STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

Honorable Kristi F. Curtis, Circuit Court Judge

EARNEST MAURICE ALLEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-002056

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

ISSUES PRESENTED

1. Did the PCR judge err in refusing to find appellate counsel ineffective for not raising the preserved meritorious issue of whether the trial judge erred in instructing the jury that the offense of attempted murder does not require a specific intent to kill?

2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the trial judge's instruction to the jury on attempted murder that malice could be inferred from the use of a deadly when there was evidence presented that would reduce the charge and the judge charged the jury with the lesser included offense of assault and battery of a high and aggravated nature?

STATEMENT

In July of 2013, the Kershaw County Grand Jury indicted Petitioner, Earnest[1] Maurice Allen, for four counts of attempted murder[2], and one count of possession of a firearm during the commission of a violent crime, indictments #2013-GS-28-681-685. (App. pp. 302-313). In August of 2013, the Kershaw County Grand Jury indicted Petitioner for resisting arrest with a deadly weapon, indictment #2013-GS-28-811. (App. pp. 314-315). On January 13, 2014, Petitioner proceeded to jury trial before the Honorable James R. Barber. Jason D. Krincich represented Petitioner at trial. Brett Perry prosecuted the case. At the close of the State's case Judge Barber directed a verdict of acquittal on one of the attempted murder charges, indictment #2013-GS-28-684. (App. p. 220, line 20 – p. 221, lines 1-14). The jury found Petitioner guilty of two counts of attempted murder, one count of the lesser included offense of assault and battery of a high and aggravated nature [ABHAN], possession of a firearm during the commission of a violent crime and resisting arrest with a deadly weapon. Judge Barber sentenced Petitioner to twenty (20) years concurrent for the attempted murder and ABHAN charges, two (2) years concurrent for the resisting arrest with a deadly weapon charge and four (4) years consecutive for possession of a firearm during the commission of a violent crime.

A timely notice of intent to appeal was filed and the direct appeal perfected. Thomas Jarrett Bouchette represented Petitioner on appeal as part of the Appellate Practice Project. On April 6, 2016, the South Carolina Court of Appeals affirmed the convictions and sentences. State v. Allen, Op. No. 2016-UP-135 (S.C. Ct.App. filed April 6, 2016) (App. pp. 433-434). On

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[1] In the indictment Petitioner's first name is spelled "Ernest." During the PCR hearing the judge asked Petitioner about the correct spelling of his name and he confirmed the spelling as "Earnest." (App. p. 573, lines 9-10).

[2] Two of the attempted murder indictments, 2013-GS-28-682 and 683, were amended in September of 2013, to correct the listed jurisdiction from Richland County to Kershaw County.

April 20, 2016, Petitioner filed a *pro se* petition for rehearing. (App. pp. 435-440). On May 3, 2016, the Court of Appeals notified Petitioner that no action would be taken on the *pro se* filing because Petitioner was still represented by counsel. (App. p. 441). Appellate counsel moved to be relieved on May 3, 2016. (App. pp. 442-445). On May 10, 2016, Petitioner refiled the *pro se* petition for rehearing. On July 15, 2016, the Court granted Appellate counsel's motion to be relieved. (App. p. 446). The remittitur issued on July 18, 2016. (App. p. 447). On August 23, 2016, Petitioner moved to have the remittitur recalled. (App. pp. 448-455). On September 9, 2016, the Court of Appeals granted the motion and recalled the remittitur. (App. p. 456). On October 21, 2016, the Court of Appeals denied the *pro se* petition for rehearing. (App. p. 457). On November 18, 2016, Petitioner filed a *pro se* petition for writ of certiorari with the South Carolina Supreme Court. (App. pp. 458-471). The State filed a return on December 28, 2016. (App. pp. 472-488). Petitioner filed a *pro se* response on January 6, 2017. (App. pp. 489-498). On August 25, 2017, the South Carolina Supreme Court denied the petition. (App. p. 499).

