THE STATE OF SOUTH CAROLINA
In Supreme Court

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S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2016-002556
Circuit Court Case No. 2014-CP-46-1307
Opinion No. 5710 (Ct. App. filed January 20, 2020)

Russell Shane Carter,.....Petitioner,

v.

Bruce Bryant,.....Respondent.

PETITON FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, Petitioner's counsel certifies that a Petition for Rehearing was made on January 29, 2020 and denied on February 20, 2020.

QUESTION PRESENTED FOR REVIEW

1. **Whether the Court of Appeals erred in reversing the jury's malicious prosecution verdict which found Deputy Gwinn lacked probable cause to arrest Shane Carter for aggravated assault?**

STATEMENT OF THE CASE

This Petition for Writ of Certiorari seeks a review of the Court of Appeals' decision finding the element of probable cause in a malicious prosecution claim was established as a matter of law. This conclusion runs counter to the evidence submitted to the jury and South Carolina common law. *Jones v. City of Columbia*, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990), holding South Carolina follows the minority rule and probable cause is normally a factual issue for the jury to resolve. Below is the salient evidence in the record, overlooked by the Court of Appeals, establishing a basis for not only submitting the factual issue of probable cause to the jury but sustaining their verdict on the malicious prosecution claim.

Shane Carter lived in the home he rented with his pregnant wife, Dawn, his children and his grandmother, who was 87 years old at the time. (R. p. 57, ll. 9-14; 62, l. 11 - p. 63, l. 4; p. 129, l. 24 - p. 130, l. 1; p. 181, l. 24 - p. 182, l. 5; p. 187, ll. 7-8; p. 187, ll. 8-9). The Carters lived in a brick home surrounded by three mobile homes. (R. p. 177, l. 3 - p. 178, l. 11). Mr. Carter was responsible for taking care of the grounds and collecting rent from the occupants of the mobile homes. (R. p. 178, ll. 22-22). Water for the property was provided by a well. (R. p. 180, ll. 117-21). Mr. Carter was also responsible for maintaining the well, which had constant

problems. (R. p. 180, l. 23 - p. 181, l. 10) . The well was experiencing problems on April 25, 2012. (R. p. 181, ll. 11-24).

Around 11:00 p.m., Mr. Carter heard banging on his front door. (R. p. 70, l. 25 - p. 71, l. 9; p. 187, ll. 10-12). He went to the door and cracked it open just enough to see what the person wanted. (R. p. 73, l. 10 - p. 74, l. 4; p. 188, ll. 21-24). Mr. Carter saw the silhouette of the person and asked twice for the person to identify himself. (R. p. 74, l. 25 - p. 75, l. 3). The person said, "I want my water." (R. p. 75, l. 4; p. 140, ll. 15-18; p. 188, ll. 14-16; p. 189, ll. 4-6). Mr. Carter ultimately realized the person was asking about well water, and Mr. Carter told him, "I'm not your landlord... I don't have a lease agreement with you." (R. p. 75, ll. 13-14). Mr. Carter then told him he was trespassing and to "get out of here." (R. p. 75, ll. 15-17; p. 142, ll. 9-11). The person demanded water and Mr. Carter again told him to leave. (R. p. 75, ll. 18-20; p. 189, ll. 6-11).

At that point, Mr. Carter realized the man smelled of alcohol and appeared irrational. Mr. Carter decided the person would not listen, so he agreed to come check on the water the next day. (R. p. 76, ll. 18-20; p. 101). The person insisted he check right then, at 11:00 p.m., and Mr. Carter once again told him "you are trespassing" and "what you need to do is go home." (R. p. 76, ll. 21-25; p. 146, ll. 4-15). Mr. Carter then told his wife to call the Sheriff's Department, which she did. (R. p. 77, ll. 5-8; p. 100, ll. 19-20; p. 135, l. 6; p. 143, ll. 21-23; p. 144, l. 25 - p. 145, l. 2; p. 147, ll. 7-15; p. 189, ll. 11-12; p. 190, ll. 10-11; p. 191, l. 4). Dawn Carter called 911 and told the operator that they had asked the person to leave but he would not. (R. p. 192, ll. 1-5; p. 204, ll. 20-23).[1] Mr. Carter's wife remained on the phone with 911.

When Mr. Carter turned back around, the man had moved forward up onto the porch and placed his hands on the screen door. (R. p. 77, ll. 10-14; p. 78, ll. 16-18; p. 145, ll. 2-9; p. 168, ll.

[1] The person on the porch was Jimmy Faile. It was determined after police arrival that he did not live in any of the trailers and was visiting someone who did.

8-20; p. 190, ll. 12-15). Mr. Carter's wife retrieved a baseball bat they kept near the door and handed it to Mr. Carter. (R. p. 78, ll. 21-25; p. 136, l. 20; p. 189, l. 16 - p. 190, l. 5). Mr. Carter stood in the doorway in a way so as to hide the bat. (R. p. 79, ll. 1-2). He reached to close the screen door, but the man placed his hand inside the door and held the door open. (R. p. 80, ll. 10-22; p. 81, l. 21 - p. 82, l. 7). Mr. Carter turned to look at his wife and upon turning back around, the man hit Mr. Carter in the side of the head with his right hand (described as a "sucker punch," R. 149, l. 5). (R. p. 82, l. 12 - p. 83, l. 4; p. 92, ll. 6-12; p. 148, ll. 3-5; p. 157, ll. 10-14; p. 192, ll. 15-21; Pl. Exh., No. 6, photograph showing laceration to Mr. Carter's left brow).

