempted statute so as to imbue an attempt with not only the intent to commit the specific offense attempted, but also *such other intent as would be imputed to a defendant by operation of law only upon consummation of the offense solely by reason of harboring the specific intent necessary to commit such offense*." Id. (emphasis in original).

In People v. Bland, 48 P.3d 1107, 1116-18 (Cal. 2002), the California Supreme Court explained that an attempt crime "sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences." Particularly important for the instant case, the court noted that differing *mens rea* required for murder and attempted

murder and explained that "[t]o constitute murder, the guilty person need not intend to take life; but to constitute an attempt to murder, he must so intend." Bland, 48 P.3d at 1117. "The wrong-doer must specifically contemplate taking life; and though his act is such as, were it successful, would be murder, if in truth he does not mean to kill, he does not become guilty of an attempt to commit murder." Id.

Regarding the applicability of transferred intent, the court held:

> To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others.

Id. To help explain its rationale, the court noted that applying transferred intent when no bystander was physically injured would result in situations where "it is virtually impossible to decide to whom the defendant's intent should be transferred." Id. The court rhetorically asked: "Is the intent to murder transferred to everyone in proximity to the path of the bullet? Is the intent transferred to everyone frightened and thereby assaulted by the shot? There is no rational method for deciding how the defendant's intent to murder should be transferred." Id. See also People v. McCloud, 149 Cal. Rptr.3d 902, 909 (Cal. Ct. App. 2012) (explaining that intent to kill does not transfer to victims who are not killed, and, as a result, transferred intent cannot serve as a basis for a finding of attempted murder).

In Cascen v. Virgin Islands, 60 V.I. 392 (V.I. 2014), the Supreme Court of the Virgin Islands reversed Cascen's conviction for third degree assault, which was based upon the transferred intent theory. Cascen fired fifteen shots at a group of people, which included his intended victim, Cyril Peters. Id. at 398. W.J., a minor, was grazed by one of the bullets. Id. The Court held there was no evidence that Cascen intended to assault W.J.; therefore, the

conviction depended solely on whether Cascen's intent to murder Peters could be transferred to W.J. Id. at 407.

Examining the *mens rea* of the two offenses, the court noted that unlike first-degree murder, which required only intent to commit murder, the assault charge required proof of the specific intent to injure the alleged victim. Id. (citing Boston v. People, 56 V.I. 634, 641 (V.I. 2012)). Ultimately, the Court held Cascen's intent to murder Peters could not be "used to support an assault conviction because even though the People showed that Cascen used 'unlawful violence upon the person of' W.J., the People introduced no evidence establishing that Cascen had the 'intent to injure' W.J." Id. at 408. See also Ramsey v. State, 56 P.3d 675, 682 (Alaska 2002) (holding that attempted murder requires a specific intent to kill a particular person and refusing to apply transferred intent); State v. Williamson, 102 S.W. 519, 520 (Mo. 1907) (holding the state failed to prove assault with intent to kill a particular person because the only evidence in the case showed the defendant shot at a second person and was not even aware that the person who ultimately died was present).

The judge's instructions at Petitioner's trial lowered the state's burden of proof for attempted murder. According to the judge, in order for them to find Petitioner guilty of attempted murder, the state was required to prove Petitioner "with the intent to kill, attempted to kill another person with malice aforethought express or implied." R. 665, ll. 4-10. Concerning specific intent, the judge told the jurors that "specific intent" did *not* mean an *intent to kill a specific person*, but rather that the defendant consciously intended the completion of acts that comprise the act of attempted murder. R. 666, l. 11-20; Cf. R. 707 (indictment alleging Petitioner "did with intent to kill another person, Tyrus Archie, with malice aforethought, either express or implied, by shooting Rayquann Jenkins").

Due Process requires the prosecution prove every element of the charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970); Todd v. State, 355 S.C. 396, 400, 585 S.E.2d 305, 307 (2003); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Lane, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013). "The office and purpose of instructions are to enlighten the jury and to aid them in arriving at a correct verdict." State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944). This Court should reverse Petitioner's conviction and sentence for attempted murder based upon the trial judge's erroneous instructions regarding transferred intent. See State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (holding that reversal is required where a trial judge's refusal to give a requested jury charge is erroneous and prejudicial to the defendant); State v. Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007) (holding that a "trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues").