On October 13, 2017, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 500-516). The State filed a return on February 15, 2018. (App. pp. 528-534). Once PCR counsel was appointed two amended applications were filed on June 1, 2018, and August 24, 2018. (App. pp. 517-527). An evidentiary hearing was held on February 20, 2019, before the Honorable Kristi F. Curtis. Kristy Grafton Goldberg represented Petitioner at the hearing. Lindsey A. McCallister represented the State. Petitioner filed a memorandum in support of the grant of post-conviction relief on September 11, 2018. (App. pp. 601-611). The State filed a memorandum in opposition to the grant of post-conviction relief on March 26, 2019. (App. pp. 612-622). Petitioner filed a response to the State's memorandum in opposition on April 4, 2019. (App. pp. 623-624). In a written order signed August 30, 2019, Judge Curtis granted relief as to

the ABHAN conviction but denied relief and dismissed the application as to the other convictions. (App. pp. 585-600). On September 30, 2019, Petitioner filed a motion to alter or amend. (App. pp. 625-628). Judge Curtis denied the motion to alter or amend in a written order signed November 25, 2019. (App. pp. 629-630).

A timely notice of intent to appeal was served on December 13, 2019. The petition for writ of certiorari was filed in the South Carolina Supreme Court on July 16, 2020. The return was filed on November 30. 2020. On December 11, 2020, pursuant to Rule 243(1), SCACR, the South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals. On September 19, 2022, the South Carolina Court of Appeals granted the petition for writ of certiorari and ordered briefing as provided by Rule 243(j), SCACR. This brief of petitioner follows.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014))." Smalls v. State, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018).

ARGUMENTS

1. **The PCR judge erred in refusing to find appellate counsel ineffective for not raising the preserved meritorious issue of whether the trial judge erred in instructing the jury that the offense of attempted murder does not require a specific intent to kill.**

During Petitioner's January 2014 trial for various charges including attempted murder, the trial judge instructed the jury, "A specific intent to kill is not an element or attempt – of attempted murder, but there must be a general intent to commit serious bodily injury." (App. p. 268, lines 12 -14). Trial counsel objected to the instruction stating, "As I indicated previously, I do object to the charge of attempted murder with regard to specific intent. Your Honor did read from what you told us you would. I would disagree that specific intent is not an element of attempted murder. I'd ask you to correct that but I understand the Court's position on that. I just make my objection noted." (App. p. 278, lines 3-10). The judge noted the objection but refused to re-charge the jury that attempted murder required a specific intent to kill. (App. p. 278, lines 11-12).

In the initial PCR application Petitioner alleged that, "Appellate counsel was ineffective for failing to raise the issue of 'specific intent to kill not being an element of attempted murder' in the Initial Brief, when it was clearly objected to at trial by trial counsel and preserved for Direct Appeal." (App. p. 507). The same allegation was included in the amended application and the second amended application. (App. p. 518; p. 524).

The initial brief of appellant was filed on January 6, 2015. (App. pp. 321-339). Appellate counsel raised two issues on appeal. Counsel challenged the trial judge's refusal to direct a verdict of acquittal for resisting arrest with a deadly weapon and the trial judge's admission of evidence that Petitioner faced a substantial sentence on the offenses contained in

the arrest warrants the officers attempted to serve. (App. p. 324). The initial brief of respondent was filed on April 22, 2015, the same day the South Carolina Court of Appeals decided 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), and overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). (App. pp. 340-371). At this time, Appellate counsel failed to file a motion to amend the initial brief to include a challenge to the trial judge's refusal to instruct the jury that attempted murder required a specific intent to kill, pursuant to King.

The final brief was filed on July 16, 2015. (App. pp. 372-390). The Court of Appeals heard argument in this case on February 2, 2016. On February 24, 2016, after the filing of the briefs and oral argument, appellate counsel filed a motion to supplement the final brief and address the specific intent to kill issue addressed in King. (App. pp. 421-424). On February 29, 2016, the State filed a return. (App. pp. 425-431). On March 28, 2016, the Court of Appeals denied the motion to supplement the final brief. (App. p. 432). On April 6, 2016, the Court of Appeals, in an unpublished opinion, affirmed Petitioner's convictions. State v. Allen, Op. No. 2016-UP-135 (S.C. Ct.App. filed April 6, 2016). (App. pp. 433-434).

Petitioner filed a *pro se* petition for rehearing that was denied. (App. pp 435-441). Petitioner then filed a *pro se* petition for writ of certiorari that was also denied. (App. pp. 458-471). In both the petition for rehearing and the petition for writ of certiorari Petitioner sought relief based on the judge's erroneous instruction to the jury that attempted murder did not require a specific intent to kill.