Mr. Carter described his actions after being hit in the left forehead. He forced them out onto the porch, where the assailant "bear hugged" Mr. Carter and pushed him up against the bannister. (R. p. 83, ll. 15-22; p. 84, l. 23 - p. 85, l. 2; p. 192, l. 23 - p. 193, l. 1; p. 195, ll. 20-25). The assailant hit Mr. Carter two more times in the head and Mr. Carter held onto the bat to prevent the assailant from taking it from him. (R. p. 83, l. 25 - p. 84, l. 4; p. 148, ll. 9- 18). The assailant kept "bamming" on Mr. Carter, so he hit his attacker in the head with the bat. (R. p. 84, ll. 11-15; p. 196, ll. 6-11). The man fell to the ground and began kicking up at Mr. Carter to prevent him from getting to his door. Mr. Carter continued to defend himself by striking the legs of the man "until he gave up." (R. p. 84, ll. 15-19; p. 85, ll. 3-5; p. 85, l. 11 - p. 89, l. 14; p. 154, ll. 9-14; p. 196, ll. 19-25). Mr. Carter then stood over the man and told him to lie flat and not move until the police showed up. (R. p. 89, l. 12 - p. 90, l. 3). Mr. Carter was in the same position when Deputy Gwinn arrived. (R. p. 90, ll. 4-8; p. 91, ll. 8-10; p. 154, l. 15 - p. 155, l. 1; p. 197, ll. 1-2).

The 911 tape was entered into evidence for the jury. (R. p.60, l.24-25 Ex. 9(a)). While the transcript of the call does not appear in the record, the recording is an exhibit, was played for the jury and reveals the following: On the call, Mr. Carter's wife can be heard providing her

address, reporting the problem with the person at their door, and at one point she explains that person on the porch was "getting physical with my husband." She describes them struggling on the front porch. Sgt. Wright, who responded to the scene of the incident and testified for the defense, confirmed the contents of the 911 call on this point. (R. p. 428, ll. 14-16).

The in-car videos of Deputies Wright, Reed and Gwinn were played for the jury. (R. p. 168 (Wright), p.232 (Reed), p. 382 (Gwinn), p. 558, Exhibit No. 2 - compilation of all videos on single disc). The combined videos show the three York County Sheriff's Office deputies' arrival to the scene and audio recorded the majority of their conversations. First on the scene was Deputy Gwinn, followed by Sgt. Wright and then Deputy Reed. They each spoke to different witnesses on the scene. There are recorded discussions with Mr. Faile (Gwinn and Wright), with Mr. Carter (Gwinn and Wright), and with Mr. Carter's wife (Reed and Wright). After these interviews, the video records conversations between Deputies Gwinn, Wright, and Reed about what they learned, whether Mr. Carter's actions were within the law, and if they should make an arrest. The deputies discussed who threw the first punch, if Mr. Carter came out of his door, and whether or not Mr. Carter had a duty to retreat into his house from the front porch. The videos conclude with the deputies not making an arrest, but leaving to conduct further investigation. At various times in the deputies' testimonies, they are asked to confirm what is heard on the video.

Deputy Jonathan Reed was one of the responding officers that night and testified via deposition as a witness in Mr. Carter's case in chief. (R. p. 204, ll. 2-15). After a review of his dash video\audio, he made the following admissions. Deputy Reed agreed that where Mr. Carter lived is considered a home and a dwelling under South Carolina law, and that would include the front porch. (R. p. 225, ll. 11-18). The deputies were aware that the assailant, Mr. Faile, did not live in the area and had no connection with the property. (R. p. 226, ll. 5-12). Deputy Reed agreed that if Mr. Carter asked the assailant, Mr. Faile, to leave but Mr. Faile did not do so, then

Mr. Faile would be trespassing. (R. p. 226, ll. 21-24). Furthermore, Deputy Reed agreed that if Mr. Carter opened the door and Mr. Faile threw a punch at him, that would be assault. (R. p. 226, l. 25 - p. 227, l. 3). Deputy Reed agreed that under the "Castle Doctrine" there is no duty to retreat in a person's own home. (R. p. 227, ll. 4-9; p. 229, ll. 5-7; see also R. 235, ll. 2-18). He also agreed that Mr. Carter would have had the right to defend himself if someone had thrown a punch and was trying to come into his home. (R. p. 229, ll. 8-16). Deputy Reed stated that he may have done the same thing Mr. Carter did to protect his own family. (R. p. 410, ll. 19-20; p. 411, ll. 2-10).

Deputy Gwinn was on duty on April 25, 2012 and was dispatched on the call to Mr. Carter's home. (R. p. 315, ll. 3-19). Deputy Gwinn asked everyone, including Mr. Carter, what happened. (R. p. 320, l. 21 - p. 321, l. 321, l. 4). He spoke with the assailant, Mr. Faile, and tried to calm him down so that he could receive medical attention. Deputy Gwinn initially could not recall if Mr. Faile said he struck Mr. Carter first. (R. p. 382, ll. 17- 19). After listening to the dash cam videotape, Deputy Gwinn agreed that Mr. Faile said he struck Mr. Carter first because Mr. Carter had a bat in his hand. (R. p. 383, ll. 8-23).

Sgt. Lee Wright testified he responded to the call at Mr. Carter's home regarding "a disorderly in progress." (R. p. 400, l. 24 - p. 401, l. 4). Sgt. Wright assisted Deputy Gwinn in talking to Mr. Faile and calming him down until EMS arrived. Mr. Faile told the EMT that his neck was fine and that he could walk. (R. p. 436, l. 22 - p. 437, l. 6). Mr. Faile went on and on about the water. (R. p. 437, ll. 7-12). EMS was able to place Mr. Faile on a stretcher and take him to Piedmont Medical Center. Sgt. Wright agreed that he "misquoted the law" regarding the Castle Doctrine at the scene, not only to Mr. Carter, but also when discussing the matter with Deputies Gwinn and Reed. (R. p. 414, l. 12 - p. 415, l. 14; p. 426, ll. 15-20; p. 457, l. 13).

