STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable Frank F. Addy, Jr., Circuit Court Judge

Appellate Case No. 2016-001363

Hubert Brown, #161888,.....Respondent,

v.

State of South Carolina,.....Petitioner.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Hubert Brown (Brown) is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. App. pp. 550, 553. Respondent was indicted at the September 2013 term of the York County Grand Jury for first-degree burglary (2012-GS-46-3185) and attempted murder (2012-GS-46-3187. App. pp. 551-52, 554-55. David C. Cook, Esquire, represented him. App. p. 1.

On July 9-11, 2013, Brown was tried before the Honorable John C. Hayes, III, and a jury. App. p. 1. Pursuant to S.C. Code Ann. § 17-25-45, the State served notice of its intention to seek life imprisonment without the possibility of parole upon conviction. App. pp. 378-79. At the conclusion of the trial, Petitioner was found guilty as charged, and Judge Hayes sentenced him to imprisonment for a term of life without the possibility of parole on each charge. App. pp. 375-76, 382-83.

Brown filed a notice of appeal and a direct appeal was perfected by Appellate Defender Carmen V. Ganjehsani, Esquire, of the South Carolina Commission on Indigent Defense – Division of Appellate Defense. App. pp. 388-405. After both parties briefed the issues, the South Carolina Court of Appeals affirmed Petitioner's convictions by unpublished opinion filed. State v. Brown, Op. No. 2014-UP-425 (S.C. Ct. App. filed November 26, 2014). App. pp. 426-27. The Remittitur was returned on December 12, 2014. App. p. 428.

Brown filed a timely application for post-conviction relief on December 31, 2014. Petitioner filed a return on July 8, 2015. App. pp. 442-47. Through counsel, Brown filed an amendments to his application on January 25, 2016. App. pp. 437-41. An evidentiary hearing on the application was convened at the Moss Justice Center in York, South Carolina, on April 19, 2016. App. p. 448. The Honorable Frank R. Addy, Jr., presided over the hearing. App. p. 448.

Brown was present and represented by Tommy Thomas, Esquire. App. p. 448. Petitioner was represented by Assistant Attorney General Justin J. Hunter, Esquire. App. p. 448. By an Order signed June 16, 2016, and filed June 20, 2016, the PCR court granted relief on multiple grounds, as discussed below. App. pp. 541-49. The State filed a Petition for Writ of Certiorari on May 9, 2018, and Respondent filed a Return to Petition for Writ of Certiorari on September 28, 2018. This Reply follows.

STATEMENT OF THE FACTS

On June 8, 2012, Brown went to the home of his friend and former coworker, Michael Mahoney (Mahoney). App. pp. 61-62, 69-70. An argument ensued, during which Brown punched Mahoney, and they ended up wrestling on the ground. App. pp. 71-73, 75. Chris Calvert (Calvert), who was living with Mahoney at the time, came up behind Brown and hit him in the head with a gear shift to stop his attack on Mahoney. App. pp. 107, 111-12. The blow dazed Brown and caused him to lose consciousness for a short period of time. App. pp. 75-76, 113. Brown then grabbed a hatchet from the trunk of his vehicle and began chasing Calvert, saying he was going to kill him. App. pp. 77-78, 113-14. Brown was bleeding profusely at this point, and Mahoney tried to convince him to go to the hospital. App. pp. 77, 116. Instead, Brown put down the hatchet, got a machete out of his trunk instead, and began to chase Calvert with it. App. pp. 78-79. After threatening to kill both Mahoney and Calvert, Brown got in his car and the car drove up out of the driveway. App. p. 82, 116.