During the PCR hearing appellate counsel testified:

> After the oral argument was made – I don't remember if it was a letter from a family member, but some way, shape or form I got a correspondence that was wanting to draw my attention to an appellate case – I think it was State v. King – that – that case was decided after the – certainly after the briefs were submitted,

> but I don't recall if it was decided before the oral argument, but that case addressed or established what had not been previously established because it related to the attempted murder statute, and that was not something that had been directly addressed in the brief, so I didn't feel like the rule that basically, where you supplement a case citation was appropriate, but we had to file a motion to ask the appellate court to say you've not decided on this issue, we're asking based on the newly decided case law to supplement the briefs and evaluate this issue in conjunction with what we've already sent in.

(App. p. 556, lines 6-23). Appellate counsel agreed that the statute addressing attempted murder, S.C. Code Ann. § 16-3-29, includes the "intent to kill language." (App. p. 558, lines 12-18). When asked why he did not raise the issue, appellate counsel testified:

> You know, I don't recall. I think in – as I was trying to prepare for today, I was looking at – I forget what exactly the Court's position was on that, and I think there may have been some reliance on the case law that had been decided, maybe under the previous statute and some interpretations from there, but as I was going through it, you know, my – whatever the arguments were, it seemed to me at the time that the Court's ruling – it just – it seemed to match up, and I didn't see it as an appellate issue, at least at that time.

(App. p. 558, line 19 – p. 559, lines 1-5).

In the order of dismissal the PCR judge wrote:

> Case law prior to the 2010 amendment to the statute supported the general intent charge. See 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, 52 (1996) (for ABWIK, the required finding of "malice aforethought, either express or implied," encompasses a requirement of general intent). Moreover, at the time of Applicant's trial and appeal in 2014 and 2015, respectively, South Carolina law was unclear as to the level of intent required for attempted murder, especially given the conflicting language of the statute.

The PCR judge erred in relying on case law prior to 2010. Case law prior to 2010, only supported the general intent charge with regard to assault and battery with intent to kill, not attempted murder. Reliance in the order of dismissal on case law prior to the 2010 passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, substantially overhauling the state's criminal law, is misplaced. The offense of attempted murder was not codified until

passage of the 2010 Act. "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 and four degrees of assault and battery in section 16–3–600. *See* S.C.Code Ann. §§ 16–3–29 & 16–3–600 (Supp.2012)." State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). The cases cited in the order of dismissal, State v. Kinard, 373 S.C. 500, 646 S.E.2d 168, (Ct.App. 2007) and State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996), involved assault and battery with intent to kill, an offense abolished by the 2010 Act.

As to the status of the law on to the level of intent required for attempted murder at the time of Petitioner's trial and appeal in 2014 and 2015, respectively, it is clear that trial counsel objected to the general intent charge at the time of trial in 2014. After the filing of the initial brief but before the filing of the final brief and arguments in the present case the South Carolina Court of Appeals decided 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), and overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). In King the Court of Appeals wrote, "We find 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." State v. King, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017), and overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). The South Carolina Supreme Court affirmed, as modified, the finding by the Court of Appeals writing, "Considering the legislative history as a whole, we conclude that section 16-3-29 is not a codification of the offense of ABWIK. We find the General Assembly expressly repealed the offense of ABWIK and purposefully created the new offense of attempted

murder, which includes a "specific intent to kill" as an element." State v. King, 422 S.C. 47, 63–64, 810 S.E.2d 18, 26–27 (2017) (n. #5 omitted).

While the King cases were decided after Petitioner's convictions at trial and the submission of the initial briefs on appeal, **trial** counsel recognized that attempted murder required an attempt to kill and **trial** counsel objected to the general intent instruction given preserving the issue for appellate review. During the motions for directed verdicts trial counsel argued, "It's my position that attempted murder under the new statute for whatever reason the legislature made it probably more restrictive than our murder statute because they added that phrase in there, with intent to kill." (App. p. 217, lines 20-24). Trial counsel then argued that the State failed to present any evidence that Petitioner had the intent to kill Captain Corey and Investigator Bailey. (App. p. 217, line 24 – p. 218, lines 1-2). The trial judge agreed with regard to the attempted murder of Captain Corey and the judge directed a verdict of acquittal on that attempted murder charge. (App. p. 220, line 20 – p. 221, lines 1-14). The fact that trial counsel recognized that the new attempted murder statute requires an intent to kill combined with the "conflicting" language of the statute, as referenced in the order of dismissal, support the fact that appellate counsel should have raised the issue instead of abandoning the issue. S.C. Code Ann. § 16-3-29 provides that, "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. A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years. A sentence imposed pursuant to this section may not be suspended nor may probation be granted." The South Carolina Supreme Court in King acknowledged the ambiguity within the statute and wrote:

> Additionally, it is necessary to address both parts of section 16-3-29 as it demonstrates that the General Assembly created the offense of attempted murder

> by purposefully adding the language "with intent to kill" to "malice aforethought, either express or implied" to require a higher level of *mens rea* for attempted murder than that of murder. Moreover, the addition of the "with intent to kill" language effectively negates the State's claim that the General Assembly merely codified ABWIK. Because our case law, particularly *Foust*, establishes "malice aforethought" as the required mental state for ABWIK, the additional language of "with intent to kill" clearly elevates the required mental state above a general-intent crime.