Sgt. Wright testified on direct examination that he had no further dealings with the case and no involvement in procuring the warrant after leaving the Carter residence. (R. 416 ll. 1-2). Upon cross examination, he changed his tune. He admitted he may have spoken with Deputy Gwinn over coffee, he just couldn't testify to it or deny it. He claimed to have done no further investigative efforts, but now was not sure if he saw or talked about the case with Deputy Gwinn. (R. 430, l. 24, 431, l.24). He was then shown the CAD dispatch report from that evening and early morning hours. Sgt. Wright's radio number was 340 and Deputy Gwinn's was 344. The record shows the following: that they both cleared the scene of Mr. Carters residence at 23:51 (11:53 pm); they were both en route to Piedmont Medical Center (PMC) at 23:54 (11:54pm); that both units arrived at PMC at 00:04 (12:04 am); that Sgt. Wright cleared PMC at 00:37 (12:37am); and Deputy Gwinn cleared PMC at 00:45 (12:45 am).

After leaving the hospital, Deputy Gwinn went to the Sheriff's Department, allegedly wrote a report[2] and went to see Judge Yard. The Court of Appeals noted that Gwinn went to seek the warrant "the following day". This suggests a lag in time between the events and the seeking of the warrant. Judge Yard is only a night magistrate. While technically correct, it misrepresents the actual timeline. Deputy Gwinn responded to the scene around 10:35 pm, left for the hospital from the scene at 11:54 pm, left the hospital at 12:45 am, and went straight to see the Judge.

Sgt. Wright agreed at trial that under the Protection of Persons and Properties Act, Mr. Faile was in Mr. Carter's dwelling at the time that he was on the porch. (R. p. 420, l. 14 - p. 421, l. 10; p. 422, ll. 19-20). He indicated he misspoke in the video when explaining the law to the deputies and to Mr. Carter's wife, Dawn. Sgt. Wright also agreed that once Mr. Faile was asked

[2] An original incident report on the normal standard form was never produced in the litigation or at trial. The only production was the court exhibit, which was a General Session Case File Summary. This report was written after the issuance of the warrant as it references the issuance in the report. (R. p. 640).

to leave, he committed trespassing when he remained, and trespassing is a crime. (R. p. 421, ll. 15-25). Sgt. Wright also testified that if Mr. Faile was the primary aggressor, that would change the complete complexion of the case, because that would prove he was causing the situation. (R. p. 449, ll. 5-19).

The deputies discussed the information they gathered from their various interviews. Sgt. Wright had an opportunity to speak with both Mr. Carter and Mr. Faile at the scene. (R. p. 407, ll. 4-8). He agreed Mr. Carter had an injury to his eye and had described how he was hit, how they grasped and tussled, and how Mr. Faile was fighting with Mr. Carter. (R. p. 440, l. 9 - p. 441 l. 7; p. 467, ll. 2-6). Sgt. Wright focused on the fact that Mr. Carter said he stepped out of his door and repeated his incorrect understanding of the law that Mr. Carter had a duty to retreat into his house. Sgt. Wright can also be heard saying that Mr. Carter "went to town" on Mr. Faile with the bat. This statement was based upon Sgt. Wright's observations of Mr. Faile, not on an admission by Mr. Carter or an accusation by Mr. Faile. (R. p. 439, l. 21 - p. 440, l. 5). Although Deputy Gwinn indicated Mr. Faile was going to claim Mr. Carter came out with a bat and hit him, to Sgt. Wright's knowledge, Mr. Faile never made that statement. (R. p. 413, ll. 7-19).

During this conversation, Deputy Reed testified one of the other deputies said "let's just take it to the magistrate," but another said "no, we can't do that anymore. We're not supposed to do that anymore." (R. p. 226, ll. 14-22). When asked why they were not supposed to consult with the magistrate about making an arrest he stated:

> That was in reference to what we -- in reference to we did receive direct -- we were not supposed to be calling to get -- to get an opinion, or a side-opinion, without presenting -- having all the facts and presenting probable cause to the magistrate without going through the formal steps of obtaining a warrant. (R. p. 226, l. 22 - p. 232, l. 3).

He admitted he used to call the ``magistrate to ask for advice, but that he had to stop. (R. p.227, l. 12-16). In the end, the deputies left the scene without making an arrest. Deputy Gwinn after

borrowing a camera, took a photograph of Mr. Carter that showed "lacerations on ... his left eye" and "a bruise on his back." (R. p. 332, l. 21 - p. 333, l. 8; Def. Exh. No. 26, 27).

Deputy Gwinn then left the scene and went to Piedmont Medical Center to check on Mr. Faile. He testified he spoke with Mr. Faile, who allegedly told him Mr. Carter came up from behind him and hit with a bat. After leaving the hospital, Deputy Gwinn went to the Sheriff's Department, wrote a "report" and went to see Judge Yard. Deputy Gwinn did not recall his conversation with Judge Yard. (R. p. 347, ll. 3-6). He was not under oath during any conversations with Judge Yard and his statement was not recorded. (R. p. 347, ll. 11-14; p. 358, ll. 15-19). His affidavit contained "a brief summary" but he did not put "the whole narrative in the report in the warrant." (R. p. 346, l. 12 - p. 347, l. 13).

Judge Yard testified that as a magistrate who works at night at the detention center, he conducts bond hearings, issues arrest warrants, collect fees for commitments, bench warrants and sign releases. He does not hold regular court. (R. p. 473, ll. 24, p. 474, ll. 24-2). Deputy Gwinn called him on April 25, 2013 to let him know that he "was on the scene of a pretty serious situation and he needed to speak to me in reference to obtaining a warrant." (R. p. 476, ll. 6-17; p. 491, l. 20 - p. 492, l. 4).