The judge's instructions in the case were confusing, at best. The instructions erroneously permitted the jurors to transfer general criminal intent for murder to an unintended person, Jenkins. In light of the offense alleged by the state, the prosecution was required to prove that Petitioner acted specifically to kill Jenkins. The judge erred in charging the jury that the state was not required to prove that Jenkins was the intended target, the judge erred in charging the jury that general intent for murder could be transferred and would satisfy the element of specific intent to kill, and the judge erred in equating malice and specific intent. Petitioner respectfully requests certiorari to review the trial judge's erroneous jury instructions regarding transferred intent.

II. The trial judge erred in failing to grant Petitioner's motion for mistrial, or instruct the jury to disregard expert testimony regarding ballistics, where the police officer who found the shell casings at the scene did not testify and no other witnesses could testify that the shell casings introduced at trial or tested by the expert were the shell casings found at the scene, which violated Petitioner's rights under the Sixth Amendment's Confrontation Clause.

Reasons to grant certiorari

The ballistics evidence introduced by the state against Petitioner was key evidence against him. However, the state failed to produce a sufficient chain of custody to show the shell casings tested were the shell casings found at the scene. In fact, the state failed to call as a witness the police officer who allegedly found the shell casings at the scene. This failure created a missing link in the chain and denied Petitioner of his right to cross-examine a critical witness against him, a substantial constitutional issue. See Rule 242(b)(4), SCACR. The Court of Appeals' opinion to the contrary conflicts with this Court's long-standing jurisprudence governing chain of custody and the right to cross-examination, including this Court's recent opinion in State v. Pulley, Op. No. 27811 (S.C. Sup. Ct. filed June 6, 2018) (Shearouse Adv. Sh. No. 23 at 21). See Rule 242(b)(3), SCACR. The resolution of the Confrontation Clause issue by the Court of Appeals involves a federal question and conflicts with decisions of the United States Supreme Court, including Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) and Bullcoming v. New Mexico, 564 U.S. 647 (2011). See Rule 242(b)(5), SCACR.

Relevant facts

Testimony

Police Officer Misty Lee responded to a call at Club Miami around 3 a.m. on March 16, 2014. R. 316, l. 22 – R. 317, l. 25. While on her way to assist another officer who had Petitioner

in custody, Lee saw a gun down in the valley of the sand berms in the field adjacent to Club Miami. R. 319, ll. 1-4; R. 320, ll. 7-13. Lee seized the gun. R. 321, l. 13 – R. 322, l. 3.

SLED Agent Michelle Eichenmiller received the gun found by Lee, six unfired cartridges in the gun's magazine, and three fired shell casings – all of which were purportedly related to this case. R. 376, ll. 2-6; R. 378, ll. 19-22; R. 382, ll. 2-6. She identified State's Exhibit #34 as containing the three cartridge casings that she examined. R. 382, ll. 6-12. According to Eichenmiller, the three fired shell casings were consistent in construction with the cartridge cases submitted with the firearm. R. 382, ll. 17-19. After examining the fired cartridge casings and the test round she fired from the firearm, Eichenmiller opined the fired cartridge cases were fired by that firearm. R. 383, ll. 19-22.[3]

Internal reports from the Sheriff's Office indicated Investigator Mike Bean collected the fired shell casings. R. 438, ll. 2-7. At the time of trial, Bean was no longer employed by the department. R. 438, ll. 8-12.

Motion for mistrial

During a break, the prosecutor explained that defense counsel was insisting that the state call Bean as a witness. R. 445, ll. 15-17. However, the solicitor claimed Bean was "under medical orders not to participate in any work related activities regarding his former job as the evidence technician" in light of his post-traumatic stress disorder diagnosis. R. 445, ll. 18-25. Thereafter, the solicitor asked the judge to allow him "to get the evidence that this witness, that

[3] Derron Soloman was a crime scene investigator for the Sumter County Sheriff's Department at the time of the trial. R. 428, ll. 1-9. He also served as the evidence technician for the department. R. 428, ll. 16-24. According to Soloman, he received a heat-sealed envelope containing three fired shell casings, which were marked as State's Exhibit #34, from SLED. R. 431, ll. 12-16. Soloman did not respond to the scene and was not the evidence technician at the time of the shooting. R. 437, ll. 19-24. Jim Atkinson was the evidence technician at the time. R. 438, l. 1; R. 438, ll. 13-17.

this last witness as his official duties into evidence, without having to call Mr. Bean." R. 446, ll. 3-7.

