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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

The Honorable John C. Hayes, III, Trial Judge
The Honorable Frank F. Addy, Jr., Post-Conviction Relief Judge

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Appellate Case No: 2016-001363
Upub. Op. No. 2020-UP-144 (Ct. App. filed May 20, 2020)

Hubert Brown,…… Respondent,

v.

State of South Carolina,……Petitioner.

SECOND SUPPLEMENTAL APPENDIX

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CERTIORARI TO YORK COUNTY
Court of Common Pleas

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

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

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QUESTIONS PRESENTED

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II. Did the PCR court err in finding trial counsel was ineffective for consenting to the admission of Dr. Shannon Hansen's evaluation report without her being called to testify at where the report was cumulative and Brown's own expert effectively testified as to Brown's mental state at the time of the crime?

III. Did the PCR court err in finding trial counsel was ineffective for failing to object to Dr. Richard Frierson's testimony concerning the contents of Dr. Hansen's report because Dr. Frierson helped develop the opinions contained in the report and was independently qualified to testify as an expert in psychiatry?

IV. Did the PCR court err as a matter of law in granting a new trial on the ground that the Assistant Solicitor's reference to Brown's expert as a "lady doctor" was objectionable when that issue was not raised by either party at the hearing?

STATEMENT OF THE CASE

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

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

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

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

Brown was present and represented by Tommy Thomas, Esquire. App. p. 448. Petitioner was represented by Assistant Attorney General Justin J. Hunter, Esquire. App. p. 448. By an Order signed June 16, 2016, and filed June 20, 2016, the PCR court granted relief on multiple grounds, as discussed below. App. pp. 541-49. Petitioner filed a notice of appeal, and this petition follows.

STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[The State]: All right.

The Court: Anything?

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

App. pp. 372-74.

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

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, ___ S.C. ___, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 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. Id. Appellate courts will reverse the decision of the post-conviction relief 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. **There is no probative evidence to support the PCR court's finding trial counsel was ineffective for failing to object to the trial court's general-intent jury instruction on attempted murder because *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017), had not yet been decided and trial counsel cannot be clairvoyant in predicting changes in the law.**

The PCR court erred in finding Counsel was ineffective for failing to object to the trial court's general-intent jury instruction on attempted murder because under the law at the time of Brown's trial, Counsel had no reason to object. The PCR court's order focuses primarily on the prejudice prong, finding Brown's mental state "was the key issue in the case" and noting the charge likely influenced the jury's decision since they asked for a recharge on the elements of attempted murder. App. p. 545. The PCR court erred, however, because prejudice is irrelevant in the absence of a deficiency in Counsel's performance, and the finding Counsel was deficient is not supported by any probative evidence in the record.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, an applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The PCR court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, an applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland, 466 U.S. at 700.

The PCR court exclusively relied on King to find Counsel was deficient. App. p. 545. That State agrees the trial court's instruction that "[a] specific intent to kill is not an element of attempted murder but [there] must be a general intent to commit serious bodily injury" is no longer valid after this Court's decision in State v. King. 422 S.C. 47, 56-57, 810 S.E.2d 18, 23 (2017) aff'g as modified State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015) ("We agree with the Court of Appeals that 'the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime.'") (citations omitted). However, the Court of Appeals' decision was delivered in June 2015 and the Supreme Court decision in October 2017; this case was tried in July 2013, well before King was decided. See id.

The relevant lens for analysis is "counsel's perspective at the time" of trial. Strickland, 466 U.S. at 689; Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) ("The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements."). Attorneys are not required "to anticipate or discover

changes in the law, or facts which did not exist, at the time of the trial." Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765. At the time of trial, South Carolina law was unclear as to the level of intent required for attempted murder, especially given the conflicting language of the statute, as noted by this Court in its analysis in King. 422 S.C. at 62, 810 S.E.2d at 25-26 ("While we are convinced this is the correct interpretation, we also acknowledge the ambiguity created by the language in section 16-3-29. . . .").

Counsel, therefore, cannot be deficient based on King, because it was not the law at the time of Brown's trial, so Counsel was not on notice that he needed to object. See, e.g., Frierson v. State, 417 S.C. 287, 297-98, 789 S.E.2d 762, 767-68 (Ct. App. 2016) (finding counsel was not deficient for failing to advise defendant of potential violation of statutory warrant requirement where law at the time of trial was unsettled on the issue); see also Hill v. State, 350 S.C. 465, 567 S.E.2d 857 (2002) (holding failure of trial counsel to object to erroneous jury instruction was ineffective where appellate decision announcing change in law had already become final by the time of defendant's trial). Counsel testified the parties discussed the issue in chambers, and the trial judge told them he was going to give the charge as written in his bench book. App. pp. 489-90. Counsel also testified if he had any reason to think the instruction was erroneous, he would have objected, but he did not see a reason at that time. App. 490.

The PCR court's order granting relief on this issue is based on a change in the law that occurred two years after Brown's trial, for which Counsel cannot be found to be deficient. Therefore, this Court should reverse the PCR court's grant of relief on this ground.

II. There is no probative evidence to support the PCR court's finding trial counsel was ineffective for consenting to the admission of Dr. Shannon Hansen's evaluation report without her being called to testify at where the report was cumulative and Brown's own expert effectively testified as to Brown's mental state at the time of the crime.

The PCR court incorrectly found Counsel was ineffective for consenting to the admission of Dr. Shannon Hansen's evaluation because she was not called to testify. App. p. 546. This finding is unsupported by any probative evidence in the record. Counsel was not deficient, nor was Brown prejudiced, where the contents of the report were cumulative to other evidence and testimony presented, and Brown's own expert credibly and effectively testified to his mental state at the time of the crime.

Importantly, Dr. Walser herself injected the contents of the State's report into the trial, making the report itself and Dr. Frierson's testimony about it cumulative. App. pp. 226-27. Brown had already been evaluated by DMH at the time Dr. Walser began her testing, and Dr. Walser reviewed the DMH report, among other records, in preparation for making her own report. App. pp. 216-17; Supp. App. 1. Dr. Walser gave detailed testimony about the tests she performed, what each test was designed to measure, Brown's performance on each test, and why the tests were necessary in order to reach a proper conclusion as to Brown's mental state. App. pp. 215-18, 227-29, 234-35. Dr. Walser concluded Brown suffered a traumatic brain injury when he was struck with the gear shift, rendering him temporarily unable distinguish moral or legal right from wrong and to be unable to "think clearly, speak clearly, [or] act in a rational way." App. pp. 229, 252-55.

Further, Dr. Walser specifically referred to the State's report and its conclusion that Brown was criminally responsible in her testimony. App. pp. 226-27. In doing so, Dr. Walser was able to explain not only why her conclusion that Brown was not criminally responsible due to the

temporary effects of a traumatic brain injury was credible, but also why the State's conclusion was not – because that doctor did not perform any of the necessary tests or even consider the possibility of a traumatic brain injury as the cause of the behavior. App. pp. 227-29. Dr. Walser was therefore able to explain away the State's finding on the basis of an insufficient examination, rather than merely offering her own conclusion.

The State then called Dr. Frierson in rebuttal and introduced Dr. Hansen's report through him, without objection. App. 290. The PCR court found it was error for Counsel to fail to object to the admission of the report. App. 546. However, the information contained in the report was merely cumulative to other testimony at trial,[1] and, as the PCR court pointed out, much of the information corroborated Dr. Walser's findings. App. 547. For example, the State's report indicates Brown was indeed suffering from paranoia and amnesia, just as Dr. Walser concluded. App. pp. 221-22, 233-34; Supp. App. 4-5. Dr. Hansen's report also concluded Brown was making a true effort to respond during her examination, supporting Dr. Walser's finding Brown was not malingering. App. pp. 247-48; Supp. App. p. 4.

Additionally, the PCR court finds fault with the admission of Dr. Hansen's report because of the nature of Brown's defense – namely that the head injury caused "temporary insanity." App. pp. 546-47. The PCR court found it significant that "nowhere in her report did Dr. Hansen indicate that she had considered and excluded temporary insanity due to head trauma as a potential diagnosis, and trial counsel could have potentially brought this to the attention of the jury had the report's author been required to testify." App. p. 457. Notably, however, Dr. Frierson addressed this issue in his testimony, stating he directed Dr. Hansen to consider head trauma as a potential

[1] The actual exhibit given to the jury at trial was redacted to remove Brown's criminal history. App. pp. 289-90.

explanation for Brown's behavior and asked her to collect more information in order to make that assessment. App. pp. 297-98.

Finally, the PCR court found Brown was prejudiced by the admission of Dr. Hansen's report "particularly... in light of the erroneous general-intent instruction and in light of the Assistant Solicitor emphasizing Dr. Hansen's report in his closing." App. p. 548. However, as discussed above, the general-intent instruction was proper at the time. Because the report was cumulative to other evidence and because Brown's expert effectively testified to her finding that Brown lacked the mental capacity for criminal responsibility at the time of the crime, Counsel was not deficient for failing to object to the admission of the report, nor was Brown prejudiced by the lack of objection. This Court should therefore reverse the PCR court's grant of relief on this ground.

III. There is no probative evidence to support the PCR court's finding trial counsel was ineffective for failing to object to Dr. Richard Frierson's testimony concerning the contents of Dr. Hansen's report because Dr. Frierson helped develop the opinions contained in the report and was independently qualified to testify as an expert in psychiatry.

Additionally, the PCR court found Counsel should have objected to Dr. Frierson's testimony since he had never examined Brown and could not give a diagnosis, and his testimony was merely "bolstering an unchallenged witness." App. pp. 548. This finding is not supported by the record because Dr. Frierson participated in the development of the DMH opinion by reviewing medical records and witness statements and directing the collection of additional information to support the report's conclusions. App. pp. 297-98. He was also independently qualified as an expert in psychiatry, and therefore, could give his own opinion as to Brown's criminal responsibility. App. pp. 292-93.

Dr. Frierson was independently qualified as an expert in psychiatry, and Brown has not alleged that qualification was in error or that Counsel was deficient for failing to object. App. pp. 292-93. Dr. Frierson's testimony consisted mostly of opinions regarding hypothetical situations suggested by the evidence introduced at trial, which he was qualified to give as an expert in psychiatry, and Counsel's objections to hypotheticals outside the evidence were sustained. See Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 604 S.E.2d 385 (2004) (noting it is well settled that opinion testimony of an expert may be based on hypothetical questions, provided the question is based on facts supported by the evidence); App. pp. 293-95, 299-301. Further, an expert witness "may state an opinion based on facts not within his firsthand knowledge" and "may base his opinion on information, whether admissible or not, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions." Hundley ex rel Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000). An expert may also testify to matters of hearsay for the purpose of showing what information he relied on in reaching his opinion. Id.

Here, although Dr. Frierson testified he only reviewed and approved Dr. Hansen's report rather than drafting it himself, he also testified he had personally reviewed Brown's medical records, the witness statements from law enforcement, and the social history obtained by a DMH social worker prior to Dr. Hansen's examination. App. pp. 295-298. Additionally, he testified he raised the possibility Brown's head injury could have been the cause of his actions and directed Dr. Hansen to obtain more information from Brown's wife as to what happened at the scene immediately after Brown was struck on the head. App. pp. 297-98. Dr. Frierson then opined, based on his review of the police reports and the information gathered by Dr. Hansen, he felt there was significant evidence to find Brown "knew what he was doing" and could distinguish right

from wrong. App. pp. 297-98. Further, he testified the decision as to the opinion DMH would issue was arrived at jointly between himself and Dr. Hansen, as part of his role as her supervisor. App. pp. 297-98. Thus, Dr. Frierson was not merely bolstering a non-testifying witnesses; rather, he was testifying as to the conclusion he helped develop. See State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) ("Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth. . . .").

Dr. Frierson's testimony in this case was not a comment on the veracity of any other witness, testifying or not. In fact, based on Dr. Hansen's report, it appears both he and Dr. Hansen generally believed Brown's version of events, but disagreed with Dr. Walser that the brain injury alone was sufficient to meet the legal requirements of criminal insanity. Supp. App. p. 5 ("Although [Brown] received treatment for head trauma around the time of his charges. . . he did not report a compulsion, delusion, command auditory hallucination, or other symptoms of mental illness that would have impaired his ability to conform his conduct to the requirements of the law.").