King, 422 S.C. at 61, 810 S.E.2d at 25. As noted in response to the State's motion in opposition to post-conviction relief, "The State's assertion in their Memorandum that the law at the time 'was not clear as to the required level of intent [for attempted murder]' is precisely the reason that Appellate counsel should be expected to raise such a legal argument. The King case shows that the argument would have been meritorious." (App. p. 623). Appellate counsel was ineffective in abandoning the meritorious issue.

The order of dismissal further states:

> Appellate counsel testified he researched the issue and did not find any cases directly supporting the argument for a specific-intent instruction. He also testified if the decision in King had come out prior to the submission of his initial brief, he would have raised the issue. Thus, this Court finds Appellate counsel's decision not to raise the issue was not based on neglect, but rather was a considered choice based on his professional judgement, made after researching the law *as it existed at the time*.

(App. p. 595).

The PCR judge overlooked the fact that case law existed at the time of trial to support the argument that attempted murder requires a specific intent to kill. Prior to the King decisions and prior to Petitioner's trial and prior to submission of the initial briefs the South Carolina Supreme Court in State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000), wrote:

> In general, "[a]ttempt is a specific intent crime." 21 Am.Jur.2d Criminal Law § 176 (1998). "The act constituting the attempt must be done with the intent to commit that particular crime." Id. See also Wharton's Criminal Law Attempt §§ 694-695 (1996)("To constitute an attempt, there must be an intent to commit a particular crime ... Although a murder may be committed without an intent to kill,

> an attempt to commit murder requires a specific intent to kill.")[5] In the context of an "attempt" crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose. United States v. Calloway, 116 F.3d 1129 (6th Cir.1997). Attempted murder would require the specific intent to kill and conduct towards that end. ABIK requires an unlawful act of violence to the person of another with malice. Clearly, each offense has an element the other does not. However, simply because convictions for both offenses would not violate double jeopardy, we are not constrained to recognize the offense of attempted murder.

Appellate counsel was ineffective in failing to argue, based on the Sutton case and general laws of statutory construction discussed in King, that attempted murder requires a specific intent to kill.

Finally the order states, "Furthermore, as discussed more fully below, the Court finds Applicant was not prejudiced because the State presented significant evidence of specific intent, at least as it relates to the officers who were the victims in two counts for which Applicant was actually convicted of attempted murder. Testimony at trial established Applicant stopped his flight, turned around, and fired multiple shots in the direction of pursuing officers. Trial Tr. pp 102, 108-09, 138-39, 153, 161-62." (App. p. 596). The PCR judge erred.

The PCR judge erred in finding that Petitioner was not prejudiced by the deficient performance of appellate counsel. The attempted murder charges in the present case were the result of Petitioner fleeing from the police who were trying to serve arrest warrants for Petitioner. Petitioner testified at the PCR hearing that he believed he was guilty of assault and battery first degree, not attempted murder. (App. p. 569, lines 1-3). None of the police officers were injured. The trial judge charged the jury on the lesser included offense of assault and battery of a high

and aggravated nature [ABHAN] for the three attempted murder charges that went to the jury.[3] (App. p. 269, line 3 – p. 270, lines 1-15). The jury found Petitioner guilty of the lesser included charge of ABHAN on the one attempted murder charges involving Investigator Bailey, indictment #2013-GS-28-0683, although that offense was reversed by the PCR judge. (App. pp. 585-600). Based on the facts of this case, there is a reasonable probability that, but for appellate counsel's deficient performance, the outcome of the proceeding would have been different. The error was not harmless as it diluted the State's burden of proof by omitting the specific intent to kill element of attempted murder. As the Court found in King, the error is not harmless.