Defense counsel explained that he was not aware that Bean would not be called as a witness until during the trial. R. 448, ll. 2-3.[4] He further noted that Bean collected the shell casings, and the location of the shell casings was critical to the case. R. 448, ll. 11-15. Bean's failure to appear meant that defense counsel could not question him about the location of the shell casings or whether the casings sent to SLED were the casings that were collected at the scene. R. 448, ll. 15-18. In light of the state's assurances that another officer would be able to provide the missing elements of the chain of custody, the judge explained he would not be able to rule on the admissibility until that officer testified. R. 449, ll. 15-19. Specifically, the judge explained he could not deny Petitioner's rights "to confront the accusers [] one of whom is Mr. Bean, by virtue of his job." R. 450, ll. 14-22. The state assured the judge that another witness would be able to lay the foundation for the crime scene, the collection [of] evidence, the photographs, and several other matters that are relative to this case." R. 451, ll. 1-9.

In camera testimony & argument

Greg Hawkins, the lead investigator, claimed he observed Bean take photographs of the shell casings. R. 454, l. 25 – R. 455, l. 2; R. 456, ll. 2-7. He was able to describe where the casings were found in the parking lot. R. 456, l. 12 – R. 457, l. 7. When shown photographs of the shell casings (State's Exhibits #20, 21, 22), Hawkins explained those were photographs of the shell casings found in the parking lot. R. 459, l. 23 – R. 460, l. 2. Hawkins also claimed that

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[4] Petitioner did not object when the shell casings were offered into evidence. R. 432, ll. 4-7. Petitioner acknowledged this fact when discussing his motion for mistrial, but noted that he was under the impression that the people collecting the evidence would be available and called as witnesses. He was not made aware of the fact that the state had no intention of calling Bean until the moment he raised the issue to the judge. R. 451, ll. 15-21. The state and the judge accepted Petitioner's explanation. R. 452, ll. 8-23.

he located the casings and placed the markers "so they'd be easier to locate the casings as Bean came along to process them." R. 460, ll. 8-15. However, Hawkins did not collect the shell casings – Bean actually collected the evidence. R. 465, ll. 16-22. Hawkins could say where casings were found, but could not tell *how* the evidence was collected or if the evidence transported to SLED and later presented in court was the *same* evidence collected at the scene. R. 467, ll. 1-6.

Petitioner moved for a mistrial based on the state's failure to call Bean as a witness. R. 469, ll. 16-22. Petitioner explained that Bean had collected the spent shell casings and the state's presentation of that evidence to the jury without Bean's presence violated Petitioner's right to confront his accusers. R. 470, ll. 7-22. Petitioner made clear that Bean's absence broke the chain of custody of the spent shell casings. R. 472, ll. 1-8. The judge made clear he understood Petitioner's motion:

> If the chain between the photograph or identifying on the ground, which I think Investigator Hawkins can do, if the chain between the collection of the case and delivery to SLED for testing is broken, or is unsatisfactory in the eyes of the law, should there be a mistrial or should I instruct the jury to disregard the testimony of the fire examiner.

R. 472, l. 22 – R. 473, l. 6.

Additional testimony

Derron Soloman, the evidence technician, told the jurors that the property voucher, marked as State's Exhibit #37, showed the three shell casings and coordinated those casings to photographs and markers. R. 478, ll. 1-11. The actual containers for the casings indicated the casings were collected by Bean and placed into those containers by Bean. R. 480, l. 21 – R. 481, l. 6. Per the chain of custody report, James Atkinson, took the casings to SLED. R. 480, ll. 16-20.

When Hawkins arrived at Club Miami, he found three spent shell casings in the parking lot. R. 523, l. 21 – R. 524, l. 5. Markers were placed by the shell casings. R. 524, ll. 18-20. Bean photographed the shell casings. R. 525, ll. 1-2. According to Hawkins, Bean collected the shell casings. R. 527, ll. 6-11. Hawkins claimed Bean would have followed "[t]he standard procedure" in collecting the shell casings by placing them into "little tins" and "would turn those into the evidence room." R. 527, ll. 12-19.