The fact that Dr. Frierson never examined Brown himself does not preclude him from offering an opinion, but goes to the weight of the evidence. See, e.g., Petersen v. National R.R. Passenger Corp., 365 S.C. 391, 400, 618 S.E.2d 903, 908 (2005) ("The experts' lack of first-hand knowledge, which could have been obtained by an on-site investigation, goes to the weight of the testimony, not its admissibility."). Counsel testified, although he could not say it was a trial strategy not to object to Dr. Frierson's testimony on rebuttal, because Dr. Frierson had never evaluated Brown, he was able to use that to Brown's advantage on cross-examination and during closing arguments. App. pp. 465-66. The defense expert, Dr. Walser, emphasized in her testimony a proper diagnosis could not be made using the methodology reflected in DMH's report because

none of the necessary testing had been done, but instead the evaluation was based solely on a short interview with Brown. App. pp. 227-29. Additionally, Dr. Frierson conceded on cross-examination that a person could exhibit reasoning and processing functions and still not be criminally responsible. App. p. 301.

For the foregoing reasons, Counsel was not deficient, nor was Brown prejudiced by Counsel's failure to object to Dr. Frierson's testimony, and the PCR court's grant of relief on this basis should be reversed.

IV. The PCR court erred as a matter of law in granting a new trial on the ground that the Assistant Solicitor's reference to Brown's expert as a "lady doctor" was objectionable because that issue was not raised by either party at the hearing, and therefore, Brown has waived his right to relief on that ground.

Finally, the PCR court also found the Assistant Solicitor's reference to Dr. Walser, the defense expert, as a "lady doctor" was objectionable. App. p. xxx. It is unclear from the PCR court's order whether or not this finding is a basis for relief on which the PCR court granted a new trial. App. pp. xxx. However, because the State contends the PCR court's finding was an error of law, out of an abundance of caution, the issue is addressed below.

The PCR court's order clearly acknowledges this ground was not pleaded by Brown, and a review of the transcript shows it was not raised during Brown's case at the evidentiary hearing. App. xxx. This Court has previously held a *sua sponte* order of a new trial on grounds not raised by either party is improper in both the civil and criminal context. State v. Dicapua, 383 S.C. 394, 398, 680 S.E.2d 292, 294 (2009) ("[M]ay a trial court in a criminal case *sua sponte* order a new trial on a ground not raised by a party? We answered this question 'no' in the context of a civil proceeding. . . . We hold the same result must follow in a criminal case."); Southern Railway Co. v. Coltex, Inc., 285 S.C. 213, 214, 329 S.E.2d 736, 736 (1985) ("The sole issue is whether a trial judge *ex meru moto* can grant a new trial on a ground not raised by a party. We hold he cannot.").

In both Dicapua and Southern Railway, this Court found that by failing to raise the ground on which the new trial was granted, it had been waived. 383 S.C. at 399, 680 S.E.2d at 294; 285 S.C. at 215-16, 329 S.E.2d at 737.

Similarly, here, Brown failed to plead this ground in his original application, or, after obtaining counsel, via amendment or through his testimony at the evidentiary hearing. App. pp. 429-41, 454-537. Accordingly, Brown has waived his right to a new trial on this ground, and the PCR court erred as a matter of law in granting a new trial *sua sponte*. This Court should therefore reverse the PCR court's grant of relief on this ground.

CONCLUSION

For all the foregoing reasons, the State requests that this Court grant this petition for a writ of certiorari and reverse the post-conviction relief court's grant of a new trial.

Respectfully submitted,

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5/9, 2018

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CERTIFICATE OF SERVICE

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

Robert M. Dudek, Esquire
SC Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 9th day of May, 2018

CAROLINE COLLINS
Administrative Coordinator

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Frank R. Addy, Circuit Court Judge

HUBERT BROWN,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2016-001363

RETURN TO PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

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Division of Appellate Defense
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ATTORNEY FOR RESPONDENT

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QUESTIONS PRESENTED

I. The PCR judge ruled properly that trial counsel was ineffective in failing to object to the trial judge's erroneous jury charge **and recharge** that attempted murder required a general intent finding when a specific intent to kill was the proper mens rea element for attempted murder, particularly where even **the solicitor noticed the incorrect charge and objected to it at trial,** and where the prejudice was obvious as the respondent was incapable of formulating any specific intent to kill as evidenced by his brain injury and hence his insanity defense raised at trial.

II. The PCR judge ruled properly in finding that trial counsel erred in failing to object to the admission of Dr. Shannon Hanson's report in to evidence at trial because she was not present at trial to testify as a witness about her conflicting report, which contradicted the respondent's insanity defense, and counsel erred further in failing to object to the testimony of Dr. Frierson, who bolstered Dr. Hanson's credibility as an expert witness, because all of this weakened and nullified the respondent's insanity defense.

III. The solicitor's reference to Dr. Carol Walser as a "lady doctor" during closing argument was a prejudicial comment that constituted reversible error.

STATEMENT OF THE CASE

Respondent Hubert Brown was convicted of first degree burglary and attempted murder per jury trial held during the July 2013 term of the York County General Sessions Court before Judge John C. Hayes, III. The respondent was sentenced to LWOP on both convictions. App. 1-384. David Cook represented the respondent at trial and Assistant Solicitor E.B. Springs appeared on behalf of the state. The respondent appealed, but after briefs were filed (App. 391-425), his convictions and sentences were affirmed by the South Carolina Court of Appeals. See State v. Brown, Unpublished Opinion. No. 2014-UP-425 (S.C. Ct. App. filed November 26, 2014). App. 426-427. Carmen V. Ganjehsani, Esquire, formerly of the South Carolina Office of Appellate Defense, represented the respondent on direct appeal, and Assistant Attorney General Jennifer Ellis Roberts represented the state on direct appeal.

On December 31, 2014, the respondent filed an application for post-conviction relief with the York County Office of the Clerk of Court. App. 430-436. On July 8, 2015, the respondent filed a return and motion for a more definite statement. App. 443-446.

A PCR hearing in the case was convened on April 19, 2016, at the York County Courthouse before Judge Frank R. Addy, Junior. App. 448-537. The respondent was present at the hearing and represented by Tommy Thomas, and Assistant Attorney General Justin Hunter appeared on behalf of the state.

On June 16, 2016, Judge Addy issued an Order granting post-conviction relief to the respondent. App. 541-549. The state appealed and filed a petition for writ of certiorari dated May 9, 2018. This return follows.

ARGUMENT I

The PCR judge properly ruled that trial counsel was ineffective in failing to object to the trial judge's erroneous jury charge **and recharge** that attempted murder required a general intent finding when a specific intent to kill was the proper mens rea element for attempted murder, and because counsel's failure to object to the erroneous charge was particularly egregious in that even the **solicitor noticed the incorrect charge and objected to it** at trial, and where the resulting prejudice was obvious as the respondent was incapable of formulating any specific intent to kill as evidenced by his brain injury and hence his insanity defense raised at trial.

At trial, eyewitnesses Michael Mahoney and Christopher Calvert both about what happened in this case. Mahoney testified that the respondent appeared at his residence while he and Calvert were both there on June 8, 2012, and that the respondent pointed a finger at him during a heated conversation. Mahoney stated that he responded by pushing the respondent. Mahoney stated that the respondent hit him, and that he and the respondent immediately began fighting each other on the ground. Shortly thereafter, the respondent stopped fighting after being hit on his (the respondent's) head. Minutes later, the respondent rose up and started chasing Calvert, but left and then returned holding a machete and cut Calvert's hand (thumb) after entering the house. App. 61, l. 10 – App. 86, l. 25.

Christopher Calvert testified at trial and admitted that he used a gear shift to hit the respondent on his head to break up the fight between the respondent and Mahoney. Then, the respondent left and returned to the residence with a machete. Calvert stated that the respondent used it to cut his hand (thumb). App. 106, l. 16 – App. 121, l. 3.

The trial judge in the case gave the following jury charge regarding the element of intent as it pertained to the offense of attempted murder:

> A specific intent to kill is not an element of murder, but it must be a general intent to commit serious bodily injury. App. 350, l. 25 – App. 351, l. 2.

Then, in response to a jury note requesting a recharge on attempted murder (App. 366, l. 14-16), the trial judge's recharge follows:

> I received your note and I want to clarify...[and] go back through the charge of attempted murder. App. 367, lines 8-11. A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit the serious bodily injury. App. 368, lines 21-23.

With respect to this element of intent as it applied to the offense of attempted murder, the solicitor raised the follow objection:

> [Solicitor]: The first time you charged this morning I was daydreaming and I wasn't daydreaming this time and I heard you say that only a general and not a specific intent for attempted murder is required. I think all attempted require [] a specific intent and I don't think the legislature has given us any leeway on that.
>
> The Court: Well that's what I've got in my charge and – A specific intent to kill is not an element of attempted murder. There must be a general intent to commit serious bodily injury
>
> [Solicitor]: I know it was general when we had ABWIK but when we went to attempted –
>
> The Court: That's what I charged them earlier. If you find some law that says that that's not right, that's in my charge and it's in my charge under the heading of Attempted Murder under 16-3-29. I don't see a case cited. But you take exception to that part of the charge?
>
> [Solicitor]: I'm just concerned because the way I was taught all attempted are specific intent. And so when we went from ABWIK which is a general intent to attempted murder I'm afraid maybe we kicked in a specific intent.
>
> The Court: You mean if I have a general intent to harm you and I harm Chris instead, or have a general intent to hurt everybody in here and the only person except Chris and he's the one I hurt and –

> [Solicitor]: Well that can be transferred intent.
>
> The Court: Well you're on the record for that.
>
> [Defense Counsel]: Nothing from the defense, Your Honor.
> App. pp. 372-374

The PCR judge granted PCR relief to the respondent on the ground that trial counsel was ineffective in failing to object to the trial judge's explanation of general intent, rather than specific intent, as the mens rea element that should have been found before returning a verdict guilty on the offense of attempted murder. The PCR judge ruled as follows:

> [The respondent] maintains that trial counsel was ineffective for failing to object to the trial court's general intent instruction as it related to the attempted murder charge. Having reviewed the transcript, the Court finds that the capable trial judge did mistakenly instruct the jury that the State need only prove general intent as opposed to specific intent. See Trial Transcript, p. 350, line 25 – p. 351, line 4. The Assistant Solicitor did point this fact out to the trial court, but trial counsel did not join in the Assistant Solicitor's efforts to have the jury correctly charged on the law, and the trial court declined to alter the erroneous instruction.
>
> Significantly, the erroneous charge gave the jury the impression that they only had to find general intent to harm, as opposed to a specific intent to kill. See State v. King, 412 S.C. 403 (Ct. App. 2015). The fact that the jury may have struggled with this issue is evident in the jury's request for a recharge on the elements of attempted murder. Trial Transcript, p. 366, lines 14-19. In response to this request, the trial court again recharged general as opposed to specific intent. Therefore, twice the trial court mistakenly stated that specific intent to kill is not an element of attempted murder.
>
> Additionally, ...the Court finds that the [respondent's] mental state was the key issue in the case with regard to both the attempted murder charge and the burglary charge. With respect to the burglary charge, the state argued that the crime the [respondent] intended to commit once he entered the dwelling was the attempted murder. Trial Transcript p. 333, lines 25 – p. 335, line 3. Therefore, although the attempted murder charge is technically the only charge affected by the erroneous instruction, the issue of Applicants *mens rea* is clearly relevant to both charges, so the burglary charge was also likely tangentially affected by this erroneous instruction
>
> The Court finds that trial counsel should have joined in the State's objection to this incorrect instruction and that a reasonable attorney would have objected. Factually, the victim's injuries resulted from a single swipe of the knife, which is

> quite different from the [respondent] repeatedly attempting to stab the victim. Therefore, specific intent to kill, as opposed to general intent to harm, was a crucial issue in the case, and the jury likely struggles with the distinction in light of their request to be reinstructed on the attempted murder charge. Furthermore, the Court finds that [the respondent] has demonstrated sufficient prejudice in that, but for counsel's error, the outcome at trial would likely have been different. Accordingly, PCR is granted with respect to the attempted murder conviction on this ground. App. 545-546.

Note that in the year 2000, our Court in held in State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), that although no attempted murder offense had been codified in our state at that time; nonetheless, if such an offense had existed, then attempted murder would have required a specific intent to kill under the rationale that specific intent is required for any attempt crime as the very definition an attempt crime means that the defendant consciously intended the completion of acts comprising the choate offense. Compare the case of State v. Reid, 393 S.C.3325, 713 S.E.2d 274 (2011), where the Court cited to Sutton and held that with respect to the offense of attempted criminal sexual conduct, specific intent, to the extent that the defendant intended to complete the acts comprising the underlying offense, was an element that must be proven in order to convict on the attempt crime.