Deputy Gwinn then came to the office and explained to Judge Yard what happened. (R. p. 479, ll. 6-13). Judge Yard stated Deputy Gwinn indicated to him "that he had a situation where he had a physical altercation between two people. There were other people on the scene. One of the people involved had been hurt seriously enough to have to be transported to Piedmont Medical for treatment." (R. p. 479, ll. 17-22). Judge Yard reviewed written statements from Mr. Carter and his wife. (R. p. 479, l. 23 - p. 486, l. 4). He did not have a version of events from Mr. Faile. (R. p. 480, ll. 11-18). Judge Yard did not know the extent of Mr. Faile's injuries. (R. P. 477, ll. 14-17).

Judge Yard issued the warrant on April 26, 2012. (R. p. 488, ll. 21-23; Pl. Exh. 1). Judge Yard stated "the probable cause was based on police investigation meaning that [Deputy Gwinn] had presented it to me what he found when he was there." (R. p. 489, ll. 21-23). The warrant states "probable cause based on police investigation." (R. p. 490, ll. 7-8). Judge Yard did not know of any other occupants at the home, other than Mr. Carter and his wife. (R. p. 481, ll. 3-6). He also did not know if this was Mr. Carter's house. (R. p. 481, ll. 9-10). Judge Yard did not look up the Defense of Habitation Act or the Castle Doctrine. (R. p. 498, ll. 9-14).

Judge Yard normally talked to officers about the cases and typed the warrants, and then they swore to the contents of the warrants. Judge Yard testified when he spoke with Deputy Gwinn on the phone for their extended conversation, that he was at the detention center and Deputy Gwinn was not under oath. (R. p. 491, ll. 20, p. 492., ll. 16). Yard acknowledged that his magistrates bench book tells him that all warrants have to be done under oath. Any testimony outside the four corners of the warrant has to be given under oath. Deputy Gwinn was not under oath when they were having conversations. Nor were those conversations recorded, and there was no written warrant application containing the facts of the case because he doesn't require one. (R. p. 496, ll.5- 24). After the warrant was issued, Deputy Gwinn called Mr. Carter later that day, who turned himself in. He was released days later on a bond. He hired defense counsel, Alex Postic, who sent in a notice of representation. (R. p.97, l.1 -19, P. 113, L. 4-13).

E.B. Springs was the Assistant Solicitor assigned to Mr. Carter's case. (R. p. 500, ll. 1-2; p. 502, ll. 8-10; p. 505, ll. 2-6). He reviewed the file and concluded that Mr. Carter acted within his rights under the Castle Doctrine and was defending his home. (R. p. 506, l. 2 - p. 507, l. 6; P. 508, l. 1 -p. 509, l. 15). Mr. Springs "nolle prossed" the case, stating "Defendant's actions were within the law." (R. p. 510, ll. 10-19; p. 511, l. 24 - p. 512, l. 13). Mr. Springs stated as much in an email to Mr. Carter's criminal defense lawyer, Mr. Postic, noting he listened to the 911

recording as well as the recordings from the officers' dash cameras, and he was personally convinced Mr. Carter's actions were within the law. (R. p. 513, l. 11 - p. 514, l. 3). He dismissed the case before there was a preliminary hearing in the matter. (R. p. 514, ll. 7-22).

On January 24, 2011, Mr. Carter brought a lawsuit against the Office of the York County Sheriff alleging claims for false arrest and malicious prosecution. The case came for trial before the Honorable John Hayes on November 7, 2016. Judge Hayes dismissed Carter's claim for false arrest but allowed the claim of malicious prosecution to go to the jury. On November 8, 2016, the jury returned a verdict for Mr. Carter in the amount of $150,000.00. The Sheriff filed timely post-trial motions, which were denied by order on December 5, 2016. (R. p. 1-2). After a timely Notice of Appeal and briefing, the Court of Appeals heard oral arguments on September 16, 2019. On January 15, 2020, the Court of Appeals issued an Opinion reversing the circuit court's order, denying the Sheriff's motion for JNOV on the malicious prosecution claim. The court held that evidence revealed but one conclusion: that there was probable cause to arrest Mr. Carter. Mr. Carter filed a Petition for Rehearing on January 29, 2020, which was denied on February 20, 2020.

ARGUMENT

Summary of Argument

South Carolina law requires that the issue of probable cause be submitted to a jury unless the evidence yields but one conclusion. Rejecting the jury's conclusion that Deputy Gwinn lacked probable cause to arrest Mr. Carter, the Court of Appeals relied on evidence offered by the York County Sheriff's Office in finding probable cause existed as a matter of law. This improperly invaded the province of the jury and fails to construe the evidence and all reasonable inferences in favor of Mr. Carter, as the non-moving party. Many of the facts relied on by the

Court of Appeals to support its conclusion that probable cause existed to arrest Mr. Carter for Assault and Battery of a High and Aggravated Nature were contested, wrong or irrelevant.

The jury was properly instructed on the issue of probable cause and applied the definitions as set forth in the appellate opinion. They were advised it was a common sense, non-technical conception that deals with the factual and practical considerations of everyday life, on which reasonable and prudent men, not legal technicians, act. They were told to consider whether the facts known to the arresting officer at the time of the arrest, viewed from the standpoint of an objectively reasonable police officer amounted to probable cause.

The Court of Appeals failed to credit important evidence the jury considered that supported its verdict. They did not acknowledge the 911 recording was contemporaneous evidence that Mr. Faile got physical with Mr. Carter first. They did not acknowledge Mr. Faile's admission that he hit Mr. Carter because he saw a bat, which also supported Mr. Carter's claim that Mr. Faile was the initial aggressor. Instead, they relied on a version of events which were testified by Deputy Gwinn at trial, but that were never submitted to the magistrate.

