STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Greenville County

Honorable R. Keith Kelly, Trial Judge
Honorable Alex Kinlaw, Jr., PCR Judge

Appellate Case No. 2019-000468

CHRISTOPHER ERIC MEJEAN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner's Issues Presented

Did the PCR court err in finding trial counsel effective where trial counsel failed to impeach Tee Smith, one of the alleged victims, with his prior inconsistent statement that supported the defense contention that Petitioner did not fire a shotgun into the Smith's trailer?

Did the PCR court err in failing to make specific findings of fact and conclusions of law on the directed verdict ineffectiveness issue where the Court of Appeals held on direct appeal that the denial of the directed verdict motion was not preserved for review due to trial counsel's failure to renew the motion for a directed verdict at the close of all evidence and Petitioner properly raised the issue at the PCR hearing?

Respondent's Issues Presented

Did the PCR court properly find trial counsel was not constitutionally ineffective for failing make an issue out of Petitioner's denying shooting into the victims' home to one of the victims immediately after the incident when Petitioner's denial was not a fact in issue at trial?

Is Petitioner's argument that trial counsel was constitutionally ineffective for failing to preserve for appellate review the trial court's denial of his motion for a directed verdict when Petitioner did not move to alter or amend the PCR court's final judgment in order to ensure that the order contained findings on the issue; and, if the issue is preserved, did the PCR court correctly deny relief where Petitioner has failed to show trial counsel was constitutionally ineffective for failing to preserve the motion when trial counsel had no duty, under the state of the law at the time of Petitioner's trial, to argue Petitioner was entitled to a directed verdict on the basis that the State had not presented evidence that Petitioner had the specific intent to kill?

STATEMENT OF THE CASE

During its June of 2013 term, the Greenville County Grand Jury indicted Petitioner for three counts of attempted murder (2013-GS-32-5236; -5237; and -5238) after Petitioner was arrested following an incident in which multiple shotgun blasts were fired into the victims' trailer, only a short distance away from Petitioner's own trailer, late at night. C. Timothy Sullivan, Jr., Esquire (trial counsel), represented Petitioner, and Assistant Solicitor Kristie Bjorndal Hodge of the Thirteenth Circuit Solicitor's Office prosecuted the case. On June 2, 2015, Petitioner proceeded to a jury trial with the Honorable R. Keith Kelly (trial court) presiding. At the conclusion of trial, the jury found Petitioner guilty of one count of the attempted murder as to Regina Smith and two counts of the lesser-included offense of first-degree assault and battery with regard to Tee Smith and the Smiths' minor child. The trial court sentenced Petitioner to imprisonment for fifteen years for attempted murder and ten years for each count of first-degree assault and battery, with the three sentences running concurrently.

Trial counsel filed a timely notice of appeal. Appellate Defender John H. Strom (appellate counsel) of the South Carolina Commission on Indigent Defense perfected the appeal. Senior Assistant Deputy Attorney General Deborah J. Shupe of the South Carolina Attorney General's Office represented the State. Appellate counsel argued the trial court erred in denying trial counsel's motion for a directed verdict because the State had not presented any evidence that Petitioner had had the specific intent to kill the victims. The South Carolina Court of Appeals affirmed in an unpublished opinion. State v. Mejean, Op. No. 2017-UP-259 (S.C. Ct. App. filed June 28, 2017) (per curiam). The remittitur was issued on July 14, 2017.

Petitioner filed an application for post-conviction relief on May 18, 2018, claiming he was entitled to post-conviction relief due to his receiving the ineffective assistance of trial counsel and appellate counsel in multiple ways, error on the part of the trial court, and his actual innocence. Respondent filed its return on October 31, 2018, requesting that the PCR court conduct an evidentiary hearing regarding Petitioner's claims. On December 18, 2018, an evidentiary hearing was convened before the Honorable Alex Kinlaw, Jr. (PCR court), at the Greenville County Courthouse. Petitioner was present at that hearing, and was represented by Sarah M. Henry, Esquire. Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office represented Respondent.

The PCR court denied the application for post-conviction relief and dismissed it with prejudice, finding Petitioner had failed to establish any constitutional violations requiring the grant of post-conviction relief. The PCR court found there was "ample evidence" admitted at trial from which the jury could have found that Petitioner had the specific intent to kill the victim. App. 369-70. With respect to Petitioner's claim that trial counsel was constitutionally ineffective for failing to question one of the victims about his prior statement to police that Petitioner had denied shooting at the victim's home immediately after the incident occurred, the PCR court found there was no deficiency in trial counsel's failing to question the victim about the statement because the fact that Petitioner denied shooting the victim's home was not in issue at trial and there was no prejudice from the omission because Petitioner took the stand at trial and denied shooting the home. App. 366. Petitioner did not file a motion to alter or amend the PCR court's judgment.