Then, approximately a decade later after Sutton was decided, the legislature in 2010 codified attempted murder under S.C. Code. Ann. § 16-3-29 and defined it as the act of "a person who with intent to kill, attempts to kill another person with malice aforethought either expressed or implied." In State v. King, 412 S.C. 403, 772 S.E.2d 184 (S.C. Ct. App. 2015), the Court of Appeals concurred with the rationale in Sutton to the extent that attempted murder would require a specific intent to kill, and went on to hold also that prior rulings would dictate that specific intent must be found in order to convict on attempt crimes and that our state legislature intended to require the state to prove the specific intent to kill as an element of attempted murder. The South Carolina Supreme Court reviewed the Court of Appeals' holding in King and concurred

that attempted murder required proof that the defendant had the specific intent to kill and reiterated that specific intent means that the defendant consciously intended the completion of the acts conspiring the attempted offense (again citing to Sutton), and that specific intent was required because criminal intent focuses on the dangerousness of the actor, not the act; and moreover, that the failure to charge specific intent to kill in an attempted murder case cannot be considered harmless error. State v. King, Opinion No. 27744 (S.C. filed October 25, 2017).

In State v. Hartsfield, 300 S.C. 469, 383 S.E2d 802 (1990), the Court addressed the insanity defense and GBMI under S.C. Code. Ann. 17-24-10 & 20 below:

> It is a defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. This section codified the common-law defense of insanity. State v. Grimes, 292 S.C. 204, 355 S.E.2d 538 (1987).
>
> A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong as defined in Section 17-24-10 (A), but because of mental disease or defect he lacked sufficient to conform his conduct to the requirements of the law.

Here, the defense presented neuro-psychologist Dr. Carol Walser, who concluded that the respondent suffered from traumatic brain injury due to a blow to his head that caused a fractured skull, and that this traumatic brain injury rendered the respondent's behavior so altered that he was not criminally responsible for his actions on June 8, 2012, which meant that he was insane by our legal definition when he acted on that night and more importantly, could not have formed any specific intent to kill when the incidents in question occurred. Dr. Walser stated that the respondent's functioning on the date in question stemmed from a loss of consciousness, confusion, an altered mental state (dazed, disoriented), erratic behavior, and the inability to think

clearly. App. 281, lines 11-18; App. 282, l. 18 – 283, l.3; App. 249, l. 13 – p. 251, l. 8; App. 219, lines 12-14; App. 279, l. 21 – p. 280, l. 25. State's witnesses Mahoney and Calvert both stated that the respondent was "dazed" after he was hit on his head. App. 76, lines 2-4; App. 113, lines 1-11. Calvert admitted that he hit the respondent's head "hard." App. 113, l. 11. The respondent's wife testified that the respondent looked "crazy" with "crazy eyes" after he was hit in the head by Calvert. App. 196, l. 19 – p. 197, l. 16. The respondent's brain could not formulate any mind set of specific intent to kill during the events in question in the case.

Therefore, in the case at bar, the trial judge's erroneous charge that instructed the jury to find general intent with respect to the offense of attempted murder as opposed to the correct requirement of a finding of specific intent as an element of attempted murder should have been objected to by trial counsel, especially since the respondent's defense was that he had no specific intent to kill because he pleaded insanity, which the judge charged (insanity) along with GBMI. The respondent was incapable of formulating a specific intent to kill in this case. Hence, the prejudice that resulted from the trial judge's error and counsel's failure to object to the trial judge's error was obvious.

Clearly, if the jury had been charged with finding a specific intent to kill, then a reasonable probability existed that in light of the respondent's insanity defense (which was proved) due to the brain injury he suffered, it would have would been impossible for the element of specific intent to kill to have been found and the outcome of his trial would have been different. See State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869 (1997), where the judge instructed the jury that under insanity, a defendant does not have criminal intent and should be acquitted. Also, a judge must charge the correct law to the jury. State v. Marin, 404 S.C. 615, 745 S.E.2d148 (2013).

Thus, the respondent's proved his insanity case by a preponderance of the evidence. As a result, trial counsel's error in failing to object to an erroneous general intent jury instruction with respect to the proper level of mens rea required for the offense of attempted murder, (that brings a specific intent to kill rather than general intent), constituted deficient legal representation in violation of the Sixth Amendment, especially where the respondent's insanity defense or GBMI had been established at trial, and **particularly where even the solicitor noted error with the judge's general intent charge**. See Strickland v. Washington, 466, U.S. 668, 104 S. Ct. 2052 (1984). Furthermore, but for counsel's error in this regard, a reasonable probability exists that the outcome of the respondent's trial would have been different.

QUESTION II

The PCR judge ruled properly in finding that trial counsel erred in failing to object to the admission of Dr. Shannon Hanson's report into evidence at trial because she was not present at trial to testify as a witness about her conflicting report, which contradicted the respondent's insanity defense, and counsel erred further in failing to object to the testimony of Dr. Frierson, who bolstered Dr. Shannon Hanson's credibility as an expert witness and her report as well, because all of this weakened and nullified the respondent's insanity defense.

The respondent's defense was insanity or at the very least GBMI. Defense witness and neuro-psychologist Dr. Carol Walser testified that she interviewed the respondent on three occasions and reviewed his medical records, and then concluded that on the date in question, the respondent suffered from a deep cut from a blow on the head, which caused him (the respondent) to have traumatic brain injury. Dr. Walser explained that the respondent's brain injury caused the resulting erratic behavior that led to the incidents that occurred on the date in question. Dr. Walker added that she diagnosed the respondent with mild neuro-cognitive disorder and

depressive disorder, both of which stemmed from his brain injury via his fractured skull. Moreover, Dr. Walser stated that the respondent's functioning on the date in question stemmed from a loss of consciousness, confusion, an altered mental state (dazed, disoriented), erratic behavior, and the inability to think clearly. App. 249, l. 13- p.251, l. 8, App. 219, l. 12-14, App 279, l. 21- p.280, l. 25. According to Dr. Walser, after the blow to the head, the respondent's brain in effect could not have processed normally, which in turn meant that he was operating during the events at issue in actions with a brain that was not criminally liable, i.e. insane. App. 281, lines 11-18; App. 282, l.18 - p. 283, l. 3.

Dr. Walser was asked about reports from Dr. Shannon Hanson, who also interviewed the respondent. Dr. Shannon Hanson was not present at trial to testify as a witness. Dr. Hanson issued a report that contained her finding that the respondent was legally sane (App. 259, l. 9 – p. 260, l. 15), but Dr. Walser did not agree with Dr. Hanson's assessment because of his (the respondent's) traumatic brain injury as said injury rendered him confused, incoherent (with language) and agitated at the scene and thus not criminally responsible. App. 226, l. 13 - p. 230, l. 17. App. 252, lines 6-11. Dr. Walser was very clear in her report that the respondent was insane and could not distinguish legal and moral right and wrong on the date the incidents occurred. App. 255, l. 11-p. 257, l. 3.

Dr. Richard Frierson, a forensic psychologist, testified that he reviewed Dr. Hanson's report (State's exhibit #29) wherein Dr. Hanson found the respondent criminally responsible and stated that Dr. Hanson was a board-certified psychiatrist, and that she was a fellow in forensic psychiatry, and that he supervised her (Dr. Hanson's) evaluation of the respondent, which in effect meant he was in agreement with Dr. Hanson's findings that the respondent was criminally responsible and not insane at the time of the events transpired. App. 287, l. 21-p. 296, l. 7.

Dr. Hanson's reports were filed on May 6, 2013. App. 7, l. 9-p. 8, l. 2. Dr. Hanson was no longer employed at DMH as of June 30, 2013. App. 301, l. 8-16; App 462, l. 18 – p. 463, l. 12. Note that Dr. Hanson was presumably terminated from DMH and did not testify at trial. The respondent's trial commenced on July 9, 2013.

During the PCR hearing, trial counsel testified that he must have agreed to the admission of Dr. Hanson's report in to evidence at App. 6, l. 17 – p. 8, l. 2 and App. 288, l. 17 – p. 290, l. 18, but that he should not have done so, and that he should have objected to Dr. Hanson's report, and that he should have objected also to Dr. Frierson's testimony as well. App. 463, l. 3- p. 469, l. 6. Counsel admitted that insanity was the only defense available to the respondent, and that Dr. Hanson's report and Dr. Frierson's testimony, which bolstered Dr. Hanson's credibility and expertise and that Dr. Hanson's report and Dr. Frierson's testimony negatively impacted his insanity defense. App. 465, l. 3-12; App. 481, l. 20- p. 483, l. 4. App. 490-491.

The PCR judge ruled that trial counsel erred in agreeing to the admission of the respondent's mental evaluation by Dr. Hanson into evidence because Dr. Hanson was not a witness at trial, and also because Dr. Hanson's report was damaging in that she found the respondent to be criminally responsible, i.e., sane where to the contrary, the respondent's defense was insanity due to his skull fracture (head injury). In addition, the PCR judge found further that counsel undercut the respondent's insanity defense and lessened the impact of the defense's expert's witness' testimony in support of the insanity defense by not objecting Dr. Hanson's report, which was contrary to the insanity defense and prejudicial as Dr. Hanson was not present at trial to be challenged regarding her report. App. 546-549.

Insanity, which was codified by the defense and charged by the judge, is proved by a preponderance of the evidence. State v. Hernandez, 287 S.C. 183, 336 S.E.2d 476 (1985).

The insanity defense is coded at S.C. Code Ann. § 17-24-10(A) (Cum. Supp. 1988):

> It is a defense to a prosecution for a crime, that at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

Undoubtedly, it was error for counsel to fail to object to the admission of Dr. Hansen's report into evidence as an exhibit when she was not a witness at trial to testify because her report contradicted the respondent's insanity defense in that Dr. Hanson found the respondent criminally responsible, i.e. sane, which reduced the strength of the respondent's insanity defense and his proof that he was insane on the date in question.

Hearsay is a statement, which maybe written, other than are made by the declarant while testifying at trial that is offered in evidence to prove the truth of the matter asserted. Rule 801, SCRE. See In Re Care and Treatment of Harvey, 355 S.C 53, 584 S.E. 2d 893 (2003), where the admission of a log containing incidents deemed to be hearsay from a report by a supervisor constituted subjective reports that did not fall under the business records exception. See also State v. Blackwell, 420 S.C. 127, 801 S.E. 2d 713 (2018), where the Court held that the chaplain's notes regarding the death row inmate's remorse comments were excludable as inadmissible hearsay and did not fall under the business records exception.

Also, the business records exception under Rule 803(6), SCRE, was not available for Dr. Hansen because Dr. Hanson was not qualified at trial as an expert as she did not testify at trial and it was therefore impossible to delve into and challenge her alleged expertise. Thus, her opinions were inadmissible. In other words, because Dr. Hanson lacked credible credentials, her report could not have come in under the business records exception. For example, Dr. Hanson was a forensic psychiatry fellow, meaning she was still in training at the time she interviewed the

respondent, and she only spent one hour with the respondent. App. 216, l. 24- p. 217, l. 1; App. 226, l. 13- p. 227, l. 13. Note further that the presumed termination of Dr. Hanson from DMH also bore on her credibility and the credibility of her report on the respondent. Tr. 301, l. 8-16.

Finally, if a defendant is prejudiced by the erroneous admission of hearsay evidence, then a reversal is required. In Re Care and Treatment of Harvey, supra. In the instant case before us, counsel erred in failing to object to the admission of the report in question (Dr. Hanson's report) into evidence, because it was hearsay and Dr. Hanson was not a witness at trial to be confronted and challenged. See. State v. Alexander, 303 S.C 408, 401 S.E. 2d 167 (1991). The respondent was prejudiced because Hanson's report weakened his insanity defense and the defense could not challenge her report.

In addition, it was also error for trial counsel to fail to object to the testimony of Dr. Richard Frierson, whose testimony was used to bolster Dr. Hanson's credibility as an expert. Dr. Frierson stated that he supervised Dr. Hanson's evaluation of the respondent, which in effect placed his endorsement on her credibility, and the credibility of her findings in her report. App. 288, l. 3- p. 291, l. 8. It is imperative to note that Dr. Frierson did not sign off on Dr. Hanson's report. Another doctor, who also did not testify at trial, signed off on Dr. Hanson's report. App. 298, l. 13-17. It was error to allow Dr. Frierson to bolster Dr. Hanson's veracity and it was error for trial counsel to fail to object to Dr. Frierson's testimony in this respect. See State v. Jennings, 394 S.C. 473, 716 S.E. 2d 91 (2011), where the Court reversed and held that the trial court erred in allowing the state to introduce the forensic interviewer's written report (particularly where the mother told the interviewer what the children told her) because it contained inadmissible hearsay that bolstered the children's testimony and allowed the interviewer to vouch for the children's testimony. Compare Briggs v. State, 421 S.C. 316, 806 S.E. 2d 713 (2017), State v. Kromah, 401

S.C. 340, 737 S.E. 2d 490 (2013). Also, Dr. Hanson's report was not cumulative because it contradicted Dr. Hanson's testimony regarding sanity versus insanity. Trial counsel's error regarding the failure to object to Dr. Hanson's report as evidence and Dr. Frierson's testimony violated the respondent's Sixth Amendment right to competent counsel at trial, and but for the errors made by counsel here via these omissions, a reasonable probability exists that the outcome of petitioner's trial would have been different. See Strickland v. Washington, supra.