The Court of Appeals seemed to leave the impression that Mr. Carter continued to beat Mr. Faile "on the ground," but fail to acknowledge that Mr. Faile continued to "up-kick" at Mr. Carter. There is no evidence from Mr. Carter, Mr. Faile, or the nature of the injuries that show Mr. Carter continued using the bat after Mr. Faile stopped his assault. The court credits one version of Mr. Faile's reported account of his confrontation with Mr. Carter at the hospital, but ignores previous documented contrary accounts given by Mr. Faile at the scene. The court gave improper weight to alleged inconsistencies in Mr. Carter's and his wife's statements, when in fact no inconsistencies existed.

The Court misconstrued the record regarding the circumstances surrounding the issuance of the warrant by Judge Yard. The Court improperly found Mr. Faile's version of events were

relayed to Magistrate Yard, despite the magistrate testifying that he never heard Mr. Faile's version of events prior to the issuance of the warrant. The Court also improperly held there was confusion whether the warrant was issued under oath. The testimony of both Deputy Gwinn and Judge Yard was that neither the discussion of events over the phone nor in-person were under oath. Judge Yard further testified his decision to issue the warrant was based on those unsworn discussions.

The court ignored evidence that Deputy Gwinn violated numerous policies of the department in pursuing this arrest. He failed to get a written statement from Mr. Faile; he failed to write out a warrant work sheet outlining probable cause for the arrest; he failed to do a background check on Mr. Faile; and he failed to provide his information to the Judge Yard under oath.

The Court of Appeals improperly credited the opinion of the Assistant Solicitor on the issue of probable cause and validity of the investigation. This was improper opinion evidence and was contradicted by the solicitor's dismissal sheet and email exchange with criminal defense counsel, where he stated he was personally convinced Mr. Carter's actions were within the law and covered by the PPPA. It is also in contrast the Court of Appeals affirmance of the exclusion of Carter's law enforcement expert because he was going to testify regarding the validity of the investigation.

Finally, the Court of Appeals failed to understand the role of the Protection of People and Property Act in the case. Mr. Carter was not asserting immunity from prosecution under the Act. He simply referred to the act as a codification of the common law castle doctrine. Mr. Carter further argues PPPA specifically contemplates reference to the law when assessing probable cause to arrest for the use of deadly force in defending a person's home.

I. South Carolina common law requires the issue of probable cause be submitted to the jury when there is conflicting evidence supporting the arrest. The Court of Appeals did not evaluate the evidence in a light most favorable to Mr. Carter.

A. Standard of Review

The fundamental error in the Court of Appeals decision is their failure to credit competent evidence in the record that created a jury question on the issue of probable cause. Although they cited the correct standard for review, they failed to apply it to the evidence submitted to the jury. They held:

> In ruling on a JNOV motion, the trial court construes all reasonable inferences and ambiguities in the evidence in favor of the non-moving party as to each element of the claim and must deny the motion if more than one reasonable inference emerges. If, however, the evidence could only produce one reasonable conclusion, the motion must be granted. We use the same yardstick as the trial court. *See Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016). (Op. p. 11).

While reciting the proper standard of review, it was not applied in the ensuing discussion of evidence. The trial court should be "concerned only with the existence or nonexistence of evidence," not its credibility or weight. *South Carolina Federal Credit Union v. Higgins (citing Jones v. General Elec. Co*., 331 S.C. 351, 356, 503 S.E.2d 173, 176 (1998)). "When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 331-332, 732 S.E.2d 166, 171 (2012). Viewed in that manner, the trial court's rulings were correct, the Court of Appeals is in error, and this Court should reverse.

B . The jury was properly charged on Probable Cause

The Court of Appeals contends, "the evidence here yielded only one conclusion, that there was probable cause to issue a warrant for Mr. Carter's arrest on the charge of ABHAN." (Op. p. 12). To maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in the plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Pallares v. Seinar*, 407 S.C. 359, 756 S.E.2d 128 (2014); *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006). An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, including lack of probable cause. *Pallares; Law*. In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution.

Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise. *Jones v. City of Columbia*, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990). *Law*, 368 S.C. at 441, 629 S.E.2d at 651. South Carolina follows the minority rule that the issue of probable cause is a question of fact and ordinarily one for the jury.

The Court of Appeals notes: "we must view things as they appeared to the officers arriving at this chaotic scene. It is an inquiry guided by common sense, and one that acknowledges human conflict is messy and tense encounters can produce differing perspectives on what happened**." (**Op. p. 11). As an initial matter, the jury was charged this language to evaluate the issue of probable cause. It should be noted an arrest was not made at the scene, and Mr. Carter agreed to turn himself in if he was charged. The decision to seek a warrant was not a split-second decision that is being second-guessed in hindsight. Deputy Gwinn was dealing with potentially two separate felonies that did not occur in the officer's presence. Deputy Gwinn

acknowledged he closed his report with 'investigation pending' and acknowledged that departmental policy called for the referral of felony investigations to the investigative unit. The court goes to great lengths giving multiple definitions of probable cause. It is important to point out the jury was charged with the very definitions offered by the court. They were told to view the case from law enforcement's perspective, based on the information available to them at the time. The trial court gave the following instructions:

> In determining whether probable cause existed, you should focus on whether the defendant -- and again, when I use the word defendant, I'm talking about the Sheriff's Office -- you should focus on whether the defendant had reasonable cause to believe that Mr. Carter committed the act about which the complaint was made, and not whether Mr. Carter as actually guilty or innocent. Whether the plaintiff, Mr. Carter, was or was not guilty of the charge set forth in the warrant is of no importance.
>
> Probable cause is determined by the facts and circumstances present in the mind of the defendant or his agents, here the deputies, at the time of the institution or continuation of the proceedings, not by any later events. If the facts and circumstances would lead a person of ordinary intelligence, caution, and prudence acting conscientiously, fairly, and without prejudice to believe that a plaintiff was guilty, that would be probable cause. Probable cause is something more than mere suspicion.
>
> Probable cause is a commonsense, non-technical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The proper standard for determining probable cause is an objective standard. That is, whether the facts known to the arresting officer at the time of the arrest, viewed from the standpoint of an objectively reasonable police officer, amounted to probable cause. The probable cause analysis that you must go through includes a realistic assessment of the situation from the law enforcement officers' perspective.
>
> (R. p. 537, l. 15 - p. 538, l. 15).