Petitioner's appeal follows.

STATEMENT OF FACTS

Tee Graham Smith (Tee) and his wife Regina Smith (Regina) testified at trial. The two had only an eight-year-old daughter in July of 2012. App. 53-54. The Smiths met Petitioner when Petitioner and Petitioner's pregnant wife Melissa (Melissa) and two step-children moved into the trailer next to them in the trailer park. App. 54-55. The families became friends, spending time together almost daily. App. 55-56, 69, 81. On July 1, 2012, Tee asked Petitioner and Melissa to watch his daughter until Regina got off of work around noon because Tee had to work. App. 56-57. Regina went to Petitioner's mother's home because she wanted to go swimming with the Mejeans. App. 70. Petitioner left his mother's home about two hours before everyone else, and refused to return to pick up his family when a storm appeared. App. 70. Regina dropped Melissa and the children off at some location where Petitioner was, and then returned home. App. 71.

When Tee got off of work, he went home to Regina and their daughter and went to bed, only to wake up in the night to find debris on the bed, in the kitchen, and in the living room. App. 57-58, 71-72. The Smiths heard a bang, saw bullet marks on the wall, noticed a picture frame had fallen off of the wall, and saw wood on their bed. App. 58. Tee discovered wood on the floor in the kitchen. App. 58. Regina noticed a bullet hole that went through the kitchen table. App. 59. They saw another bullet hole about four feet above their daughter's head where she was sleeping in the living room. App. 59.

Tee went outside with his pistol and fired two warning shots into the air. App. 59. Tee did not see anyone around the trailer during a run around it in the rain. App. 59. Tee did see that there were bullet holes showing that someone had been shooting their home. App. 59. Regina

testified at least one hundred pellets of bird shot had gone through the side of the trailer. App. 75. Tee hid his wife and daughter in the bathroom, and they called 911. App. 59-60, 72. Regina called Melissa because she was worried about her, and Melissa was not home, although Petitioner was. App. 60, 72. Melissa said that Petitioner had recently called her from home, yelling and screaming. App. 72. Regina heard more shots being fired in the direction of Petitioner's home twenty or thirty minutes later. App. 72-73.

Upon Tee's second exit of the home, he saw Petitioner walking from Petitioner's home toward Petitioner's shed, which was approximately six feet away from Petitioner's rear porch. App. 60-61. After he left the shed, Petitioner walked towards Tee. App. 60. Tee asked Petitioner if he had shot his house, and he testified Petitioner yelled back in reply, "Where's my motherfucking bitch?" App. 60, 64. Petitioner did not show any concern that Tee had told him that someone was shooting his home. App. 64. Regina heard Petitioner and Tee talking; she could not make out their words, but Petitioner sounded angry. App. 73. She asked Tee to come inside, and they stayed indoors until the police arrived. App. 73.

Tee's testimony was that there was a light on in the shed, which allowed him to see a figure in Petitioner's hand down by his side, which reminded Tee of a shotgun. App. 61. Tee knew Petitioner had a shotgun, but he did not know if Petitioner had the firearm on his person at that time. App. 61-62. Tee did not see any cars outside, not even Petitioner's. App. 62. Tee did not see anybody in the field in front of his home, nor in the woods behind it. App. 63.

Petitioner had personal knowledge of the layout of the home, including the location of the living room, kitchen, and bedrooms. App. 65, 79. Petitioner was not present when law

enforcement arrived an hour later. App. 64-65. The Smiths knew Petitioner and Melissa had been having marital problems. App. 63-64, 78-79.

On cross-examination, Tee admitted that he did not know of any reason Petitioner would have to want to kill him and his family. App. 66. Tee testified Petitioner yelled at him and asked him where "his mother fucking bitch at." App. 66. Trial counsel asked if Petitioner had denied shooting Tee's trailer, and Tee answered that, "Nothing else came out of his mouth." App. 66. Although Tee did not see Petitioner shoot the gun, he testified he genuinely believed Petitioner had a gun, which he thought looked like a Mossberg with a long barrel. App. 66. Tee knew Petitioner had a gun, but Tee did not see who fired the gun at his house. App. 66-67. Likewise, Regina did not know who fired the shots into her home. App. 81. Tee affirmed that Petitioner was worried about Melissa. App. 67.