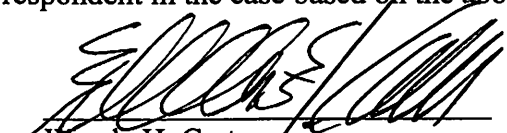
QUESTION III

The solicitor's reference to Dr. Walser as a "lady doctor" during closing argument was a prejudicial comment that constituted reversible error.

The solicitor's reference to the defense's expert witness Dr. Walser as a "lady doctor" was a gender reference that was tantamount to the type of a mockery against her credibility as a women that infected the trial with sufficient unfairness as to deprive the respondent of a fair trial. See Donnelly v. DeChristoforo, 416 U.S.637 (1974). The PCR judge properly ruled that the "lady doctor" comment was "inappropriate" and "objectionable." App. 549.

CONCLUSION

Due to the holding in Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984), which outlined the standard of the existence of "any evidence of probative value" in determining whether to uphold the PCR judge's ruling as the scope of review in PCR cases, counsel would request that this Court uphold the grant of PCR relief to the respondent in the case based on the above raised arguments.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of September, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

Honorable Frank R. Addy, Circuit Court Judge

HUBERT BROWN,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Hubert Brown, #161888, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 28th day of September, 2018.

Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me this 28th day of September, 2018.

ATTORNEY FOR RESPONDENT

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.

The South Carolina Court of Appeals

Hubert Brown, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2016-001363

ORDER

This matter is before the Court on a petition for a writ of certiorari. Based on the vote of the panel, the petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

cc:
Lindsey Ann McCallister, Esquire
Wanda H. Carter, Esquire
The Honorable Frank R. Addy, Jr.

FILED
June 28, 2019

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STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO YORK COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-001363

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

v.

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

BRIEF OF PETITIONER

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TABLE OF CONTENTS

QUESTIONS PRESENTED

I. Did the PCR court err in finding trial counsel was constitutionally ineffective for failing to object to the trial court's general-intent jury instruction on attempted murder because *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017), had not been decided at the time of trial, and trial counsel cannot be clairvoyant in predicting changes in the law?

II. Did the PCR court err in finding trial counsel was ineffective for consenting to the admission of Dr. Shannon Hansen's evaluation report without her being called to testify at where the report was cumulative and Brown's own expert effectively testified as to Brown's mental state at the time of the crime?

III. Did the PCR court err in finding trial counsel was ineffective for failing to object to Dr. Richard Frierson's testimony concerning the contents of Dr. Hansen's report because Dr. Frierson helped develop the opinions contained in the report and was independently qualified to testify as an expert in psychiatry?

IV. Did the PCR court err as a matter of law in granting a new trial on the ground that the Assistant Solicitor's reference to Brown's expert as a "lady doctor" was objectionable when that issue was not raised by either party at the hearing?

STATEMENT OF THE CASE

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

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

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

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

Brown was present and represented by Tommy Thomas, Esquire. App. p. 448. Petitioner was represented by Assistant Attorney General Justin J. Hunter, Esquire. App. p. 448. By an Order signed June 16, 2016, and filed June 20, 2016, the PCR court granted relief on multiple grounds, as discussed below. App. pp. 541-49.

Petitioner filed a notice of appeal, and a petition for writ of certiorari on May 9, 2018. Respondent, through counsel, filed a return to the petition on September 28, 2018. Petitioner then filed a reply on October 18, 2018. By Order dated October 19, 2018, the Supreme Court transferred this case to the Court of Appeals. The Court of Appeals granted certiorari and ordered the parties to brief the issues by Order dated June 28, 2019. This Brief of Petitioner follows.

STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

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

> is required. I think all attempts require[] a specific intent and I don't think the legislature has given us any leeway on that.
>
> The Court: Well that's what I've got in my charge and – A specific intent to kill is not an element of attempted murder. There must be a general intent to commit serious bodily injury.
>
> [The State]: I know it was general when we had ABWIK but when we went to attempted - -
>
> The Court: That's what I charged them earlier. If you find some law that says that that's not right, that's in my charge and it's in my charge under the heading of Attempted Murder under 16-3-29. I don't see a case cited. But you take exception to that part of the charge?
>
> [The State]: I'm just concerned because the way I was taught all attempts are specific intent. And so when we went from ABWIK which is a general intent to attempted murder I'm afraid maybe we kicked in a specific intent.
>
> The Court: You mean if I have a general intent to harm you and I harm Chris instead, or have a general intent to hurt everybody in here and the only person except Chris and he's the one I hurt and - -
>
> [The State]: Well that can be transferred intent.
>
> The Court: Well you're on the record for that.
>
> [The State]: All right.
>
> The Court: Anything?
>
> [Defense counsel]: Nothing from the defense, Your Honor.

App. pp. 372-74.

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

STANDARD OF REVIEW

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, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (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. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief 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).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688). 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. The PCR court erred in finding trial counsel was constitutionally ineffective for failing to object to the trial court's general-intent jury instruction on attempted murder because *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017), had not been decided at the time of time, and trial counsel cannot be clairvoyant in predicting changes in the law.

The PCR court erred in finding Counsel was constitutionally ineffective for failing to object to the trial court's general-intent jury instruction on attempted murder because under the law at the time of Brown's trial, Counsel had no reason to object. The PCR court's order focuses primarily on the prejudice prong, finding Brown's mental state "was the key issue in the case" and noting the charge likely influenced the jury's decision since they asked for a recharge on the elements of attempted murder. App. p. 545. The PCR court erred, however, because prejudice is irrelevant in the absence of a deficiency in Counsel's performance, and the finding Counsel was deficient was error given the state of the law at the time of Brown's trial.

The PCR court exclusively relied on King to find Counsel was deficient. App. p. 545. The State agrees the trial court's instruction that "[a] specific intent to kill is not an element of attempted murder but [there] must be a general intent to commit serious bodily injury" is no longer valid after the Supreme Court's decision in State v. King. 422 S.C. 47, 56-57, 810 S.E.2d 18, 23 (2017) aff'g as modified State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015) ("We agree with the Court of Appeals that 'the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime.'") (citations omitted). However, this Court's decision was delivered in June 2015 and the Supreme Court decision in October 2017; this case was tried in July 2013, well before King was decided. See id.

Importantly, the relevant lens for analysis is "counsel's perspective at the time" of trial. Strickland, 466 U.S. at 689; Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) ("The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements."). Attorneys are not required "to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765. At the time of trial, South Carolina law was unclear as to the level of intent required for attempted murder, especially given the conflicting language of the statute, as noted by the Supreme Court in its analysis in King. 422 S.C. at 62, 810 S.E.2d at 25-26 ("While we are convinced this is the correct interpretation, we also acknowledge the ambiguity created by the language in section 16-3-29. . . .").

Further, existing authority supported the attempted murder instruction given at Brown's trial, as evidenced by both the majority opinion and by Justice Kittredge's concurring opinion in King. 422 S.C. at 74-74, 810 S.E.2d at 32 (Kittredge, J., concurring in result only) (discussing the shared history of attempted murder and ABWIK in South Carolina); see also State v. Kinard, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (Ct. App. 2007) ("malice aforethought encompasses both the specific and general intent to commit murder"); State v. Foust, 325 S.C. 12, 14-15, 479 S.E.2d 50, 51 (1996) (for ABWIK, the required finding of "malice aforethought, either express or implied," encompasses a requirement of general intent). Justice Kittridge, writing separately, noted, "The majority and I agree that the statutory language creates an ambiguity – 'with intent to kill' speaks to a specific intent crime while 'malice aforethought, either expressed or implied' points to a general intent crime." Id. at 72, 810 S.E.2d at 31. Given the legislative history of the attempted

murder statute,[1] it was not unreasonable for Counsel to interpret the elements of attempted murder as requiring only general intent. See id. at 73, 810 S.E.2d at 32 ("If the legislature intended to create a specific intent crime, why did it use verbatim the language of the repealed common law offense of ABWIK that had a settled understanding as a general intent crime?") Justice Kittridge concluded he would "affirm the trial court's finding and related jury instruction that '[a] specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily harm.'" Id. at 75, 810 S.E.2d at 32.

Counsel, therefore, cannot be deficient based on King, because it was not the law at the time of Brown's trial, so Counsel was not on notice that he needed to object. See, e.g., Frierson v. State, 417 S.C. 287, 297-98, 789 S.E.2d 762, 767-68 (Ct. App. 2016) (finding counsel was not deficient for failing to advise defendant of potential violation of statutory warrant requirement where law at the time of trial was unsettled on the issue); see also Hill v. State, 350 S.C. 465, 567 S.E.2d 857 (2002) (holding failure of trial counsel to object to erroneous jury instruction was ineffective where appellate decision announcing change in law had already become final by the time of defendant's trial). As evidenced by Justice Kittridge's concurrence, even five justices of our state's Supreme Court could not agree on the appropriate level of intent, and therefore, Counsel's argument was not unreasonable. Counsel testified the parties discussed the issue in chambers, and the trial judge told them he was going to give the charge as written in his bench book. App. pp. 489-90. Counsel also testified if he had any reason to think the instruction was erroneous, he would have objected, but he did not see a reason at that time. App. 490.

[1] In 2010, the General Assembly replaced the offense of assault and battery with intent to kill (ABWIK)[1] with the offense of attempted murder and codified ABHAN, along with three other lesser degrees of assault and battery, as a lesser-included offense. S.C. Code Ann. §§ 16-3-29, 16-3-600; see State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014).

The PCR court's order granting relief on this issue is based on a change in the law that occurred two years after Brown's trial. Counsel should not be found constitutionally ineffective for failing to predict what even the Judicial Department could not, as the general-intent charge apparently came directly from the judge's bench book. This Court should therefore reverse the PCR court's grant of relief on this ground.

II. The PCR court erred in finding trial counsel was constitutionally ineffective for consenting to the admission of Dr. Shannon Hansen's evaluation report without her being called to testify where the report was cumulative, and Brown's own expert effectively testified as to Brown's mental state at the time of the crime.

The PCR court incorrectly found Counsel was constitutionally ineffective for consenting to the admission of Dr. Shannon Hansen's evaluation because she was not called to testify as a witness at trial. App. p. 546. This finding is unsupported by any probative evidence in the record. Counsel was not deficient, nor was Brown prejudiced, where the contents of the report were cumulative to other evidence and testimony presented, and Brown's own expert credibly and effectively testified to his mental state at the time of the crime.

Importantly, Brown's expert, Dr. Walser, herself injected the contents of the State's report into the trial, making the report itself and Dr. Frierson's testimony about it cumulative. App. pp. 226-27. Brown had already been evaluated by DMH at the time Dr. Walser began her testing, and Dr. Walser reviewed the DMH report, among other records, in preparation for making her own report. App. pp. 216-17; Supp. App. 1. Dr. Walser gave detailed testimony about the tests she performed, what each test was designed to measure, Brown's performance on each test, and why the tests were necessary in order to reach a proper conclusion as to Brown's mental state. App. pp. 215-18, 227-29, 234-35. Dr. Walser concluded Brown suffered a traumatic brain injury when he was struck with the gear shift, rendering him temporarily unable distinguish moral or legal right

from wrong and to be unable to "think clearly, speak clearly, [or] act in a rational way." App. pp. 229, 252-55.

Further, Dr. Walser specifically referred to the State's report and its conclusion that Brown was criminally responsible in her testimony. App. pp. 226-27. In doing so, Dr. Walser was able to explain not only why her conclusion that Brown was not criminally responsible due to the temporary effects of a traumatic brain injury was credible, but also why the State's conclusion was not – because that doctor did not perform any of the necessary tests or even consider the possibility of a traumatic brain injury as the cause of the behavior. App. pp. 227-29. Dr. Walser was therefore able to explain away the State's finding on the basis of an insufficient examination, rather than merely offering her own conclusion.