Here, the jury was guided in their deliberations by a proper charge on the law. The Court of Appeals erred in substituting their judgment for that of the jury.

C. The Court of Appeals misstated and overlooked evidence supporting the jury's finding a lack of probable cause to arrest Carter.

The Court of Appeals made several key assertions that are not supported by the record. Foremost, that the officers were faced with a classic case of conflicting evidence. This statement is immediately at odds with the claim that the evidence only leads to a single conclusion. As the jury was instructed, they were to use their common sense to assess whether an objectively reasonable officer viewed from his perspective lacked probable cause to arrest. Did he have the information available to him at the time of his application of a warrant that made it more probable that Mr. Faile's conflicting statements were correct and Mr. Carter's statement was not? This is not a situation that required a decision on the scene. Deputy Gwinn specifically decided not to make an arrest at the time and finished his report by stating the investigation was pending. Deputy Gwinn was faced with making a decision about whose story was more believable.

Under the standard of review, the jury is presumed to have understood Deputy Gwinn could have listened to the 911 tape prior to seeking a warrant. The jury is presumed to have credited Deputy Gwinn's admission that if he had listened to the 911 call, it would have made a difference in whom he arrested. The jury is presumed to have determined a reasonable officer would have believed it was highly unlikely that Mr. Carter, who had been begging Mr. Faile to leave and had called the police, was unlikely to attack the person for complying with his request to leave. The jury could have presumed a reasonable officer would have used their common sense to realize if Mr. Carter had taken a swing of the baseball bat to the back of Mr. Faile's head as he walked away, it is doubtful Mr. Faile would have gotten back up. The jury is presumed to have believed the cut over Mr. Carter's eye matched the description of the sucker punch Mr. Carter described. The jury is presumed to have found a reasonable officer would have known that two statements taken independently by Mr. Carter and his wife were not inconsistent. The

jury is presumed to have found a reasonable officer would have known that when Mr. Faile refused to leave the front porch he was in Mr. Carter's dwelling and when Mr. Faile hit Carter, Carter had a right to respond with deadly force.

The Court of Appeals has characterized the situation facing Deputy Gwinn as a classic case of competing stories. "Deputy Gwinn took statements from both Mr. Carter and Mr. Faile, whose accounts differed as to whom started the altercation and whether Mr. Faile was attempting to leave Mr. Carter's property when the altercation began." (Op. p.12). This assertion is misleading. While Deputy Gwinn did recount a version of events given by Mr. Faile at the hospital that claimed Mr. Carter struck him from behind with a bat as he walked away, Mr. Faile told Deputy Gwinn at the scene that Mr. Faile struck Mr. Carter because Mr. Carter had a bat in his hand. (R. p. 383, ll. 8-23). Deputy Gwinn admitted he did not get a written statement from Mr. Faile, which was in violation of departmental policy. (R. p. 362, ll. 24, p.363 l. 16). Deputy Gwinn could have reviewed dash cam video (R. p. 368, l. 7 - p. 369, l. 20), listened to the 911 call (R. p. 369, l. 21 - p. 370, l. 7), or turned the case over to another investigator. (R. p. 370, ll. 8-10). Deputy Gwinn had not listened to the 911 tape as of the trial date (R. p. 370, ll. 11-13) and agreed that, if it had corroborated that Mr. Faile struck Mr. Carter first, that would have made a difference. (R. p. 370, l. 14 - p. 371, l. 24).

The Court noted that Mr. Carter and his wife's statement "differed a bit". (Op. p. 13). To the extent there is a difference, it is one without a distinction. Deputy Gwinn testified about Mr. Carters wife's version of events, stating "the majority of it was the same but it was some inconsistencies with what originally happened when the assault took place." (R. p. 323, ll. 14-23; p. 342, ll. 15-18). Specifically, "[Plaintiff] said that he came outside, and she said the other gentleman came inside." (R. p. 324, ll. 1-2; p. 344, l. 21 - p. 345, l. 2).

However, after reading both statements he admitted they were same, except they differed if Mr. Faile hit Mr. Carter while still in the doorway or after taking a step out. On cross-examination, Deputy Gwinn read Mr. Carter's wife's version as follows: "We were about to go to sleep with half of the house already asleep when some man that I guess is staying with the next-door people came over beating on our door threatening us." (R. p. 343, ll. 3-6). Mr. Carter's statement, given separately, stated, "I was stirred from my bed at 9:41 Wednesday night by loud banging and consistent (sic) knocking. Upon reaching the door I was met by a stranger demanding to know what the problem with the water was." (R. p. 343, l. 19 - p. 344, l. 5; p. 344, ll. 12-17). Deputy Gwinn agreed the statements were similar. (R. p. 344, ll. 18-20). Mr. Carter's wife also stated, "And he grabbed the screen door, and he wouldn't let go.... Shane told him to take his hands off the door and he refused. More words exchanged and the guy pushed Shane [through the door]. And Shane had the bat beside the door and grabbed it." (R. p. 345, ll. 3- 18). Mr. Carter's statement contained the following: "I instructed Dawn to call the police. That's when ... he held my screen door open. I took a step with my right foot and was blind-sided by a right hook to the brow area." (R. p. 345, l. 19 - p. 346, l. 3). When asked if he thought these two statements were inconsistent, Deputy Gwinn stated, "I was referring to our actual conversation, not the actual statement." (R. p. 346, ll. 4-13).