Melissa testified at trial that she was still married to Petitioner. App. 83. She was very good friends with the Smiths. App. 83. While keeping the Smiths' daughter on July 1, 2012, her family decided to go swimming at Petitioner's mother's home, and Regina tagged along. App. 84. Petitioner left before everyone else and later, after she had to make multiple phone calls to him before he answered, refused to return to pick her up. App. 84. Regina dropped her and her kids off at the home of the sister of one of Petitioner's friends, and Melissa and the sister took the kids to a local church for a fireworks display. App. 84-85. Melissa and the kids went to Petitioner's friend's home for some hours, and she left him there and went home with her kids. App. 86. Melissa then went to her cousin's home, without notifying Petitioner of the fact, to see more fireworks, and she intended to stay there with the kids overnight so that Petitioner could "cool off" after their argument; she affirmed at trial that Petitioner had been drinking alcohol that

day. App. 86-88. She testified that she and Petitioner had only one vehicle at the time, so he was left without a vehicle. App. 87-88.

Melissa received a call from the landline at her and Petitioner's home on which she heard "muffled yelling," and she then received phone call from Regina about ten to twenty minutes later, in which Regina said that someone had shot at the Smiths' home. App. 88-89. She received a second call from Regina minutes later in which she heard only indistinguishable yelling. App. 89. She received a third call from Regina and was informed that law enforcement was coming to the house. App. 89. Melissa received a call later from police asking her to come back to her home. App. 89. She returned home and gave law enforcement permission to search her home. App. 90. Her home was trashed, Petitioner was nowhere to be found, and a single gun was missing from Petitioner's collection. App. 90-91. Melissa's attempts to call Petitioner were unsuccessful. App. 91-92. On cross-examination, Melissa confirmed that Petitioner owned a shotgun. App. 94. She confirmed that her home had also been struck by gunfire. App. 95. She testified she received two phone calls from the landline at her home: one immediately before Regina's first call and one immediately after. App. 96.

Officer Adam Davis testified at trial about his work at the crime scene on July 2, 2012. App. 101. He noticed three shell casings in the yard in front of the Smiths' home and three corresponding projectile impacts on the front wall of the home. App. 102. He did not attempt to collect fingerprints for processing because the weather and heat would have degraded any prints present. App. 103. He described the impact through the Smiths' bedroom window as one caused by birdshot. App. 104. He scribed the impact in the kitchen wall as one caused by a shotgun slug. App. 105. He described the impact through the wall leading into the Smith's living room as

having a "circular pattern" similar to the one caused by the shotgun slug. App. 105. Davis identified spent, twelve-gauge shotgun casings, from two manufacturers, found outside the Smiths' home. App. 106, 116-17. He did not find a shogun at the scene, however. App. 108. He could not say how long the spent casings had been lying on the ground in front of the home, but noted that the casings were not covered by soil; instead, they were "fresh on top." App. 118-19. Davis found more spent casings in the driveway leading to the rear yard towards the storage shed behind Petitioner's home and in front of the storage shed. App. 119-22. There was a shotgun round lodged in the door of the storage shed. Ap. 121. Inside Petitioner's shed, he found an unspent shotgun round of the same type and from the same manufacturer as a spent casing found in front of Tee's home. App. 123-24. In Petitioner's yard, he found multiple unspent casings matching those found in Tee's yard. App. 124-28.

Davis did not notice any damage to the doorway into Petitioner's home, but observed that the interior of the home was in disarray. App. 131. There were unspent shotgun cartridges and an empty gun bag inside Petitioner's bedroom. App. 129, 133, 140. Some of the unspent casings in the home were of the same type and from the same manufacturer as the spent casings found in front of Tee's home, but Davis could not tell whether they were of the same diameter. App. 133, 135.

On cross-examination, Davis agreed he could not tell when the spent shotgun casings found outdoors on the scene were fired on the evening of July 1, 2012, due to the weather conditions outdoors. App. 138. Davis did not remember seeing "any particular damage" to Petitioner's back door, but did think it was in poor condition. App. 139.

At the close of the State's case, trial counsel moved for a directed verdict as to the indictments for attempted murder, arguing the State had not introduced any evidence that Petitioner had the specific intent to kill the Smiths. App. 143-44. The State argued there had been evidence admitted showing Petitioner fired the shots into the victims' home and that the fact that the shots were made by a deadly weapon implies that the shooter had the specific intent to kill. App. 144. The trial court denied the defense motion. App. 144.

Petitioner testified on his own behalf at trial. App. 157. Petitioner testified he owned a shotgun, but does not know what happened to it. App. 158. Petitioner affirmed that he and Melissa had been arguing on the night in question, that he had been drinking alcohol, and that Melissa had gone to a relative's home to spend the night. App. 159.