The State then called Dr. Frierson in rebuttal and introduced Dr. Hansen's report through him, without objection. App. 290. The PCR court found it was error for Counsel to fail to object to the admission of the report. App. 546. However, the information contained in the report was merely cumulative to other testimony at trial,[2] and, as the PCR court pointed out, much of the information corroborated Dr. Walser's findings. App. 547. For example, the State's report indicates Brown was indeed suffering from paranoia and amnesia, just as Dr. Walser concluded. App. pp. 221-22, 233-34; Supp. App. 4-5. Dr. Hansen's report also concluded Brown was making a true effort to respond during her examination, supporting Dr. Walser's finding Brown was not malingering. App. pp. 247-48; Supp. App. p. 4.

Additionally, the PCR court finds fault with the admission of Dr. Hansen's report because of the nature of Brown's defense – namely that the head injury caused "temporary insanity." App.

[2] The actual exhibit given to the jury at trial was redacted to remove Brown's criminal history. App. pp. 289-90.

pp. 546-47. The PCR court found it significant that "nowhere in her report did Dr. Hansen indicate that she had considered and excluded temporary insanity due to head trauma as a potential diagnosis, and trial counsel could have potentially brought this to the attention of the jury had the report's author been required to testify." App. p. 457. Notably, however, Dr. Frierson addressed this issue in his testimony, stating he directed Dr. Hansen to consider head trauma as a potential explanation for Brown's behavior and asked her to collect more information in order to make that assessment. App. pp. 297-98.

Finally, the PCR court found Brown was prejudiced by the admission of Dr. Hansen's report "particularly. . . in light of the erroneous general-intent instruction and in light of the Assistant Solicitor emphasizing Dr. Hansen's report in his closing." App. p. 548. However, as discussed above, the general-intent instruction was proper at the time. Because the report was cumulative to other evidence and because Brown's expert effectively testified to her finding that Brown lacked the mental capacity for criminal responsibility at the time of the crime, Counsel was not deficient for failing to object to the admission of the report, nor was Brown prejudiced by the lack of objection. This Court should therefore reverse the PCR court's grant of relief on this ground.

III. The PCR court erred in finding trial counsel was constitutionally ineffective for failing to object to Dr. Richard Frierson's testimony concerning the contents of Dr. Hansen's report because Dr. Frierson helped develop the opinions contained in the report and was independently qualified to testify as an expert in psychiatry.

Additionally, the PCR court found Counsel should have objected to Dr. Frierson's testimony since he had never examined Brown and could not give a diagnosis, and his testimony was merely "bolstering an unchallenged witness." App. pp. 548. This finding is not supported by the record because Dr. Frierson participated in the development of the DMH opinion by reviewing medical records and witness statements and directing the collection of additional information to

support the report's conclusions. App. pp. 297-98. He was also independently qualified as an expert in psychiatry, and therefore, he could give his own opinion as to Brown's criminal responsibility. App. pp. 292-93.

Dr. Frierson was independently qualified as an expert in psychiatry, and Brown has not alleged that qualification was in error or that Counsel was deficient for failing to object on that basis. App. pp. 292-93. Dr. Frierson's testimony consisted mostly of opinions regarding hypothetical situations suggested by the evidence introduced at trial, which he was qualified to give as an expert in psychiatry, and Counsel's objections to hypotheticals outside the evidence were sustained. See Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 604 S.E.2d 385 (2004) (noting it is well settled that opinion testimony of an expert may be based on hypothetical questions, provided the question is based on facts supported by the evidence); App. pp. 293-95, 299-301. Further, an expert witness "may state an opinion based on facts not within his firsthand knowledge" and "may base his opinion on information, whether admissible or not, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions." Hundley ex rel Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000). An expert may also testify to matters of hearsay for the purpose of showing what information he relied on in reaching his opinion. Id.

Here, although Dr. Frierson testified he only reviewed and approved Dr. Hansen's report rather than drafting it himself, he also testified he had personally reviewed Brown's medical records, the witness statements from law enforcement, and the social history obtained by a DMH social worker prior to Dr. Hansen's examination. App. pp. 295-298. Additionally, he testified he raised the possibility Brown's head injury could have been the cause of his actions and directed Dr. Hansen to obtain more information from Brown's wife as to what happened at the scene

immediately after Brown was struck on the head. App. pp. 297-98. Dr. Frierson then opined, based on his review of the police reports and the information gathered by Dr. Hansen, he felt there was significant evidence to find Brown "knew what he was doing" and could distinguish right from wrong. App. pp. 297-98. Further, he testified he and Dr. Hansen jointly decided what opinion DMH would issue, as part of his role as her supervisor. App. pp. 297-98. Thus, Dr. Frierson was not merely bolstering a non-testifying witnesses; rather, he was testifying as to the conclusion he helped develop. See State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) ("Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth. . . .").

Dr. Frierson's testimony in this case was not a comment on the veracity of any other witness, testifying or not. In fact, based on Dr. Hansen's report, it appears both he and Dr. Hansen generally believed Brown's version of events, but disagreed with Dr. Walser that the brain injury alone was sufficient to meet the legal requirements of criminal insanity. Supp. App. p. 5 ("Although [Brown] received treatment for head trauma around the time of his charges. . . he did not report a compulsion, delusion, command auditory hallucination, or other symptoms of mental illness that would have impaired his ability to conform his conduct to the requirements of the law.").

The fact that Dr. Frierson never examined Brown himself does not preclude him from offering an opinion, but goes to the weight of the evidence. See, e.g., Petersen v. National R.R. Passenger Corp., 365 S.C. 391, 400, 618 S.E.2d 903, 908 (2005) ("The experts' lack of first-hand knowledge, which could have been obtained by an on-site investigation, goes to the weight of the testimony, not its admissibility."). Counsel testified, although he could not say it was a trial strategy not to object to Dr. Frierson's testimony on rebuttal, because Dr. Frierson had never

evaluated Brown, he was able to use that to Brown's advantage on cross-examination and during closing arguments. App. pp. 465-66. The defense expert, Dr. Walser, emphasized in her testimony a proper diagnosis could not be made using the methodology reflected in DMH's report because none of the necessary testing had been done, but instead the evaluation was based solely on a short interview with Brown. App. pp. 227-29. Additionally, Dr. Frierson conceded on cross-examination that a person could exhibit reasoning and processing functions and still not be criminally responsible. App. p. 301.

For the foregoing reasons, Counsel was not deficient, nor was Brown prejudiced by Counsel's failure to object to Dr. Frierson's testimony, and the PCR court's grant of relief on this basis should be reversed.

IV. The PCR court erred as a matter of law in granting a new trial on the ground that the Assistant Solicitor's reference to Brown's expert as a "lady doctor" was objectionable because that issue was not raised by either party at the hearing, and therefore, Brown has waived his right to relief on that ground.

Finally, the PCR court also found the Assistant Solicitor's reference to Dr. Walser, the defense expert, as a "lady doctor" was objectionable. App. p. 510. It is unclear from the PCR court's order whether or not this finding is a basis for relief on which the PCR court granted a new trial. App. p. 510. However, because the State contends the PCR court's finding was an error of law, out of an abundance of caution, Respondent addressed the issue in its petition.

The PCR court's order clearly acknowledges this ground was not pleaded by Brown, and a review of the transcript shows it was not raised during Brown's case at the evidentiary hearing. App. 510. The South Carolina Supreme Court has previously held a *sua sponte* order of a new trial on grounds not raised by either party is improper in both the civil and criminal context. State v. Dicapua, 383 S.C. 394, 398, 680 S.E.2d 292, 294 (2009) ("[M]ay a trial court in a criminal case *sua sponte* order a new trial on a ground not raised by a party? We answered this question 'no' in

the context of a civil proceeding. . . . We hold the same result must follow in a criminal case."); Southern Railway Co. v. Coltex, Inc., 285 S.C. 213, 214, 329 S.E.2d 736, 736 (1985) ("The sole issue is whether a trial judge *ex meru moto* can grant a new trial on a ground not raised by a party. We hold he cannot."). In both Dicapua and Southern Railway, the Supreme Court found that by failing to raise the ground on which the new trial was granted, it had been waived. 383 S.C. at 399, 680 S.E.2d at 294; 285 S.C. at 215-16, 329 S.E.2d at 737.

Similarly, here, Brown failed to plead this ground in his original application, or, after obtaining counsel, via amendment or through his testimony at the evidentiary hearing. App. pp. 429-41, 454-537. Accordingly, Brown has waived his right to a new trial on this ground, and the PCR court erred as a matter of law in granting a new trial *sua sponte*. This Court should therefore reverse the PCR court's grant of relief on this ground.

CONCLUSION

For all the foregoing reasons, the State requests this Court reverse the post-conviction relief court's grant of a new trial on all grounds.

Respectfully submitted,

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August 28, 2019

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STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO YORK COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-001363

HUBERT BROWN,

RESPONDENT,

v.

THE STATE OF SOUTH CAROLINA,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Petitioner**, has been served upon opposing counsel by delivering two (2) copies addressed to:

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This 28th day of August, 2019

CAROLINE COLLINS
Administrative Coordinator

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to York County

Honorable Frank R. Addy, Circuit Court Judge

HUBERT BROWN,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2016-001363

BRIEF OF RESPONDENT

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Other Authorities

ISSUES PRESENTED

I. The PCR judge ruled properly that trial counsel was ineffective in failing to object to the trial judge's erroneous jury charge **and recharge** that attempted murder required a general intent finding when a specific intent to kill was the proper mens rea element for attempted murder, particularly where even **the solicitor noticed the incorrect charge and objected to it at trial**, and where the prejudice was obvious as the respondent was incapable of formulating any specific intent to kill as evidenced by his brain injury and hence his insanity defense raised at trial.

II. The PCR judge ruled properly in finding that trial counsel erred in failing to object to the admission of Dr. Shannon Hanson's report into evidence at trial because she was not present at trial to testify as a witness about her conflicting report, which contradicted the respondent's insanity defense, and counsel erred further in failing to object to the testimony of Dr. Frierson, who bolstered Dr. Hanson's credibility as an expert witness, because all of this weakened and nullified the respondent's insanity defense.

III. The solicitor's reference to Dr. Carol Walser as a "lady doctor" during closing argument was a prejudicial comment that constituted reversible error.

STATEMENT

Respondent Hubert Brown was convicted of first degree burglary and attempted murder per jury trial held during the July 2013 term of the York County General Sessions Court before Judge John C. Hayes, III. The respondent was sentenced to LWOP on both convictions. App. 1-384. David Cook represented the respondent at trial and Assistant Solicitor E.B. Springs appeared on behalf of the state. The respondent appealed, but after briefs were filed (App. 391-425), his convictions and sentences were affirmed by the South Carolina Court of Appeals. See State v. Brown, Unpublished Opinion. No. 2014-UP-425 (S.C. Ct. App. filed November 26, 2014). App. 426-427. Carmen V. Ganjehsani, Esquire, formerly of the South Carolina Office of Appellate Defense, represented the respondent on direct appeal, and Assistant Attorney General Jennifer Ellis Roberts represented the state on direct appeal.

On December 31, 2014, the respondent filed an application for post-conviction relief with the York County Office of the Clerk of Court. App. 430-436. On July 8, 2015, the respondent filed a return and motion for a more definite statement. App. 443-446.

A PCR hearing in the case was convened on April 19, 2016, at the York County Courthouse before Judge Frank R. Addy, Junior. App. 448-537. The respondent was present at the hearing and represented by Tommy Thomas, and Assistant Attorney General Justin Hunter appeared on behalf of the state.

On June 16, 2016, Judge Addy issued an Order granting post-conviction relief to the respondent. App. 541-549. The state appealed and filed a petition for writ of certiorari dated May 9, 2018. This brief follows per this Court's Order dated June 28, 2019, that granted petitioner's petition for writ of certiorari.

STANDARD OF REVIEW

In reviewing a PCR court's decision, this Court will uphold the PCR court's findings if there is any evidence of probative value to support them. Suber v. State, 371 S.C. 554, 640 S.E.2d 884 (2007). However, if the PCR court's conclusions are controlled by an error of law or are unsupported but the evidence, then this Court must reverse the decision. Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011).

QUESTION I

The PCR judge properly ruled that trial counsel was ineffective in failing to object to the trial judge's erroneous jury charge **and recharge** that attempted murder required a general intent finding when a specific intent to kill was the proper mens rea element for attempted murder, and because counsel's failure to object to the erroneous charge was particularly egregious in that even the **solicitor noticed the incorrect charge and objected to it** at trial, and where the resulting prejudice was obvious as the respondent was incapable of formulating any specific intent to kill as evidenced by his brain injury and hence his insanity defense raised at trial.