The Court of Appeals relied heavily on the testimony of Deputy Gwinn that he went to the hospital to interview Mr. Faile. (R. p. 324, l. 14 - p. 325, l. 23). Mr. Faile stated he went to Mr. Carter's home because the neighbor did not have water, and as he was walking off of the porch Mr. Carter struck him in the back of the head. (R. p. 326, ll. 5-12). Mr. Faile stated a fight ensued. (R. p. 326, ll. 13-14). Deputy Gwinn observed that Mr. Faile's head appeared "swollen in some parts and sunken in in others." (R. p. 326, ll. 15-20). Mr. Faile also had bruises all over his body. (R. p. 326, ll. 21-23). Deputy Gwinn took photographs of Mr. Faile. (R. p. 326, ll. 1-3;

p. 328, l. 16 - p. 332, l. 15; Def. Exhs. No. 1 through 24). The Court of Appeals held that "Deputy Gwinn included this information in his police report and provided it, along with Mr. Carter's and Mr. Carter's wife's statements to Judge Yard." (Op. p. 12). The evidence does not support this statement.

What was presented to Judge Yard is disputed. In fact, it is disputed by Judge Yard himself. Judge Yard reviewed written statements from Mr. Carter and his wife. (R. p. 479, l. 23 - p. 480, l. 4). He did not have a version of events from Mr. Faile. (R. p. 480, ll. 11-18). The Court of Appel makes reference to the bruises on Mr. Faile coming from the "business end of a bat." However, Judge Yard was never presented with the pictures during the warrant process. (R. p 493, ll. 7-9). Deputy Gwinn claimed to have drafted a narrative for his report and took it with him to Magistrate Yard. (R. p. 333, -11- ll. 14-22; p. 334, ll. 3-8; p. 335, ll. 4-18; p. 336, l. 14 - p. 337, l. 5). Deputy Gwinn could not recall if he took the photographs with him. (R. p. 335, ll. 19-22). Deputy Gwinn could not recall whether he borrowed a camera to take photographs at the scene, or whether anyone came to the hospital with him. (R. p. 358, l. 25 - p. 360, l. 1). Deputy Gwinn did not recall his conversation with Judge Yard. (R. p. 347, ll. 3-6). There is no evidence from Judge Yard or Deputy Gwinn that Judge Yard was ever given a written report.

Judge Yard says he made his decision based on the fact that Mr. Carter kept hitting Mr. Faile until he stopped moving. It is important to note that neither statement by Mr. Carter nor his wife say he continued to hit Mr. Faile after he ceased fighting. There is nothing on the audio interview of Mr. Carter admitting he continued to hit Mr. Faile after he stopped kicking. In fact, Mr. Carter said just the opposite: that he stopped hitting him when Mr. Faile stopped kicking him. The warrant does not indicate that Mr. Carter continued to hit Mr. Faile after he stopped fighting. The only evidence that Mr. Carter beat a defenseless Mr. Faile is Sgt. Wright's baseless exaggeration that Mr. Carter "went to town" on Mr. Faile.

Judge Yard issued the warrant on April 26, 2012. (R. p. 488, ll. 21-23; Pl. Exh. 1). Judge Yard stated "the probable cause was based on police investigation meaning that [Deputy Gwinn] had presented it to me what he found when he was there." (R. p. 489, ll. 21-23). The warrant states "probable cause based on police investigation." (R. p. 490, ll. 7-8). He testified that it was his professional opinion that based on Deputy Gwinn's statements that there was a violation of the law. (R. p. 486, l.24, p. 487, l.1) The original incident report was never produced. The Court of Appeals cited to the Incident Summary Report in its opinion suggesting its contents were provided to Judge Yard. The Report was not entered into evidence. The court exhibit Incident Summary for General Sessions was obviously written after the issuance of the warrant, as it references the warrant's issuance itself. (R. p. 640, court's Exhibit). There is no way of ascertaining what was in "the report" allegedly written and used to apprise Judge Yard of the facts. Deputy Gwinn did not recall his conversation with Judge Yard. (R. p. 347, ll. 3-6). There is no independent evidence Deputy Gwinn had a written report done prior to seeing Judge Yard, except Gwinn's testimony. However, as will be discussed below, none of the discussion of police investigations were done under oath. Judge Yard testified he issued the warrant based on Mr. Carter's statement that "As he hit the porch he was up-kicking and I continued to strike him in the legs until he submitted. I instructed him to roll over on his stomach and I would no longer hit him." (R. p. 497, ll. 15-18).

The Court of Appeals indicated "There was confusion in the record about what Deputy Gwinn actually swore to under oath." (Op. p. 13). There is no confusion. He did not testify under oath in any discussion with Judge Yard. He did not give his police report to the magistrate. He did not have pictures of injuries. It also does not matter whether Deputy Gwinn had any conversations with the magistrate apart from the conclusory affidavit, because it is undisputed that any such conversation was not under oath. A warrant affidavit that is "insufficient in itself to

establish probable cause may be supplemented before a magistrate by sworn oral testimony." *State v. Crane,* 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988). However, a warrant issued upon a statement of facts not sworn to, is unconstitutional. *Gist v. Berkeley County Sheriff's Dept.*, 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999); *Accord; State v. Dunbar, 361* S.C.240, 603 S.E.2d615 (Ct. App. 2004); *State v. Wimbush,* 9 S.C. 309 (1878). The Court of Appeals say they are free to look beyond the corners of the warrant but they are not allowed to consider evidence not provided under oath.