Upon his return home that night, with a friend dropping him off, he noticed his front door was open. App. 159. He entered the home through the front door armed with a section of pipe he picked up from outdoors. App. 160. He found his former marijuana dealer "Frog" inside holding Petitioner's shotgun. App. 161. Petitioner chased Frog from the home, and Frog fired multiple rounds back at Petitioner, with two penetrating his back door. App. 161. As he chased after Frog near the Smiths' home, Frog fired more shots at him, missing Petitioner. App. 161-62. He chased Frog over a fence into a pasture, at which point he heard Tee calling him. App. 162. He stopped, Tee asked if Petitioner had shot his house, and Petitioner answered that he had not. App. 162. When he asked Tee where Petitioner's "bitch" was, he was referring to Frog, not Melissa. App. 162. He then continued to search for Frog through the pasture, not stopping for hours. App. 163. He did not remember calling Melissa from the house that night. App. 163.

Petitioner testified he did not know that police were looking for him. App. 164. He returned home after hours of searching for Frog, and lay down to get some rest. App. 164. An officer arrived at his home and arrested him. App. 164. He denied shooting a firearm at any point on the evening in question. App. 166.

On cross-examination, the State questioned Petitioner about the argument he had had with Melissa on the night in question, as well as their past domestic troubles. App. 167-68. Petitioner testified Frog had been at his home for a party a couple of weeks before the break-in, and that the two had smoked marijuana at that time. App. 170. Petitioner denied owing money to Frog. App. 170-71. Petitioner affirmed he was referring to his shotgun when he asked Tee where his "mother fucking bitch" was, although he normally did not refer to the gun that way, and affirmed that he has referred to Melissa on similar terms. App. 174. He did not stop to warn the Smiths or apologize for the shots fired into their home at the time, not out of lack of concern for the Smiths, but because time was "of the essence" in his chase after Frog. App. 174. He ran after Frog all night and was not worried about his wife and kids at the time because chasing down Frog was more important. App. 175-76. He did not think it necessary for him to call the police to report Frog's conduct. App. 176.

He affirmed he would not point his shotgun at someone and fire it or shoot it into someone's home. App. 177. He testified he only kills what he intends to eat and affirmed that he only shoots at something he intends to kill. App. 177-78. On redirect, Petitioner testified he did not know Tee's home had been hit by gunfire when they met in the yard, and that Tee "seemed fine." App. 178.

Trial counsel rested the defense's case but did not renew his earlier motion for a directed verdict. App. 179-81. During his closing argument, trial counsel reaffirmed Petitioner's testimony that he denied to Tee that he had shot the Smiths' home. App. 186. Trial counsel reiterated that Petitioner's testimony was that he was referring to his shotgun when he said he was looking for his "fucking bitch". App. 186. Trial counsel argued Petitioner's returning to his home and surrendering to police without a fight indicated he did not have any animosity towards the Smiths. App. 187, 190. He argued the jury had to acquit Petitioner if they believed that Frog fired the shots into the Smiths' home and had to determine whether Petitioner had the specific intent to kill the Smiths if they found Petitioner fired the shots. App. 187. He argued Petitioner would not have shot upwards into the Smiths' home if he had intended to kill them as he was an experienced hunter who knew how to shoot to kill what he is aiming at. App. 188. He argued Petitioner would not have wanted to kill the Smiths, who were his friends. App. 189.

The State argued in closing that, if one of the Smiths had died from Petitioner's gunshots, Petitioner would have been guilty of murder because he "acted with reckless disregard for the life of another human being purposely, willfully, intentionally." App. 194-95. The State claimed Petitioner had the intention to shoot into a home where people lived, something a person would not do unless he intended them harm or was totally disregarding their lives and safety because doing so could kill someone. App. 195. The State further argued common sense indicated Petitioner loaded his shotgun and went looking for his wife, not his shotgun, and the facts showed Petitioner and Melissa had been arguing; Petitioner had been drinking; Petitioner knew Melissa was good friends with Regina; and Petitioner showed up with a loaded shotgun. App. 197. The State asked the jury to consider all the evidence and find Petitioner guilty of attempted

murder. App. 198. The State argued the Petitioner's shooting into the Smiths' home indicates he had the specific intent to kill them or else that he was stupid and did not care if he killed someone, which still showed malice, recklessness, and intent to harm. App. 198-99.

STANDARD OF REVIEW

Petitioner has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his PCR action, and when alleging that trial counsel was constitutionally ineffective, he must prove "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Petitioner 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, at 117, 386 S.E.2d at 625 (quoting Strickland, at 690). The proper measure of performance is whether the 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. (citing Strickland, at 690). Petitioner must overcome this presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625. Second, Counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, at 117-18, 386 S.E.2d at 625.

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When

reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed de novo without deference to the lower court. Smalls, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR court correctly found trial counsel was not constitutionally ineffective for failing to cross-examine the victim about his prior statement because Petitioner's denial that he was the shooter was not a fact in issue at trial.