Mahoney and Calvert went inside Mahoney's house and began to clean themselves up in the bathroom, while Mahoney's wife called 911. App. pp. 82, 85, 132-33. Suddenly, Mahoney's wife started screaming. App. p. 85, 133. Brown had returned to the house with the machete. App. pp. 116-17, 133. He swung it toward Calvert's head, and Calvert threw his hand up to protect himself. App. pp. 117-18. The machete hit Calvert's hand, cutting his thumb off most of the way so that it was hanging by the skin. App. pp. 57, 85, 118, 133. When Deputy Mark Whitesides arrived on the scene in response to the 911 call, he talked to the witnesses and developed Brown as a suspect. App. pp. 56-59. Police eventually arrested Brown in Walterboro, and he was charged with attempted murder and first-degree burglary. App. pp. 140, 161-65.

Brown presented an insanity defense at trial and was evaluated by experts for both the State and the defense. App. pp. 6-9, 208, 215; Supp. App. 1-5. At trial, Brown called an expert, Dr. Carol Walser, a neuropsychologist, who testified that although she agreed with the State that Brown was competent to stand trial, she did not find him to be criminally responsible for his actions at the time of the incident, as he was suffering from a mental defect due to a traumatic brain injury. App. pp. 208, 215, 229-30, 249, 254-55. Dr. Walser testified she met with Brown multiple times, over the course of thirteen hours in total, and administered a battery of neuropsychological tests. App. pp. 215-18, 234-35. Dr. Walser concluded Brown showed several signs of traumatic brain injury, including balance issues, amnesia, speech issues (aphasia), paranoia, and episodes in which he would "blank out" in the middle of a conversation. App. pp. 222, 233-34, 241-44. According to Dr. Walser, at the time of the incident, Brown lacked the capacity to reason and was behaving "chaotically." App. pp. 254-55. Dr. Walser also testified she found no evidence of malingering. App. pp. 222-25, 236, 247-48.

The State's evaluator found Brown to be both competent to stand trial and criminally responsible for his actions as the time of the crime. App. 226-27; Supp. App. 1-5. However, the doctor who performed Brown's evaluation at the Department of Mental Health (DMH) had left the state and was not available for trial. App. p. 301. Instead, in reply, the State called Dr. Richard Frierson, a medical doctor and psychiatrist with DMH. App. pp. 287-88. Dr. Frierson supervised the doctor who evaluated Brown and discussed Brown's case with her, but never met with Brown himself. App. pp. 288-89, 295-98. Without objection, the State introduced the report of the DMH evaluation through Dr. Frierson. App. p. 290. According to that report, Brown was criminally responsible for his actions at the time of the crime. App. 226-27; Supp. App. 1-5.

At trial, Judge Hayes gave the standard charges on reasonable doubt, burden of proof, and presumption of innocence, as well as a charge on Brown's insanity defense. App. pp. 337-45, 355-57. When the trial judge instructed the jury regarding the attempted murder charge, he stated:

> A specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily injury. Intent means intending the result which actually occurs, it means something which – acts which is [sic] not accidental or involuntary. Intent may be shown by acts and conduct[] of the defendant and other circumstances from which you may naturally and reasonably infer intent.
>
> Evidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose to be accomplished, and the resulting wounds or injury may be considered in determining the intent with which the act was committed. Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully committed an act a natural tendency of which is to destroy another's life.

App. pp. 350-51. At the completion of the jury charges, defense counsel asked the trial judge to cure his charges regarding the defense of guilty but mentally ill, which Brown did not raise. App. p. 363. The trial judge agreed and brought the jury back in for a curative instruction. App. pp. 363-65. The trial judge asked trial counsel, "And that's all you have?" to which he replied, "That's it, Your Honor." App. p. 365.

Later, the jury sent a note requesting to be recharged on attempted murder. App. p. 366. The trial judge recharged attempted murder, again stating, "A specific intent to kill is not an element of attempted murder but there must be a general intent to commit the serious bodily injury." App. pp. 367-72. When the trial judge asked whether there was anything from the State on the recharge, the following exchange took place:

> [The State]: The first time you charged this morning I was daydreaming and I wasn't daydreaming this time and I heard you say that only a general and not a specific intent for attempted murder

is required. I think all attempts require[] a specific intent and I don't think the legislature has given us any leeway on that.