At trial, eyewitnesses Michael Mahoney and Christopher Calvert both about what happened in this case. Mahoney testified that the respondent appeared at his residence while he and Calvert were both there on June 8, 2012, and that the respondent pointed a finger at him during a heated conversation. Mahoney stated that he responded by pushing the respondent. Mahoney stated that the respondent hit him, and that he and the respondent immediately began fighting each other on the ground. Shortly thereafter, the respondent stopped fighting after being hit on his (the respondent's) head. Minutes later, the respondent rose up and started chasing Calvert, but left and then returned holding a machete and cut Calvert's hand (thumb) after entering the house. App. 61, l. 10 – App. 86, l. 25.

Christopher Calvert testified at trial and admitted that he used a gear shift to hit the respondent on his head to break up the fight between the respondent and Mahoney. Then, the respondent left and returned to the residence with a machete. Calvert stated that the respondent used it to cut his hand (thumb). App. 106, l. 16 – App. 121, l. 3.

The trial judge in the case gave the following jury charge regarding the element of intent as it pertained to the offense of attempted murder:

> A specific intent to kill is not an element of murder, but it must be a general intent to commit serious bodily injury. App. 350, l. 25 – App. 351, l. 2.

Then, in response to a jury note requesting a recharge on attempted murder (App. 366, l. 14-16), the trial judge's recharge follows:

> I received your note and I want to clarify...[and] go back through the charge of attempted murder. App. 367, lines 8-11. A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit the serious bodily injury. App. 368, lines 21-23.

With respect to this element of intent as it applied to the offense of attempted murder, the solicitor raised the follow objection:

> [Solicitor]: The first time you charged this morning I was daydreaming and I wasn't daydreaming this time and I heard you say that only a general and not a specific intent for attempted murder is required. I think all attempted require [] a specific intent and I don't think the legislature has given us any leeway on that.
>
> The Court: Well that's what I've got in my charge and – A specific intent to kill is not an element of attempted murder. There must be a general intent to commit serious bodily injury
>
> [Solicitor]: I know it was general when we had ABWIK but when we went to attempted –
>
> The Court: That's what I charged them earlier. If you find some law that says that that's not right, that's in my charge and it's in my charge under the heading of Attempted Murder under 16-3-29. I don't see a case cited. But you take exception to that part of the charge?
>
> [Solicitor]: I'm just concerned because the way I was taught all attempted are specific intent. And so when we went from ABWIK which is a general intent to attempted murder I'm afraid maybe we kicked in a specific intent.
>
> The Court: You mean if I have a general intent to harm you and I harm Chris instead, or have a general intent to hurt everybody in here and the only person except Chris and he's the one I hurt and –

> [Solicitor]: Well that can be transferred intent.
>
> The Court: Well you're on the record for that.
>
> [Defense Counsel]: Nothing from the defense, Your Honor.
> App. pp. 372-374

The PCR judge granted PCR relief to the respondent on the ground that trial counsel was ineffective in failing to object to the trial judge's explanation of general intent, rather than specific intent, as the mens rea element that should have been found before returning a verdict guilty on the offense of attempted murder. The PCR judge ruled as follows:

> [The respondent] maintains that trial counsel was ineffective for failing to object to the trial court's general intent instruction as it related to the attempted murder charge. Having reviewed the transcript, the Court finds that the capable trial judge did mistakenly instruct the jury that the State need only prove general intent as opposed to specific intent. See Trial Transcript, p. 350, line 25 – p. 351, line 4. The Assistant Solicitor did point this fact out to the trial court, but trial counsel did not join in the Assistant Solicitor's efforts to have the jury correctly charged on the law, and the trial court declined to alter the erroneous instruction.
>
> Significantly, the erroneous charge gave the jury the impression that they only had to find general intent to harm, as opposed to a specific intent to kill. See State v. King, 412 S.C. 403 (Ct. App. 2015). The fact that the jury may have struggled with this issue is evident in the jury's request for a recharge on the elements of attempted murder. Trial Transcript, p. 366, lines 14-19. In response to this request, the trial court again recharged general as opposed to specific intent. Therefore, twice the trial court mistakenly stated that specific intent to kill is not an element of attempted murder.
>
> Additionally, ...the Court finds that the [respondent's] mental state was the key issue in the case with regard to both the attempted murder charge and the burglary charge. With respect to the burglary charge, the state argued that the crime the [respondent] intended to commit once he entered the dwelling was the attempted murder. Trial Transcript p. 333, lines 25 – p. 335, line 3. Therefore, although the attempted murder charge is technically the only charge affected by the erroneous instruction, the issue of Applicants *mens rea* is clearly relevant to both charges, so the burglary charge was also likely tangentially affected by this erroneous instruction
>
> The Court finds that trial counsel should have joined in the State's objection to this incorrect instruction and that a reasonable attorney would have objected. Factually, the victim's injuries resulted from a single swipe of the knife, which is

> quite different from the [respondent] repeatedly attempting to stab the victim. Therefore, specific intent to kill, as opposed to general intent to harm, was a crucial issue in the case, and the jury likely struggles with the distinction in light of their request to be reinstructed on the attempted murder charge. Furthermore, the Court finds that [the respondent] has demonstrated sufficient prejudice in that, but for counsel's error, the outcome at trial would likely have been different. Accordingly, PCR is granted with respect to the attempted murder conviction on this ground. App. 545-546.

Note that in the year 2000, our Court in held in State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), that although no attempted murder offense had been codified in our state at that time; nonetheless, if such an offense had existed, then attempted murder would have required a specific intent to kill under the rationale that specific intent is required for any attempt crime as the very definition an attempt crime means that the defendant consciously intended the completion of acts comprising the choate offense. Compare the case of State v. Reid, 393 S.C.3325, 713 S.E.2d 274 (2011), where the Court cited to Sutton and held that with respect to the offense of attempted criminal sexual conduct, specific intent, to the extent that the defendant intended to complete the acts comprising the underlying offense, was an element that must be proven in order to convict on the attempt crime.

Then, approximately a decade later after Sutton was decided, the legislature in 2010 codified attempted murder under S.C. Code. Ann. § 16-3-29 and defined it as the act of "a person who with intent to kill, attempts to kill another person with malice aforethought either expressed or implied." In State v. King, 412 S.C. 403, 772 S.E.2d 184 (S.C. Ct. App. 2015), the Court of Appeals concurred with the rationale in Sutton to the extent that attempted murder would require a specific intent to kill, and went on to hold also that prior rulings would dictate that specific intent must be found in order to convict on attempt crimes and that our state legislature intended to require the state to prove the specific intent to kill as an element of attempted murder. The South Carolina Supreme Court reviewed the Court of Appeals' holding in King and concurred

that attempted murder required proof that the defendant had the specific intent to kill and reiterated that specific intent means that the defendant consciously intended the completion of the acts conspiring the attempted offense (again citing to Sutton), and that specific intent was required because criminal intent focuses on the dangerousness of the actor, not the act; and moreover, that the failure to charge specific intent to kill in an attempted murder case cannot be considered harmless error. State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017).

In State v. Hartsfield, 300 S.C. 469, 383 S.E2d 802 (1990), the Court addressed the insanity defense and GBMI under S.C. Code. Ann. 17-24-10 & 20 below:

> It is a defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. This section codified the common-law defense of insanity. State v. Grimes, 292 S.C. 204, 355 S.E.2d 538 (1987).
>
> A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong as defined in Section 17-24-10 (A), but because of mental disease or defect he lacked sufficient to conform his conduct to the requirements of the law.

Here, the defense presented neuro-psychologist Dr. Carol Walser, who concluded that the respondent suffered from traumatic brain injury due to a blow to his head that caused a fractured skull, and that this traumatic brain injury rendered the respondent's behavior so altered that he was not criminally responsible for his actions on June 8, 2012, which meant that he was insane by our legal definition when he acted on that night and more importantly, could not have formed any specific intent to kill when the incidents in question occurred. Dr. Walser stated that the respondent's functioning on the date in question stemmed from a loss of consciousness, confusion, an altered mental state (dazed, disoriented), erratic behavior, and the inability to think

clearly. App. 281, lines 11-18; App. 282, l. 18 – 283, l.3; App. 249, l. 13 – p. 251, l. 8; App. 219, lines 12-14; App. 279, l. 21 – p. 280, l. 25. State's witnesses Mahoney and Calvert both stated that the respondent was "dazed" after he was hit on his head. App. 76, lines 2-4; App. 113, lines 1-11. Calvert admitted that he hit the respondent's head "hard." App. 113, l. 11. The respondent's wife testified that the respondent looked "crazy" with "crazy eyes" after he was hit in the head by Calvert. App. 196, l. 19 – p. 197, l. 16. The respondent's brain could not formulate any mind set of specific intent to kill during the events in question in the case.

Therefore, in the case at bar, the trial judge's erroneous charge that instructed the jury to find general intent with respect to the offense of attempted murder as opposed to the correct requirement of a finding of specific intent as an element of attempted murder should have been objected to by trial counsel, especially since the respondent's defense was that he had no specific intent to kill because he pleaded insanity, which the judge charged (insanity) along with GBMI. The respondent was incapable of formulating a specific intent to kill in this case. Hence, the prejudice that resulted from the trial judge's error and counsel's failure to object to the trial judge's error was obvious.

Clearly, if the jury had been charged with finding a specific intent to kill, then a reasonable probability existed that in light of the respondent's insanity defense (which was proved) due to the brain injury he suffered, it would have would been impossible for the element of specific intent to kill to have been found and the outcome of his trial would have been different. See State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869 (1997), where the judge instructed the jury that under insanity, a defendant does not have criminal intent and should be acquitted. Also, a judge must charge the correct law to the jury. State v. Marin, 404 S.C. 615, 745 S.E.2d148 (2013).

Thus, the respondent's proved his insanity case by a preponderance of the evidence. As a result, trial counsel's error in failing to object to an erroneous general intent jury instruction with respect to the proper level of mens rea required for the offense of attempted murder, (that brings a specific intent to kill rather than general intent), constituted deficient legal representation in violation of the Sixth Amendment, especially where the respondent's insanity defense or GBMI had been established at trial, and **particularly where even the solicitor noted error with the judge's general intent charge**. See Strickland v. Washington, 466, U.S. 668, 104 S. Ct. 2052 (1984). Furthermore, but for counsel's error in this regard, a reasonable probability exists that the outcome of the respondent's trial would have been different.

QUESTION II

The PCR judge ruled properly in finding that trial counsel erred in failing to object to the admission of Dr. Shannon Hanson's report into evidence at trial because she was not present at trial to testify as a witness about her conflicting report, which contradicted the respondent's insanity defense, and counsel erred further in failing to object to the testimony of Dr. Frierson, who bolstered Dr. Shannon Hanson's credibility as an expert witness and her report as well, because all of this weakened and nullified the respondent's insanity defense.

The respondent's defense was insanity or at the very least GBMI. Defense witness and neuro-psychologist Dr. Carol Walser testified that she interviewed the respondent on three occasions and reviewed his medical records, and then concluded that on the date in question, the respondent suffered from a deep cut from a blow on the head, which caused him (the respondent) to have traumatic brain injury. Dr. Walser explained that the respondent's brain injury caused the resulting erratic behavior that led to the incidents that occurred on the date in question. Dr. Walker added that she diagnosed the respondent with mild neuro-cognitive disorder and

depressive disorder, both of which stemmed from his brain injury via his fractured skull. Moreover, Dr. Walser stated that the respondent's functioning on the date in question stemmed from a loss of consciousness, confusion, an altered mental state (dazed, disoriented), erratic behavior, and the inability to think clearly. App. 249, l. 13- p.251, l. 8, App. 219, l. 12-14, App 279, l. 21- p.280, l. 25. According to Dr. Walser, after the blow to the head, the respondent's brain in effect could not have processed normally, which in turn meant that he was operating during the events at issue in actions with a brain that was not criminally liable, i.e. insane. App. 281, lines 11-18; App. 282, l.18 - p. 283, l. 3.

Dr. Walser was asked about reports from Dr. Shannon Hanson, who also interviewed the respondent. Dr. Shannon Hanson was not present at trial to testify as a witness. Dr. Hanson issued a report that contained her finding that the respondent was legally sane (App. 259, l. 9 – p. 260, l. 15), but Dr. Walser did not agree with Dr. Hanson's assessment because of his (the respondent's) traumatic brain injury as said injury rendered him confused, incoherent (with language) and agitated at the scene and thus not criminally responsible. App. 226, l. 13 - p. 230, l. 17. App. 252, lines 6-11. Dr. Walser was very clear in her report that the respondent was insane and could not distinguish legal and moral right and wrong on the date the incidents occurred. App. 255, l. 11-p. 257, l. 3.