According to Officer Robert Burnish, Bean marked the shell casings and collected them. R. 501, l. 21 – R. 502, l. 7. He was adamant that Hawkins had not marked the location of the shell casings. R. 512, ll. 8-12. "Collecting means after the photograph has been taken, he would have picked up the evidence. In this case the shell casings, placed them in a plastic bag and turned them in to evidence." R. 502, ll. 8-13. In fact, Burnish claimed that he was with Bean when Bean collected the shell casings. R. 507, ll. 15-21. Although Burnish claimed he was present when the shell casings were discovered at the scene, he was unable initially to say who actually discovered them. R. 501, ll. 18-20; R. 503, ll. 16-18. Upon further questioning, he claimed Bean found the shell casings. R. 510, ll. 19-24. Burnish was confident that Bean had found the shell casings. R. 510, l. 23 – R. 511, l. 17.

Hawkins claimed that he had marked the shell casings with evidence markers when he found them at the scene. R. 564, ll. 4-6. He acknowledged Burnish's contrary testimony that Bean had marked the evidence. R. 564, ll. 7-10. When asked to explain the inconsistency, Hawkins testified: "I know when I saw the casings, I had my markers with me, so I marked them at that time. Now whether Bean used different numbers and remarked them later, I have no idea. But I know that I used my markers to initially mark them, so they would be able to easily find where those casings were at again." R. 564, ll. 12-18. Although he claimed the markers in the

photograph appeared to be "the same type of markers" that he used, he was unable to say definitively if the markers were the ones he had set. R. 565, ll. 1-3; R. 564, ll. 19-23.

Argument & ruling on mistrial motion

Petitioner reiterated his motion for mistrial based on the state's failure to present Bean as witness. R. 581, ll. 14-22. Petitioner noted the importance of the firearms expert's testimony to the state's case. R. 582, ll. 2-10. Petitioner further explained Bean's absence denied him his constitutional right to cross examine his accuser. R. 583, ll. 14-22.

The state argued he was only required to show that the investigation was handled in a reasonable manner and that the evidence was collected in a manner in which it was normally collected. R. 583, ll. 1-9. The state insisted the shell casings were "non-fungible item[s] with specific identifying features. Which they did, they marked each one individually, took pictures of their location. And then collected them and sent them to SLED." R. 583, ll. 9-13. The judge denied the motion for mistrial explaining his ruling as follows:

> I don't think that the chain evidence has been damaged enough to require a mistrial. Obviously where this came up is when the SLED agent was called out of order because she was here in the morning. And that's not an unusual thing. I am not faulting anyone for that, but that's what happened. But when it became apparent that Mr. Bean wasn't going to be here to testify about what he did with them, the question was going to be then, what other witnesses would perhaps cover that sufficiently to have a suitable chain of custody.

R. 584, ll. 1-12. Believing Burnish and Hawkins adequately covered it for admissibility purposes, the judge denied the mistrial motion. R. 584, ll. 13-16. Further, the judge denied the request to instruct the jury to disregard the firearms examiner's testimony. R. 584, ll. 16-21.

Closing argument

The solicitor relied upon the ballistics evidence in his closing argument. According to the solicitor, the jury knew Petitioner had fired the gun three times because the gun had been

matched to the shell casings by the firearms expert from SLED. R. 618, l. 24 – R. 619, l. 3. According to the solicitor, there was "[n]o question about that. There's not going to be any controversy about that. This gun fired 3 times." R. 619, ll. 3-5. To explain inconsistencies in statements presented by various witnesses, the prosecutor asked the jurors to "look at the physical evidence. Look at the markers on the ground. Look at what the police officers found when they got there." R. 626, ll. 14-18. According to the solicitor, the evidence markers proved "[t]he gun was moving. It was moving in a straight line, because the shell casings that were kicked out of that gun, one here, one here, one here. It's not manipulation by the police. They didn't manipulate the evidence. This is what they found." R. 626, ll. 19-24. To support this point, the solicitor asked the jurors why the shell casings were found "20 or 25 feet away from the door" when "the gun that fired those shell casings [were] 500 feet out here in this field." R. 627, ll. 7-13. The solicitor emphasized that Petitioner "was arrested 20 feet from the gun which matched the three shell casings." R. 630, ll. 10-11.

Motion for new trial

After the jury returned its verdict, Petitioner renewed his motion for a mistrial in the form of a motion for new trial based upon the fact that Bean was not called to testify regarding "where the shell casings were found, and how they were collected and sent to the evidence technician." R. 690, ll. 7-22.