The Court: Well that's what I've got in my charge and – A specific intent to kill is not an element of attempted murder. There must be a general intent to commit serious bodily injury.

[The State]: I know it was general when we had ABWIK but when we went to attempted - -

The Court: That's what I charged them earlier. If you find some law that says that that's not right, that's in my charge and it's in my charge under the heading of Attempted Murder under 16-3-29. I don't see a case cited. But you take exception to that part of the charge?

[The State]: I'm just concerned because the way I was taught all attempts are specific intent. And so when we went from ABWIK which is a general intent to attempted murder I'm afraid maybe we kicked in a specific intent.

The Court: You mean if I have a general intent to harm you and I harm Chris instead, or have a general intent to hurt everybody in here and the only person except Chris and he's the one I hurt and - -

[The State]: Well that can be transferred intent.

The Court: Well you're on the record for that.

[The State]: All right.

The Court: Anything?

[Defense counsel]: Nothing from the defense, Your Honor.

App. pp. 372-74.

Ultimately, the jury found Brown guilty on both charges, and Judge Hayes sentenced him to concurrent sentences of life without parole pursuant to § 17-25-45. App. pp. 375-76, 382-83.

ARGUMENT

The PCR court erred as a matter of law in finding trial counsel was ineffective for failing to object to the trial court's general-intent jury instruction on attempted murder because State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017), had not yet been decided and trial counsel cannot be clairvoyant in predicting changes in the law. Further, Counsel's failure to object did not undermine the defense because Counsel presented expert testimony Brown was unable to form any intent to kill – either general or specific.

The PCR court erred in finding Counsel was ineffective for failing to object to the trial court's general-intent jury instruction on attempted murder because under the law at the time of Brown's trial, Counsel had no reason to object. In finding Counsel deficient, the PCR court exclusively relied on the Court of Appeals' decision in King. App. p. 545. However, the Court of Appeals' decision was delivered in June 2015 and this Court's decision in October 2017; this case was tried in July 2013, well before King was decided. Further, Counsel presented the testimony of an expert witness who testified Brown was incapable of forming any intent to kill – either general or specific – after receiving an incapacitating blow to the head, and the jury nonetheless rejected the defense and found Brown guilty.

At the time of trial in 2013, South Carolina law was not clear as to the level of intent required for attempted murder. Section 16-3-29, enacted in 2010, states a person commits the offense of attempted murder when the person, "with intent to kill, attempts to kill another person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-29. This Court itself acknowledged the ambiguity created by the statutory language of the attempted murder statute in requiring both an "intent to kill" and "malice aforethought, either express or implied." See King, 422 S.C. at 62, 810 S.E.2d at 25-26 ("While we are convinced this is the correct interpretation, we also acknowledge the ambiguity created by the language in section 16-3-29. . . .").

Further, even this Court's decision in King requiring specific intent did not fully resolve the ambiguity created by the statutory language. For example, in arriving at the conclusion specific intent is required for attempted murder, this Court cited an opinion from the Supreme Court of Nevada which it characterized as "clarify[ing] this area of criminal law by distinguishing the crime of attempted murder from murder by analogizing express malice to a specific intent to kill." Id. at 57, 810 S.E.2d at 23 (citing Keys v. State, 104 Nev. 736, 766 P.2d 270 (1988)). That same Nevada opinion, however, explicitly states, "[o]ne cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill." Id. Yet, South Carolina's attempted murder statue specifically states the requisite mental state may arise through implied malice. S.C. Code Ann. § 16-3-29. This Court expressly acknowledged the conflict, writing in a footnote, "While we find it unnecessary to address King's additional sustaining ground, we would respectfully suggest to the General Assembly to re-evaluate the language following "malice aforethought" as the inclusion of the word 'implied' in section 16-3-29 *is arguably inconsistent with a specific-intent crime*." 422 S.C. at 64 n. 5, 810 S.E.2d at 27 n. 5 (emphasis added).