Dr. Richard Frierson, a forensic psychologist, testified that he reviewed Dr. Hanson's report (State's exhibit #29) wherein Dr. Hanson found the respondent criminally responsible and stated that Dr. Hanson was a board-certified psychiatrist, and that she was a fellow in forensic psychiatry, and that he supervised her (Dr. Hanson's) evaluation of the respondent, which in effect meant he was in agreement with Dr. Hanson's findings that the respondent was criminally responsible and not insane at the time of the events transpired. App. 287, l. 21-p. 296, l. 7.

Dr. Hanson's reports were filed on May 6, 2013. App. 7, l. 9-p. 8, l. 2. Dr. Hanson was no longer employed at DMH as of June 30, 2013. App. 301, l. 8-16; App 462, l. 18 – p. 463, l. 12. Note that Dr. Hanson was presumably terminated from DMH and did not testify at trial. The respondent's trial commenced on July 9, 2013.

During the PCR hearing, trial counsel testified that he must have agreed to the admission of Dr. Hanson's report in to evidence at App. 6, l. 17 – p. 8, l. 2 and App. 288, l. 17 – p. 290, l. 18, but that he should not have done so, and that he should have objected to Dr. Hanson's report, and that he should have objected also to Dr. Frierson's testimony as well. App. 463, l. 3- p. 469, l. 6. Counsel admitted that insanity was the only defense available to the respondent, and that Dr. Hanson's report and Dr. Frierson's testimony, which bolstered Dr. Hanson's credibility and expertise and that Dr. Hanson's report and Dr. Frierson's testimony negatively impacted his insanity defense. App. 465, l. 3-12; App. 481, l. 20- p. 483, l. 4. App. 490-491.

The PCR judge ruled that trial counsel erred in agreeing to the admission of the respondent's mental evaluation by Dr. Hanson into evidence because Dr. Hanson was not a witness at trial, and also because Dr. Hanson's report was damaging in that she found the respondent to be criminally responsible, i.e., sane where to the contrary, the respondent's defense was insanity due to his skull fracture (head injury). In addition, the PCR judge found further that counsel undercut the respondent's insanity defense and lessened the impact of the defense's expert's witness' testimony in support of the insanity defense by not objecting Dr. Hanson's report, which was contrary to the insanity defense and prejudicial as Dr. Hanson was not present at trial to be challenged regarding her report. App. 546-549.

Insanity, which was codified by the defense and charged by the judge, is proved by a preponderance of the evidence. State v. Hernandez, 287 S.C. 183, 336 S.E.2d 476 (1985).

The insanity defense is coded at S.C. Code Ann. § 17-24-10(A) (Cum. Supp. 1988):

> It is a defense to a prosecution for a crime, that at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

Undoubtedly, it was error for counsel to fail to object to the admission of Dr. Hansen's report into evidence as an exhibit when she was not a witness at trial to testify because her report contradicted the respondent's insanity defense in that Dr. Hanson found the respondent criminally responsible, i.e. sane, which reduced the strength of the respondent's insanity defense and his proof that he was insane on the date in question.

Hearsay is a statement, which maybe written, other than are made by the declarant while testifying at trial that is offered in evidence to prove the truth of the matter asserted. Rule 801, SCRE. See In Re Care and Treatment of Harvey, 355 S.C 53, 584 S.E. 2d 893 (2003), where the admission of a log containing incidents deemed to be hearsay from a report by a supervisor constituted subjective reports that did not fall under the business records exception. See also State v. Blackwell, 420 S.C. 127, 801 S.E. 2d 713 (2018), where the Court held that the chaplain's notes regarding the death row inmate's remorse comments were excludable as inadmissible hearsay and did not fall under the business records exception.

Also, the business records exception under Rule 803(6), SCRE, was not available for Dr. Hansen because Dr. Hanson was not qualified at trial as an expert as she did not testify at trial and it was therefore impossible to delve into and challenge her alleged expertise. Thus, her opinions were inadmissible. In other words, because Dr. Hanson lacked credible credentials, her report could not have come in under the business records exception. For example, Dr. Hanson was a forensic psychiatry fellow, meaning she was still in training at the time she interviewed the

respondent, and she only spent one hour with the respondent. App. 216, l. 24- p. 217, l. 1; App. 226, l. 13- p. 227, l. 13. Note further that the presumed termination of Dr. Hanson from DMH also bore on her credibility and the credibility of her report on the respondent. Tr. 301, l. 8-16.

Finally, if a defendant is prejudiced by the erroneous admission of hearsay evidence, then a reversal is required. In Re Care and Treatment of Harvey, supra. In the instant case before us, counsel erred in failing to object to the admission of the report in question (Dr. Hanson's report) into evidence, because it was hearsay and Dr. Hanson was not a witness at trial to be confronted and challenged. See. State v. Alexander, 303 S.C 408, 401 S.E. 2d 167 (1991). The respondent was prejudiced because Hanson's report weakened his insanity defense and the defense could not challenge her report.

In addition, it was also error for trial counsel to fail to object to the testimony of Dr. Richard Frierson, whose testimony was used to bolster Dr. Hanson's credibility as an expert. Dr. Frierson stated that he supervised Dr. Hanson's evaluation of the respondent, which in effect placed his endorsement on her credibility, and the credibility of her findings in her report. App. 288, l. 3- p. 291, l. 8. It is imperative to note that Dr. Frierson did not sign off on Dr. Hanson's report. Another doctor, who also did not testify at trial, signed off on Dr. Hanson's report. App. 298, l. 13-17. It was error to allow Dr. Frierson to bolster Dr. Hanson's veracity and it was error for trial counsel to fail to object to Dr. Frierson's testimony in this respect. See State v. Jennings, 394 S.C. 473, 716 S.E. 2d 91 (2011), where the Court reversed and held that the trial court erred in allowing the state to introduce the forensic interviewer's written report (particularly where the mother told the interviewer what the children told her) because it contained inadmissible hearsay that bolstered the children's testimony and allowed the interviewer to vouch for the children's testimony. Compare Briggs v. State, 421 S.C. 316, 806 S.E. 2d 713 (2017), State v. Kromah, 401

S.C. 340, 737 S.E. 2d 490 (2013). Also, Dr. Hanson's report was not cumulative because it contradicted Dr. Hanson's testimony regarding sanity versus insanity. Trial counsel's error regarding the failure to object to Dr. Hanson's report as evidence and Dr. Frierson's testimony violated the respondent's Sixth Amendment right to competent counsel at trial, and but for the errors made by counsel here via these omissions, a reasonable probability exists that the outcome of respondent's trial would have been different. See Strickland v. Washington, supra.

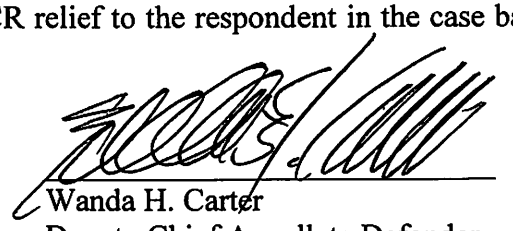
QUESTION III

The solicitor's reference to Dr. Walser as a "lady doctor" during closing argument was a prejudicial comment that constituted reversible error.

The solicitor's reference to the defense's expert witness Dr. Walser as a "lady doctor" was a gender reference that was tantamount to the type of a mockery against her credibility as a women that infected the trial with sufficient unfairness as to deprive the respondent of a fair trial. See Donnelly v. DeChristoforo, 416 U.S.637 (1974). The PCR judge properly ruled that the "lady doctor" comment was "inappropriate" and "objectionable." App. 549.

CONCLUSION

Due to the holding in Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984), which outlined the standard of the existence of "any evidence of probative value" in determining whether to uphold the PCR judge's ruling as the scope of review in PCR cases, counsel would request that this Court uphold the grant of PCR relief to the respondent in the case based on the above raised arguments.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR RESPONDENT

This 27th day of September, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable Frank R. Addy, Circuit Court Judge

HUBERT BROWN,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Respondent have been served on Hubert Brown, #161888, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 27th day of September, 2019.

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 27th day of September, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hubert Brown, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2016-001363

Appeal From York County
John C. Hayes, III, Trial Judge
Frank R. Addy, Jr., PCR Judge

Unpublished Opinion No. 2020-UP-144
Submitted April 1, 2020 – Filed May 20, 2020

AFFIRMED

Assistant Attorney General Lindsey Ann McCallister, of Columbia, for Petitioner.

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Respondent.

PER CURIAM: In July 2013, a jury convicted Hubert Brown of first-degree burglary and attempted murder. The trial court sentenced Brown to life without parole for each charge. Brown filed a direct appeal, and this court affirmed his convictions and sentences. Brown then filed an application for post-conviction

relief (PCR), which the PCR court granted following an evidentiary hearing. This court thereafter granted the State's petition for a writ of certiorari. We now affirm the PCR court's order granting Brown PCR pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the PCR court erred by finding trial counsel was ineffective for failing to object to the trial court's jury charge instructing them that attempted murder required general, rather than specific, intent: *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (holding a reviewing court will uphold the factual findings of the PCR court if there is any evidence of probative value to support them); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish a claim of ineffective assistance of counsel, a PCR applicant must show (1) counsel was deficient and (2) counsel's deficiency prejudiced the defendant's case); *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009) ("In reviewing jury charges for error, this [c]ourt must consider the . . . charge as a whole in light of the evidence and issues presented at trial."); *id.* ("If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error."); *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) ("In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution."); S.C. Code Ann. § 16-3-29 (2015) ("A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder."); *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 286 (2000) ("Attempted murder would require the specific intent to kill and conduct towards that end."); *State v. King*, 412 S.C. 403, 409, 772 S.E.2d 189, 192, *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 ("Before 2010, our courts held attempt crimes require the State to prove the defendant had specific intent to complete the attempted crime.").

2. As to whether the PCR court erred by finding trial counsel was ineffective for consenting to the admission of a psychiatric evaluation prepared by a doctor who did not testify at trial and for failing to object to the testimony of another doctor concerning the contents of that psychiatric evaluation: Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); Rule 803(6), SCRE ("A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a

regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, *all as shown by the testimony of the custodian or other qualified witness*, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however,* that subjective opinions and judgments found in business records are not admissible." (first emphasis added)); *Stevens v. Allen*, 336 S.C. 439, 455, 520 S.E.2d 625, 633 (Ct. App. 1999), *aff'd*, 342 S.C. 47, 536 S.E.2d 663 (2000) ("[U]nder Rule 803(6), SCRE, a proper foundation must be laid for admittance of the evidence, and this includes a chain of custody."); *Briggs v. State*, 421 S.C. 316, 323, 806 S.E.2d 713, 717 (2017) ("[I]mproper bolstering testimony is inadmissible."); *id.* at 325, 806 S.E.2d at 718 ("[N]o witness may give an opinion as to whether [another witness] is telling the truth."); *State v. Jennings*, 394 S.C. 473, 479, 716 S.E.2d 91, 94 (2011) ("When credibility is the ultimate issue in a case, improper corroboration evidence that is merely cumulative to other testimony is not harmless.").

3. As to whether the PCR court erred by granting PCR on the ground that the State referred to Brown's expert as a "lady doctor," we find the PCR court did not intend for its remarks regarding the State's inappropriate comment to be a basis for PCR. The PCR court noted the issue was not raised by Brown, the court did not frame its discussion of the comment in the context of trial counsel's ineffectiveness, and it expressed its desire to "note" that the comment was inappropriate and to "discourage[]" it.

AFFIRMED.[1]

LOCKEMY, C.J., and GEATHERS, and HEWITT, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

_____

IN THE COURT OF APPEALS

_____

Certiorari to York County
The Honorable Frank F. Addy, Jr., Post-Conviction Relief Judge
The Honorable John C. Hayes, III, Trial Judge
Appellate Case Number 2016-001363
Unp. Op. No. 2020-UP-144 (filed May 20, 2020)

_____

Hubert Brown.....Respondent,

v.

State of South Carolina, ...Petitioner.

_____

STATE'S PETITION FOR REHEARING

_____

Through its unpublished, *per curiam* opinion issued on May 20, 2020, this Court affirmed the decision of the PCR court granting a new trial. In this unpublished opinion, this Court affirmed on all grounds for relief found by the PCR court: (1) trial counsel was constitutionally ineffective in failing to object to the trial court's general-intent jury charge as to the count of attempted murder; (2) trial counsel was constitutionally ineffective for consenting to the admission of a psychiatric evaluation prepared by a doctor who did not testify at trial; and (3) trial counsel was constitutionally ineffective for failing to object to testimony of another doctor about the contents of the report. Brown v. State, 20-UP-144 (S.C. Ct. App. filed May 20, 2020). Petitioner submits this Court has misapprehended or overlooked relevant facts of this case and the applicable law. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing and reverse the PCR judge's grant of relief.