Ultimately, the judge denied the motion. The judge admitted he was "concerned about" the chain of custody until he "heard the testimony of Lieutenant Burnish, Investigator Hawkins." R. 693, ll. 9-11. However, the judge determined "that the testimony as a whole established that the gunshots were fired from an automatic or a semiautomatic weapon. The spent chambers or the spent casings were ejected. And they were in the general area where witnesses identified the

defendant as being." R. 693, ll. 16-21. Concerning the "crucial part" of the chain of custody evidence, the judge acknowledged the state had to prove "those shell casings that Mr. Hawkins identified as being on the ground, ... Burnish identified as being on the ground, are the same ones that were delivered to the evidence room, sent to [SLED] for testing. Sent back to this courtroom and presented to the jury." R. 693, l. 22 – R. 694, l. 4. Additionally, the judge acknowledged "it wasn't a perfect chain," but determined that "under the law in this state, the evidence establishes how those items were obtained, and how they were handled in a sufficient manner for the jury to reasonably conclude that they were what the state claimed them to be." R. 694, ll. 4-10.

Discussion

It is axiomatic that a criminal defendant has the right to confront his accusers. U.S. Const. Amend. VI; S.C. Const. Art. I, § 14; Bullcoming v. New Mexico, 564 U.S. 647 (2011); Melendiaz v. Massachusetts, 557 U.S. 305, 313-314 (2009). This Court "has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). Although the evidence must be clear as to who handled the evidence and what was done with it between the taking and the analysis, testimony from each custodian is not a prerequisite to establishing a chain of custody sufficient for admissibility. Benton v. Pellum, 232 S.C. 26, 33-34, 100 S.E.2d 534, 537 (1957); Sweet, 374 S.C. at 7, 647 S.E.2d at 206. If other evidence establishes the identity of those who handled the evidence and "reasonably demonstrates the manner of handling of the evidence," courts are willing to fill gaps in the chain of custody due to an absent witness. Sweet, 374 S.C. at 7, 647 S.E.2d at 206. "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837

(2001). This Court has found evidence inadmissible "only where there is a missing link in the chain of possession because the identity of those who handled the [substance] was not established at least as far as practicable." Id. Police need not account for every transfer of the fungible evidence, but must demonstrate a reasonable assurance the condition of the item remained the same from the time it was obtained until its introduction at trial. State v. Hatcher, 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011)(quoting State v. Price, 731 S.W.2d 287, 290 (Mo. Ct. App. 1987)).

"The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14, of the S.C. Constitution." State v. Stewart, 278 S.C. 296, 303, 295 S.E.2d 627, 630-631 (1982). The appellate court must reverse a trial judge's refusal to grant a mistrial if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010)). A mistrial must be ordered when the incident "is so grievous that the prejudicial effect can be removed in no other way." Id. "The less than lucid test is ... whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 32-33, 301 S.E.2d 471, 472 (1983).

The state failed to present a critical witness to establish the chain of custody of the three shell casings found at the scene – Bean. This failure denied Petitioner his right to confront his accusers. None of the witnesses presented were able to say that the three shell casings transported to SLED, tested by the firearms' expert, and introduced at trial were the same three shell casings found at the scene. Contrary to the solicitor's argument that the shell casings had unique identifying features, nothing could be further from the truth. The shell casings looked like every other shell casing of the same type. Nothing on the shell casings identified them as the same ones in the

photographs or the same ones collected by Bean. There was no evidence of what happened between the collecting of the shell casings and the delivery of the shell casings to SLED. Petitioner had no ability to challenge the collection and preservation because the state failed to call Bean as a witness. As such, the state failed to establish the chain of custody as far as practicable.

In light of the testimony by the firearms' examiner concerning the "match" between the spent shell casings and the gun, the judge was obligated to grant Petitioner's mistrial motion. The jury simply could not ignore the testimony as it was one of the few pieces of concrete evidence connecting Petitioner to the charged offenses. The examiner's testimony carried with it the imprimatur of expertise, and therefore, more trustworthy. At a minimum, the judge should have instructed the jury to disregard the testimony by the firearms' examiner due to the state's failure to present a chain of custody for the spent shell casings and the significance of the evidence presented based upon the spent shell casings.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented. In the event this Court grants the petition but dispenses with full briefing, Petitioner respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of July, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Sumter County
George C. James, Jr., Circuit Court Judge

Opinion No. 2018-UP-187 (S.C. Ct. App. filed May 9, 2018)
Indictment No.: 2014-GS-43-0524

THE STATE,

RESPONDENT,

V.

RODNEY R. GREEN,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Alphonso Simon, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Rodney R. Green, #335829, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 23rd day of July, 2018.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 23rd day of July, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023