The relevant lens for analysis of whether Counsel was ineffective is "counsel's perspective at the time" of trial. Strickland, 466 U.S. at 689; Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) ("The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements."). Attorneys are not required "to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765. Counsel, therefore, cannot be deficient based on King, because it was not the law at the time of Brown's trial, at least so clearly such that Counsel was on notice that he needed to object. See, e.g., Frierson v. State, 417 S.C. 287,

297-98, 789 S.E.2d 762, 767-68 (Ct. App. 2016), aff'd as modified by Frierson v. State, 423 S.C. 257 (2018) (finding counsel was not deficient for failing to advise defendant of potential violation of statutory warrant requirement where law at the time of trial was unsettled on the issue); see also Hill v. State, 350 S.C. 465, 567 S.E.2d 857 (2002) (holding failure of trial counsel to object to erroneous jury instruction was ineffective where appellate decision announcing change in law had already become final by the time of defendant's trial). This Court has itself acknowledged the language of the statutory is arguably inconsistent with a requirement of specific intent, and the fact that this Court took pains to explain its reasoning in King at length, while repeatedly acknowledging the confusion in this area of law in general, and specifically regarding the language of South Carolina's statute, illustrates the problem with the PCR court's decision. Until King was decided, there was no clear rule for interpreting the ambiguous statutory language, and finding Counsel ineffective on that basis was an error of law by the PCR court.

Further, Counsel's failure to object to the general intent charge did not undermine the defense because the defense expert's testimony was that Brown was incapable for forming *any* intent, either general or specific. According to Dr. Walser, at the time of the incident, Brown lacked the capacity to reason and was behaving "chaotically." App. pp. 254-55. When pushed by the solicitor as to whether Brown's actions in retrieving the weapon from his car and going back inside the home showed he was thinking and making decisions at the time, Dr. Walser testified, "[W]e don't know what the intention is there. . . . [I]t could be based on some paranoid thinking which he definitely has had and that is not rational." App. pp. 271-72. She further testified that behavior "is to be expected, and it can be part of chaotic behavior. . . [or] paranoia that's occurred from the

injury." App. p. 271. When Dr. Walser was asked whether Brown saying "I'm going to kill you"[1] after being hit in the head showed his ability to "process" information, Dr. Walser explained it "doesn't mean they are one-hundred percent unable to think at all. It may come and go. It's not consistent, and therefore, it's not reliable and you can't say they are reliably able to reason." App. p. 283. Dr. Walser also repeatedly testified Brown was not capable of determining right and wrong at the time of the incident. App. pp. 256-57, 282-83.

[1] The State notes this evidence of Brown's statement to the victim, "I'm going to kill you," is evidence from which the jury could have found a specific intent to kill, even if that instruction had been given, further undermining Brown's prejudice argument. See App. p. 127.

CONCLUSION

As to all other issues, the State reiterates the arguments made in its Petition for Writ of Certiorari. For all the foregoing reasons and the reasons contained in the Petition for Writ of Certiorari, the State requests this Court grant the petition and reverse the post-conviction relief court's grant of a new trial.

Respectfully submitted,

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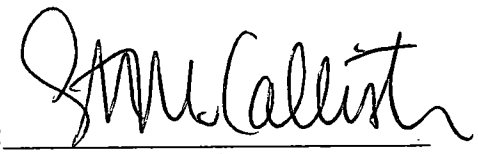
BY: 
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10/18, 2018

STATE OF SOUTH CAROLINA

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Appellate Case No. 2016-001363

HUBERT BROWN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Reply to Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Mrs. Wanda H. Carter
S.C. Commission on Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 18th day of October, 2018

CARMEN NORD
Legal Assistant

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
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S.C. SUPREME COURT

October 18, 2018

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Hubert Brown, #161888 v. State of South Carolina**
Appellate Case No. 2016-001363
Lower Court Case No. 2014-CP-46-4219

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Reply to Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Lindsey McCallister
Assistant Attorney General
SC Bar No. 79054

LM/can
Enclosures

cc: Wanda H. Carter, Esquire (2 copies)