Petitioner argues the PCR court erred in denying relief and finding there was no strategic reason for trial counsel to raise the issue of Petitioner's denial of being the shooter at the scene immediately after the shooting and that Petitioner did not suffer any prejudice from trial counsel's failure to do so.[1]

At trial, Tee testified on direct examination that, when he saw Petitioner outside immediately after the shooting occurred, he asked Petitioner if Petitioner had shot at Tee's home, and that Petitioner replied, "[W]here's my mother fucking bitch?" App. 60. Tee affirmed that he told the police officers who arrived at the scene about an hour after the shooting "basically" everything to which he had testified. App. 64-65. Trial counsel questioned Tee on cross-examination about the words exchanged between Petitioner and Tee outside his home after the shooting. App. 66. The following exchange occurred:

> Q: When he approached you and you asked him did he shoot the trailer, did he say – what?
> A: He yelled at me and asked me where was his mother fucking bitch at.
> Q: Did he tell you that he did not shoot the trailer?
> A: Nothing else came out of his mouth.

App. 66.

[1] Petitioner argues the PCR court incorrectly characterized the issue as a failure of trial counsel to raise the issue that Petitioner denied shooting the house to Tee instead of characterizing the issue as an argument that trial counsel was constitutionally ineffective for failing to impeach Tee with a prior inconsistent statement. Respondent suggests the PCR court worded the issue in that way in order to maintain consistency with Petitioner's wording of the issue in his application for post-conviction relief, but the PCR court's analysis is the same.

At the PCR hearing, trial counsel testified he received a witness statement written and signed by Tee in which Tee wrote he asked Petitioner if Petitioner shot his home and Petitioner said "*No*. Where's my motherfucking bitch at?" App. 321-22 (emphasis added). Trial counsel affirmed that Tee omitted Petitioner's denying shooting Tee's home during his testimony. App. 323. However, trial counsel also testified he did not see a lie in Tee's trial testimony. App. 324. Trial counsel explained he did not think to impeach Tee on the matter because Tee's trial testimony was largely consistent with his prior written statement. App. 324-25.

Petitioner also questioned trial counsel about a report written by a law enforcement officer who was not called as a witness by either party at trial. App. 325-26. The following exchange occurred between Petitioner and trial counsel:

> Q: All right. Perfect. So in the report, from what you remember, it looks like Mr. Smith – this is Tee Smith again, one of the victims, tells the officer that [Petitioner] told him that he did not shoot the house; is that –
> A: And he has no idea what was going on.
> Q: Yeah. And that he had no idea what was going on. That – when he asked him about it, [Petitioner] said, I don't know?"
> A: Yeah.

App. 326-27. Explaining his reason for not calling the law enforcement officer who wrote the report as a witness at trial in order to impeach Tee for testifying Petitioner said only, "Where's my mother fucking bitch at," trial counsel testified, "I just looked at the overall thing and I just didn't think it was necessary." App. 327. Trial counsel believed that "it just looked repetitive." App. 328.

In Thomas v. State, this Court found a defense attorney's performance was deficient when he failed to impeach the victim's credibility at trial by not calling the medical personnel who treated the victim immediately after she was attacked, whom she told she did not know her assailant, when the victim later identified Thomas as her attacker and testified at trial that she

knew Thomas at the time of the attack and that he was the assailant. 308 S.C. 123, 417 S.E.2d 531 (1992). In Rutland v. State, this Court found that Rutland, who claimed self-defense in a trial for murder after he shot and killed the estranged husband of a romantic partner, was prejudiced by his defense attorney's failure to impeach a witness with her prior, inconsistent statements, after that witness gave statements to law enforcement and a newspaper reporter in which she indicated the victim was armed and drew his firearm before Rutland shot him but then testified at trial to the effect that Rutland went for his weapon first and that she did not see the victim with a gun. 415 S.C. 570, 785 S.E.2d 350 (2016). Petitioner cites Thomas and Rutland for support, but neither case is helpful to Petitioner here because, unlike the witnesses identified in those cases, Tee's testimony did not directly identify Petitioner as the perpetrator. On the contrary, both Tee and Regina testified at trial that they did not know who fired the blasts into their home because they were indoors at the time.

In this case, it would have served no useful purpose to impeach Tee's credibility as Petitioner's defense was not based upon proving false some or all of Tee's, Regina's, or Melissa's testimony. Rather, Petitioner's contention at trial was that, while those aforementioned witnesses were elsewhere, Frog shot through the Smiths' trailer. Petitioner did not materially dispute the testimony of the witnesses as to the events before or after the shooting, but provided additional facts meant to explain his innocence given the context of the events that they witnessed. Trial counsel's testimony at the PCR hearing shows he did not think there was any reason to impeach Tee's credibility in light of his defense strategy. The PCR court correctly found that there would have been no strategic reason for trial counsel to impeach Tee with the

prior, somewhat inconsistent statement because doing so would have yielded no discernable benefit to Petitioner.