Ineffective Assistance of Counsel for Failure to Object to the General-Intent Jury Instruction as to Attempted Murder

The PCR court's order in this case focused primarily on the prejudice prong, finding Brown's mental state "was the key issue in the case" and noting the charge likely influenced the jury's decision since they asked for a recharge on the elements of attempted murder. App. p. 545. However, because prejudice is irrelevant in the absence of a deficiency in trial counsel's performance, the PCR court's findings reflect an incorrect application of the Strickland standard. Moreover, the deficiency finding is premised on an error of law that this Court should correct.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Under this prong, the court measures an attorney's performance by its reasonableness under prevailing professional norms. Id. (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)). Importantly, Strickland requires only that counsel's actions be reasonable, not that counsel be infallible. See Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Then, only if an applicant has proved deficiency should the court then move on to conduct a prejudice analysis. Strickland, 466 U.S. at 687 ("Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."). In this case, prejudice is irrelevant because the PCR court's finding that trial counsel was deficient was an error of law given that the requisite level of intent for attempted murder was unsettled in South Carolina at the time of Brown's trial.

On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at

839 (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. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief 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). This Court, however, appears to have deferred to the PCR court's finding of facts on this issue as its opinion cites to Sellner as support for affirming this ground. The PCR court improperly granted relief, and this Court should correct that error by conducting the proper analysis without any deference to the PCR court's findings.

The relevant lens for that analysis is "counsel's perspective at the time" of trial. Strickland v. Washington, 466 U.S. 668, 689 (1984); Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) ("The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements."). At the time of trial, South Carolina law was unclear as to the level of intent required for attempted murder, particularly given the conflicting language of the statute, as noted by the Supreme Court in its analysis in King. 422 S.C. at 62, 810 S.E.2d at 25-26 ("While we are convinced this is the correct interpretation, we also acknowledge the ambiguity created by the language in section 16-3-29. . . .").

South Carolina has made clear that attorneys are not required "to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765; Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (explaining an attorney is not required to "be clairvoyant or anticipate changes in the law which were not in existence at the time of trial."). Similarly, there exists ample authority interpreting Strickland from other jurisdictions, including the Fourth Circuit, which recognizes that trial counsel "is not required to forecast changes in the existing law." Mayo v. Henderson, 13 F.3d 528, 533 (2nd Cir.

1994). See also Kornahrens v. Evatt, 66 F.3d 1350, 1360 (4th Cir. 1995) ("Skipper was on appeal to the Supreme Court at the time of Kornahrens's trial, and [counsel] testified that he was aware of that fact. Nevertheless, the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law."); United States v. McNamara, 74 F.3d 514, 515-17 (4th Cir.1996) (finding counsel cannot be considered ineffective for failing to anticipate changes in law).

The reasonableness of trial counsel's failure to object is informed by the legislative history of attempted murder in South Carolina. In 2010, the General Assembly replaced the offense of assault and battery with intent to kill (ABWIK)[1] with the offense of attempted murder and codified ABHAN, along with three other lesser degrees of assault and battery, as a lesser-included offense. S.C. Code Ann. §§ 16-3-29, 16-3-600; see State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) ("[T]he Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the Act)... substantially overhauled the state's criminal law.... Through the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses. In place of these offenses, the Act codifies attempted murder in section 16–3–29..."). It was well-settled that the old crime of ABWIK required only a general intent to kill. State v. Foust, 325 S.C. 12, 14-15, 479 S.E.2d 50, 51 (1996) (for ABWIK, the required finding of "malice aforethought, either express or implied" encompasses a requirement of general intent). However, attempted murder is now defined by statute as: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied[.]" Id. at § 16-3-29. In 2017, the Supreme Court decided State v. King, 422 S.C. 47, 56-57, 810 S.E.2d 18, 23 (2017), aff'g as modified State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), and found "'[T]he

[1] Formerly S.C. Code Ann. §16-3-620.

Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder....'" Moreover, the Supreme Court expressly acknowledged the ambiguity in the statute which required it to issue such a detailed and thorough opinion explaining its interpretation of the required level of intent. Id. at 62, 810 S.E.2d at 25-26 ("While we are convinced this is the correct interpretation, we also acknowledge the ambiguity created by the language in section 16-3-29. . . .").

However, the Court of Appeals' decision was delivered in June 2015 and the Supreme Court's decision in October 2017, years after Applicant's case was tried. At the time of Applicant's trial in 2014, which is the relevant time frame for analysis of counsel's actions under Strickland, the law in South Carolina was not clear as to the required level of intent. If statute was clear as to the required level of intent, the Supreme Court would not have needed to issue a decision explaining what the Legislature meant by its wording. See id. at 64 n. 5, 810 S.E.2d at 27 n. 5 ("[W]e would respectfully suggest to the General Assembly to re-evaluate the language following "malice aforethought" as the inclusion of the word 'implied' in section 16-3-29 *is arguably inconsistent with a specific-intent crime*.") (emphasis added). Further, as evidenced by Justice Kittredge's concurrence, even five justices of our state's Supreme Court could not agree on the appropriate level of intent, and therefore, trial counsel's failure to object to the general-intent instruction was not unreasonable. See id. at 73, 810 S.E.2d at 32 ("If the legislature intended to create a specific intent crime, why did it use verbatim the language of the repealed common law offense of ABWIK that had a settled understanding as a general intent crime?").

The PCR court's order granting relief on this issue is based on an appellate decision issued two years after Brown's trial. Trial counsel can not be found constitutionally ineffective for failing

to predict how appellate courts in this state would interpret an ambiguous and unclear statute more than two years in the future.

Ineffective Assistance of Counsel for Consenting to the Admission of Psychiatric Evaluation Prepared by Non-testifying Witness and Ineffective Assistance of Counsel for Failing to Object to Testimony of Another Doctor about the Report

As discussed above, in a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. 441, 334 S.E.2d 813.

Here, the PCR court found, and this Court agreed, trial counsel should have objected to Dr. Frierson's testimony since he had never examined Brown and could not give a diagnosis, and his testimony was merely "bolstering an unchallenged witness" – the doctor who prepared the report, Shannon Hansen, who was not present at trial. App. pp. 548. Frierson's testimony, however, was not bolstering as it did not vouch for the credibility of anyone else. See State v. Taylor, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) ("Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth. . . ."). Dr. Frierson testified as to the conclusion he helped develop, even if he did not personally examine Brown. Frierson testified he reviewed Brown's medical records, the witness statements from law enforcement, and the social history obtained by a DMH social worker prior to Dr. Hansen's examination. App. pp. 295-298. Additionally, he testified he raised the possibility Brown's head injury could have been the cause of his actions and directed Dr. Hansen to obtain more information from Brown's wife as to what happened at the scene immediately after Brown

was struck on the head. App. pp. 297-98. Dr. Frierson then opined, based on his review of the police reports and the information gathered by Dr. Hansen, he felt there was significant evidence to find Brown "knew what he was doing" and could distinguish right from wrong. App. pp. 297-98. As Dr. Frierson was independently qualified as an expert in psychiatry, this was appropriate testimony. App. pp. 292-93. See Hundley ex rel Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000) (explaining an expert witness "may state an opinion based on facts not within his firsthand knowledge" and "may base his opinion on information, whether admissible or not, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions.").

Finally, the PCR court found, and this Court agreed, trial counsel was also constitutionally ineffective for consenting to the admission of the report itself because Dr. Hansen was not called to testify as a witness at trial. Although the PCR court correctly pointed out much of the information corroborated the defense expert's findings, and she herself directly referred to and testified about the contents of the report during her own testimony – including, notably, Dr. Hansen's debated conclusion that Brown was criminally responsible for his actions – the PCR court nonetheless found trial counsel was deficient and Brown was prejudiced by the report's admission.

The PCR court pointed to two specific reasons for its findings, neither of which are logically supported by the record. First, the PCR court found it significant that "nowhere in her report did Dr. Hansen indicate that she had considered and excluded temporary insanity due to head trauma as a potential diagnosis, and trial counsel could have potentially brought this to the attention of the jury had the report's author been required to testify." App. p. 457. Notably, however, Dr. Frierson addressed this issue in his testimony, stating he directed Dr. Hansen to

consider head trauma as a potential explanation for Brown's behavior and asked her to collect more information in order to make that assessment. App. pp. 297-98. They then jointly concluded head trauma was not a sufficient explanation for his behavior and ruled it out. App. pp. 297-98. All of this was appropriately testified to by Dr. Frierson, so even if trial counsel should have objected to the physical document coming into evidence, Brown was in no way prejudiced by its admission because both experts testified about this issue and discussed the contents of the report at length.

Finally, the PCR court found Brown was prejudiced by the admission of Dr. Hansen's report "particularly. . . in light of the erroneous general-intent instruction and in light of the Assistant Solicitor emphasizing Dr. Hansen's report in his closing." App. p. 548. However, as discussed above, the general-intent instruction was proper at the time, and therefore, it cannot have caused unfair prejudice to Brown. Additionally, the contents of Dr. Hansen's report were testified to by both the defense expert and Dr. Frierson, so even if the physical document had been excluded from evidence, the assistant solicitor could have properly made the same argument. Because of these logical holes in the PCR court's order, its decision granting relief is not supported by the record, and this Court should reconsider its decision affirming the PCR court's grant of relief and reverse that decision.

Conclusion

For the foregoing reasons, Petitioner respectfully requests the Court grant this petition for rehearing and reverse the PCR court's order granting Respondent a new trial.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 4, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to York County
The Honorable Frank F. Addy, Jr., Post-Conviction Relief Judge
The Honorable John C. Hayes, III, Trial Judge
Appellate Case Number 2016-001363

HUBERT BROWN,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Wanda H. Carter, Esquire
wcarter@sccid.sc.gov

This 4th day of June, 2020.

s/ Lindsey A. McCallister
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The South Carolina Court of Appeals

Hubert Brown, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2016-001363

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.

James E. Lockemy C.J.

J.

J.

Columbia, South Carolina

cc:
Lindsey Ann McCallister, Esquire
Wanda H. Carter, Esquire
The Honorable Frank R. Addy, Jr.

FILED
August 19, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hubert Brown, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2016-001363

Appeal From York County
John C. Hayes, III, Trial Judge
Frank R. Addy, Jr., PCR Judge

Unpublished Opinion No. 2020-UP-144
Submitted April 1, 2020 – Filed May 20, 2020
Withdrawn, Substituted, and Refiled August 19, 2020

AFFIRMED

Lindsey Ann McCallister, of Columbia, for Petitioner.

Wanda H. Carter, of Columbia, for Respondent.

PER CURIAM: In July 2013, a jury convicted Hubert Brown of first-degree burglary and attempted murder. The trial judge sentenced Brown to life without parole (LWOP) for each charge. Brown filed a direct appeal and this court affirmed his convictions and sentences. Brown then filed an application for post-conviction relief (PCR), which the PCR court granted following an

evidentiary hearing. This court thereafter granted the State's petition for a writ of certiorari. We now affirm the PCR court's order granting Brown PCR pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the PCR court erred by finding trial counsel was ineffective for failing to object to the trial court's jury charge instructing them that attempted murder required general, rather than specific, intent: *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (holding a reviewing court will uphold the factual findings of the PCR court if there is any evidence of probative value to support them); *id.* ("Questions of law are reviewed de novo, and we will reverse the PCR court's decision when it is controlled by an error of law."); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish a claim of ineffective assistance of counsel, a PCR applicant must show (1) counsel was deficient and (2) counsel's deficiency prejudiced the defendant's case); *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009) ("In reviewing jury charges for error, this [c]ourt must consider the . . . charge as a whole in light of the evidence and issues presented at trial."); *id.* ("If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error."); *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) ("In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution."); S.C. Code Ann. § 16-3-29 (2015) ("A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder."); *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 286 (2000) ("Attempted murder would require the specific intent to kill and conduct towards that end."); *State v. King*, 412 S.C. 403, 409, 772 S.E.2d 189, 192 (Ct. App. 2015) ("Before 2010, our courts held attempt crimes require the State to prove the defendant had specific intent to complete the attempted crime."), *aff'd as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017), and *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019).

2. As to whether the PCR court erred by finding trial counsel was ineffective for consenting to the admission of a psychiatric evaluation prepared by a doctor who did not testify at trial and for failing to object to the testimony of another doctor concerning the contents of that psychiatric evaluation: Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); Rule 803(6), SCRE ("A memorandum, report, record, or data compilation, in any

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Affirmed pursuant to Rule 220(b), SCACR, and the following authorities:

AFFIRMED.[1]

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.