The Court of Appeals also discussed the nature of Faile's injuries as a contributing factor in the probable cause analysis. "Deputy Gwinn testified Mr. Faile was "covered in blood," and had "bruises all over his body." (Op. p. 12). While this may appear serious, in the end Mr. Faile had a single laceration to his head requiring stitches and was otherwise was fine. What the court did not mention was the injury to Mr. Carter's right eye corroborating that he was struck by Mr. Faile. Deputy Gwinn also took a photograph of Mr. Carter that demonstrated he had "lacerations on ... his left eye" and "a bruise on his back." (R. p. 332, l. 21 - p. 333, l. 8; Def. Exh. No. 26, 27). The court claimed Mr. Faile was "motionless" when Deputy Gwinn arrived, apparently suggesting he was beaten to the point he could not move. The jury is presumed to have believed Mr. Faile, instead of being beaten unconscious, was actually following Mr. Carter's directions to not move until the police arrive. Further, Mr. Carter explained that Mr. Faile 'played like he was dead' when Deputy Gwinn first arrived (R. p. 88, l.3-9). But the notion that Mr. Faile was lifeless was completely contradicted by his conduct as heard on the officer's video. On the video, he can be heard ranting in a drunken fashion about the lack of water and the fact that he did not need medical help.

The Court of Appeals held "Deputy Gwinn included this information in his police report and provided it along with Mr. Carter's wife's statements to Judge Yard. Deputy Gwinn

ultimately presented all sides to the magistrate.**"** (Op. p. 13). Judge Yard testified that as a magistrate he issues arrest warrants. (R. p. 475, ll. 12-13). Deputy Gwinn called him on April 25, 2013 to let him know he "was on the scene of a pretty serious situation and he needed to speak to me in reference to obtaining a warrant." (R. p. 476, ll. 6-17; p. 491, l. 20 - p. 492, l. 4). Deputy Gwinn then came to the office and explained to Judge Yard what happened. (R. p. 479, ll. 6-13). Judge Yard stated Deputy Gwinn indicated to him "that he had a situation where he had a physical altercation between two people. There were other people on the scene. One of the people involved had been hurt seriously enough to have to be transported to Piedmont Medical for treatment." (R. p. 479, ll. 17-22). Judge Yard reviewed written statements from Mr. Carter and his wife. (R. p. 479, l. 23 - p. 480, l. 4). He did not have a version of events from Mr. Faile. (R. p. 480, ll. 11-18).

The Court of Appeals held, "The officer who misstated that Castle Doctrine law did not apply in South Carolina corrected himself later when speaking with Mr. Carter's wife, and there was no evidence this misstatement was repeated to the magistrate or affected the warrant application process." (Op. p.13). They claim he corrected himself, but that was at trial and not at the scene. Sgt. Wright was still insisting to Mr. Carter's wife that if Mr. Faile hit her husband, he still had a duty to retreat into his home. (R. p. 447, l. 23, p. 448, l.5). The supervising deputy at the scene was pushing this mistaken understanding of the law. Sgt. Wright, although initially denying involvement, was forced on cross-examination to admit he went to the hospital and was with Deputy Gwinn right before Deputy Gwinn went to see Judge Yard. It was also Sgt. Wright who insisted at the scene, as heard on the video, that it was a critical fact whether Mr. Carter stepped out of his doorway onto the porch, when in fact the definition of a dwelling under the law includes the porch. Finally, it was Sgt. Wright who came up with the theory, apparently adopted by Judge Yard, that Mr. Carter "went to town" on Mr. Faile with the bat once he was on

the ground. Contrary to the Court of Appeals' assertion, there was ample evidence for the jury to believe Sgt. Wright continued to influence the direction of the investigation with his mistaken factual and legal beliefs.

The Court of Appeals made note that the assistant solicitor testified "that the arrest was good and the officers' investigation was solid" in support of its finding of probable cause. This observation is ironic as the Court of Appeals in this same case excluded Mr. Carter's law enforcement expert, who was offered to testify on investigation of felonies. The solicitor, years after the fact, claim that he thought probable cause was established was to be rejected by the jury as inconsistent with his own previous written opinion. Mr. Springs stated in an email to Mr. Carter's criminal defense lawyer, noting he listened to the 911 recording as well as the recordings from the officers' dash cameras and he was personally convinced that Mr. Carter's actions were within the law. (R. p. 513, l. 11 - p. 514, l. 3). He dismissed the case before there was a preliminary hearing that would have resolved the matter of probable cause judicially. (R. p. 514, ll. 7-22).

On two occasions the court referenced the P.P.P.A. *S.C. Code* §16-11-440 et seq. (Op. pp. 7&14), noting the act provides immunity from prosecution not arrest. Mr. Carter never claimed he was immune from arrest. His argument was the Act represented a codification of the Castle Doctrine and is the governing law in South Carolina. A reasonable officer would factor "the law" into his evaluation of probable cause to arrest. The Act specifically provides in S.C. Code §16-11-450 (B) which reads: (B) A law enforcement agency may use standard procedures for investigating the use of deadly force as described in subsection (A), but the agency may not arrest the person for using deadly force unless probable cause exists that the deadly force used was unlawful. The judge charged the jury on this law. It was reasonable for a jury to consider this evidence as well.

CONCLUSION

For the reasons stated above, Petitioner respectfully asks this Court to grant his petition for writ of certiorari and review the Court of Appeals' decision to reverse the circuit court on the malicious prosecution claim.

Respectfully submitted this the 28th day of April 2020.

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