The PCR court properly found Petitioner did not demonstrate there was a reasonable likelihood the outcome of his trial would have been different had trial counsel brought more attention to the fact that Petitioner denied shooting Tee's home when confronted at the scene, as it was not a disputed fact at trial. App. 366. As the PCR court correctly noted, Petitioner testified at trial and made it clear that he denied the act when confronted by Tee after the incident. App. 162, 366. Although comments made during an opening statement are not evidence, the jury also heard the State say during its opening at trial that Petitioner denied to Tee that he had shot his trailer. App. 49. Then, trial counsel reiterated during his closing argument Petitioner's testimony that he denied to Tee that he had shot the trailer. App. 186.

Even if trial counsel had attempted to impeach Tee with his prior statement, it is unlikely the jury likely would have been swayed in Petitioner's favor because of a single, self-serving statement made by Petitioner immediately after the shooting. See State v. Sweet, 270 S.C. 97, 98-100, 240 S.E.2d 648, 649 (1978) (finding a witness's testimony that Sweet told him approximately one week after a rape certain personal details about the victim and that the victim had relayed them to Sweet through friendly conversation was being offered by the defense for the purpose of bolstering Sweet's defense of consent, was directly related to Sweet's defense, and was testimonial in nature, making it inadmissible as hearsay and a self-serving statement) (citing State v. Atchison, 268 S.C. 588,595, 235 S.E.2d 294, 297 ("[A] defendant cannot introduce in his defense his own statements made to others.")).

This is particularly true where Petitioner's defense still needed to explain at trial the second half of his statement to Tee after the shooting. There was no dispute that Petitioner asked Tee where was "[Petitioner's] mother fucking bitch . . ." Petitioner, however, implausibly claimed the "bitch" in that sentence was his shotgun; he was not, as the State argued, referring to his wife Melissa. App. 162, 174. However, Petitioner admitted at trial he did not typically refer to his shotgun as his bitch and admitted he had referred to Melissa on similar terms in the past, testifying he "called [Melissa] every name in the book probably." App. 174. The State attacked Petitioner's flimsy explanation and argued common sense showed Petitioner was in a drunken rage and looking for his wife when he shot into the Smiths' home. App. 197. Because the jury convicted Petitioner, it clearly found Petitioner's explanation for his actions that night to lack credibility.

Petitioner has failed to show the PCR court erred in denying relief on this ground. The PCR court's finding of no deficiency is supported by the trial record because trial counsel had no strategic reason to impeach Tee's credibility when Petitioner did not dispute the overwhelming majority of Tee's testimony, Petitioner testified at trial that he denied to Tee at the scene that he had fired his shotgun into the Smiths' home, and the fact Petitioner denied shooting the house was not a fact in issue. Moreover, there is no reasonable likelihood that the outcome of trial would have been different because Petitioner did not deny saying "where's my mother fucking bitch at," the second part of his statement to Tee, which was understandable only as a statement made by Petitioner in anger while looking for his wife. The testimony on Petitioner's statement about his bitch and the State's cross-examination of him on this point cemented the State's

argument that Petitioner fired into the Smiths' home because he was enraged and searching for his wife and cast doubt on the credibility of Petitioner's testimony about his actions that night.

This Court should deny the petition for a writ of certiorari.

II. The issue of whether trial counsel was constitutionally ineffective for failing to preserve for appellate review the denial of his motion for a directed verdict is itself not preserved for appellate review; and, notwithstanding the lack of preservation, the PCR court correctly denied relief because Petitioner has failed to show trial counsel was constitutionally ineffective for failing to preserve the motion because there was no duty for him to argue that the State had not presented evidence that Petitioner had the specific intent to kill.

Petitioner argues the PCR court erred in failing to make specific findings of fact and conclusions of law regarding his argument that trial counsel was constitutionally ineffective for failing to preserve for appellate review the denial of his motion for a directed verdict. This issue is not preserved for this Court's review, however, because when the PCR court failed to address the issue in its final order, Petitioner did not move to alter or amend the judgment in accordance with Rule 59(e), SCRCP. Even if the issue is preserved, Petitioner has failed to meet his burden of proving trial counsel was constitutionally ineffective for failing to preserve for review the motion because trial counsel was not required, in arguing his motion, to argue law not instituted by this Court until its opinion, reached years after Petitioner's trial, in State v. King, 422 S.C. 47, 64, 810 S.E.2d 18, 27 (2017).

A. Petitioner has failed to preserve for appellate review the issue of whether trial counsel was constitutionally ineffective for failing to preserve for direct appellate review the denial of his motion for a directed verdict because Petitioner did not ask the PCR court to make specific findings of fact or conclusions of law as to this issue by moving to alter or amend the final judgment.

Petitioner argues trial counsel was constitutionally ineffective for failing to preserve for appellate review the denial of his motion for a directed verdict by not renewing it at the close of

the defense's case-in-chief. Petitioner argues the appellate courts would have reversed on this ground as there was allegedly no evidence at trial that Petitioner had the specific intent to kill Regina Smith. Petitioner further argues the PCR court erred in failing to make specific findings of fact and conclusions of law despite the claim's being duly raised before it. Petitioner questioned trial counsel about his failure to preserve the issue at the PCR hearing; however, Petitioner did not move to alter or amend the judgment when the PCR court did not address the issue in its order.

This Court recently acknowledged that the failure of an applicant for post-conviction relief to move to alter or amend the judgment when the PCR court fails to address duly raised issues in its final order precluded appellate review of those issues. Fishburne v. State, 427 S.C. 505, 515, 832 S.E.2d 584, 589 (2019) (citing Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (requiring an applicant to move to alter or amend the judgment in order to preserve issues that are not adequately addressed in a PCR court's final order)). In Fishburne, the PCR court did not address all of Fishburne's claims in its order of dismissal, and Fishburne did not move to alter or amend the judgment afterwards. Id. at 511-12, 832 S.E.2d at 587. On appeal, the State argued this Court's review of the claims was precluded because Fishburne did not move to alter or amend the PCR court's final judgment, in accordance with Rule 59(e), SCRCP. Brief for Respondent at 6-7, Id. (citing Marlar; Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Burgess v. State, 402 S.C. 92, 738 S.E. 2d 264 (S.C. Ct. App. 2013). Ultimately, this Court concluded that its issue preservation rules did not prohibit it from remanding the case so that the PCR court could address the issues not addressed in the final judgment. Id. at 516, 832 S.E.2d at 589. Fishburne's concurring opinion—which was joined by the author of the majority opinion in

the case—explained, though, that Fishburne represented a departure from the normal practice and that the Court will find an issue unpreserved and decline to address the merits thereof if a party fails to move to alter or amend the judgment when required to do so. Id. at 517-18, 832 S.E.2d at 590 (Hearn, J., concurring) (emphasizing that the majority opinion should not be read as an instruction that the requirement that a motion be filed according to Rule 59(e), SCRCP, in order to preserve an issue for appellate review be relaxed in PCR cases and characterizing its departure from the normal practice in Fishburne as motivated by "extraordinary circumstances . . . .").

Because Petitioner did not move to alter or amend the judgment, in accordance with Rule 59(e), SCRCP, to ask the PCR court to address the issue of whether trial counsel was constitutionally ineffective for failing to preserve his motion for a directed verdict, this Court should find the issue not preserved for review in accordance with the authorities acknowledged by this Court in Fishburne. If, however, this Court departs from the principles of issue preservation, it should remand the case so the PCR court can make supplemental findings.

B. Regardless of Petitioner's failure to preserve the issue, the PCR court correctly denied relief because Petitioner has failed to show trial counsel was constitutionally ineffective for failing to preserve the denial of his motion for a directed verdict because Petitioner cannot prove prejudice where trial counsel had no duty, under the state of the law at the time of Petitioner's trial, to argue Petitioner was entitled to a directed verdict on the basis that the State had not presented evidence that Petitioner had the specific intent to kill.

Petitioner argues trial counsel was constitutionally ineffective for failing to preserve for appellate review the denial of his motion for a directed verdict when he did not renew the motion at the close of the defense's case-in-chief because there was no evidence at trial that Petitioner

had the specific intent to kill and because Petitioner would have prevailed on direct appeal had the issue been preserved.[2]

The State argued in reply to trial counsel's motion for a directed verdict the jury could infer Petitioner's specific intent to kill from the evidence that Petitioner fired his shotgun, a deadly weapon, into the victims' home. App. 144. After the trial court denied trial counsel's motion, he did not renew it at the close of his case because he believed a different ruling would not be warranted. App. 339. Due to the ambiguity of the language in the attempted murder statute and the lack of clarity that even this Court has highlighted, trial counsel was not acting outside the reasonable bounds of prevailing professional norms at the time of Petitioner's trial by operating under the assumption that the State could prove specific intent to kill merely by proving that Petitioner had fired into the Smiths' trailer with a shotgun, a deadly weapon. Indeed, as trial counsel testified during the PCR hearing, he believed at the time that "the intent [could] be inferred" from Petitioner's shooting into the Smiths' trailer with his shotgun. App. 337.

In State v. King, this Court considered the implications of the phrase "malice aforethought, either express or implied," which is found in the attempted murder statute. 422 S.C. 47, 56, 64, 810 S.E.2d 18, 22, 27 (2017), modifying State v. King, 412 S.C. 403, 772 S.E.2d 189 (S.C. Ct. App. 2015). In that case, this Court approvingly cited another court's reasoning that implied malice is incompatible with the specific intent to kill required for a defendant to be guilty of attempted murder and summary that:

[2] Petitioner was convicted of the attempted murder only of Regina Smith; he was convicted of the lesser-included offense of first-degree assault and battery, which is not a specific intent crime, with regards to Tee Smith and the Smiths' minor child. Even if this Court were to reverse the PCR court's denial of relief on this issue, Petitioner would be entitled to a new trial only on the conviction related to Regina.

> 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. at 58, 810 S.E.2d at 24 (quoting Keys v. State, 104 Nev. 736 (1988)). Importantly, however, in its discussion of the Court of Appeals' treatment of the issue, this Court agreed with the State that the Court of Appeals partly based its conclusion on dicta from State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), acknowledging that South Carolina has been afflicted with "conflicting case law regarding levels of criminal intent," and noted the "ambiguity" created by the language in the attempted murder statute. King, at 55-62, 810 S.E.2d at 22-26.

This Court recognized the lack of clarity in the Court of Appeals' opinion in King, writing that the opinion would have been clearer had the Court of Appeals considered the portion of the attempted murder statute regarding malice rather than focusing in isolation "on the phrase 'with intent to kill' . . . ." Id. at 61, 810 S.E.2d at 25. Justice Kittridge's concurring opinion in King further emphasized the ambiguity of the attempted murder statute, stating that the question of whether attempted murder is a specific intent crime "is easily stated . . . but not easily answered." Id. at 71, 810 S.E.2d at 31 (Kittredge, J., concurring).[3] The extent of the ambiguity is such that the Court specifically requested that the General Assembly "re-evaluate the language" of the attempted murder statute. Id. at 64, 810 S.E.2d at 27, fn.5.

As this Court's opinion in King acknowledges, trial counsel's belief regarding implied malice and specific intent was reasonable at the time of Petitioner's trial. At that time, trial counsel did not have the benefit of reading this Court's opinion in King for guidance on the

[3] The majority of this Court in King acknowledged and agreed with Justice Kittredge on this point. Id. at 62, 810 S.E.2d at 25-26.

incompatibility between implied malice and the specific intent to kill.[4] Trial counsel should not be held to the standard of a clairvoyant, being required to predict that this Court would instruct in its King opinion that implied malice was incompatible with the specific intent to kill, given that language is expressly written into the statute, and particularly when the Court of Appeals had conspicuously failed to do so. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (explaining that the Supreme Court "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."). Because trial counsel is not required to be clairvoyant, the PCR court correctly found he was not deficient in failing to preserve the denial of the motion because he reasonably believed implied malice could be used to prove specific intent.

As Petitioner has not met his burden in establishing trial counsel was constitutionally ineffective, this Court should deny the petition for a writ of certiorari.

CONCLUSION

The PCR court did not err in denying relief due to trial counsel's failure to cross-examine Tee Smith on his prior statement because it correctly found there was no strategic reason for trial counsel to impeach the credibility of Tee's testimony when the majority of Petitioner's own testimony complemented, rather than contradicted, that witness's; Petitioner presented his own version of events at trial; the fact that Petitioner denied doing the shooting was not in issue at

[4] Respondent submits that the briefs filed in Petitioner's direct appeal, which were not included in the Appendix filed by Petitioner but were before the PCR court, also show that the uncertainty of whether the attempted murder statute provided for the specific intent to kill to be implied from other evidence remained even after the Court of Appeals issued its opinion in King, shortly before Petitioner's trial. The briefs should have been included in the Appendix pursuant to Rule 243, SCACR.

trial; and Petitioner did not suffer any prejudice because Petitioner was unable to offer a credible explanation for his asking Tee where was Petitioner's "mother fucking bitch".

Additionally, Petitioner has not preserved for review his argument that trial counsel was constitutionally ineffective for failing to preserve for direct appellate review the denial of his motion for a directed verdict, and, in any event, Petitioner cannot prove deficiency because trial counsel had no duty to make the argument Petitioner puts forth, which is based on an opinion that this Court had not yet rendered at the time of Petitioner's trial. This Court should therefore deny the petition for a writ of certiorari.

Respectfully submitted,

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