In the context of direct appeal, the South Carolina Supreme Court in In State v. Burdette, 427 S.C. 490, 496, 832 S.E.2d 575, 578–79 (2019), addressing an erroneous inferred malice charge as discussed below is issue two, wrote:

> An erroneous instruction alone is insufficient to warrant this Court's reversal. "Errors, including erroneous jury instructions, are subject to harmless error analysis." Belcher, 385 S.C. at 611, 685 S.E.2d at 809. "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.' " State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Id. (quoting Kerr, 330 S.C. at 145, 498 S.E.2d at 218).

The standard for determining harmless error in the context of an erroneous jury instruction is whether *beyond a reasonable doubt* the erroneous instruction did not contribute to the verdict. The error in the present case was not harmless.

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[3] During the PCR hearing the State conceded that trial counsel was ineffective in requesting the lesser included offense of ABHAN rather than assault and battery first degree because there were no injuries. (App. p. 540, lines 1-7).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Addressing ineffective assistance of appellate counsel the South Carolina Supreme Court in Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (n. #6 omitted), wrote:

> A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). However, counsel is not required to raise every non-frivolous claim, but may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).
>
> Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance.

In Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999)(n. #6 omitted), the South Carolina Supreme Court wrote:

> The standard established by Strickland is that the defendant must establish by a reasonable probability that the result of the **proceeding** would have been different. Strickland, supra; Evitts v. Lucey, supra; Smith v. State , 309 S.C. 413, 424 S.E.2d 480, 481 (1992) (petitioner must prove there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the **proceeding** would have been different"). See also People v. Griffin, 178 Ill.2d 65, 227 Ill.Dec. 338, 687 N.E.2d 820 (1997) (defendant who contends appellate counsel rendered ineffective assistance, e.g., by failing to argue issue, must show that failure to raise issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have reversed).[6]

Appellate counsel was ineffective in failing to raise the preserved meritorious issue of whether the trial judge erred in instructing the jury that the offense of attempted murder does not require a specific intent to kill. Petitioner was prejudiced by the deficient performance of appellate counsel. There is a reasonable probability that, but for the deficient performance of appellate counsel, the result of the proceeding would have been different.

In State v. Burdette, 427 S.C. 490, 498, 832 S.E.2d 575, 580 (2019), the South Carolina Supreme wrote, "When considering whether an incorrect jury instruction constitutes harmless error, we are required to review the trial court's charge to the jury in its entirety. See Stanko, 402 S.C. at 264, 741 S.E.2d at 714 ("Jury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error.")."

If appellate counsel had raised the judge's refusal to instruct the jury that attempted murder requires a specific intent to kill on appeal, the appellate court would have viewed the jury charge in its entirety. In addition to the trial judge refusing to instruct the jury that attempted murder required a specific intent to kill, the trial judge also instructed the jury that malice could be inferred from the use of a deadly weapon, as discussed in issue two below. S.C. Code § 16-

3-29 provides, "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." Attempted murder requires both a specific intent to kill and malice. Viewing the charge on attempted murder as a whole, the refusal of the trial judge to instruct the jury that jury that attempted murder requires a specific intent to kill was not harmless. Petitioner was prejudiced by the deficient performance of appellate counsel in failing to raise the meritorious issue. There is a reasonable probability that, but for appellate counsel's deficient performance, the result of the proceedings would have been different

The remedy in the present case is a new trial. In Ezell v. State, 345 S.C. 312, 315–16, 548 S.E.2d 852, 853–54 (2001) (n. # 3 omitted), the South Carolina Supreme Court wrote:

> The determination of the appropriate remedy is controlled by Southerland v. State, supra. This Court, in Southerland, stated the following:
>
> A defendant is constitutionally entitled to the effective assistance of appellate counsel.... First, the burden of proof is on petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. Second, the petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the **proceeding** would have been different.
>
> Southerland, 337 S.C. at 615-616, 524 S.E.2d at 836 (citations omitted) (emphasis in original). Here, we conclude the result of respondent's appeal would have been different had counsel submitted the audio tape to the Court of Appeals. Therefore, based on Southerland, the appropriate remedy for the ineffective assistance of appellate counsel on the particular facts of this case is to grant respondent a new trial.

In the present case the result of Petitioner's appeal would have been different had appellate counsel raised the issue of the trial judge's refusal to instruct the jury that attempted murder requires a specific intent to kill. The PCR judge erred in refusing to grant a new trial based on the ineffective assistance of appellate counsel.

2. **The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the trial judge's instruction to the jury on attempted murder that malice could be inferred from the use of a deadly when there was evidence presented that would reduce the charge and the judge charged the jury with the lesser included offense of assault and battery of a high and aggravated nature.**

During the instruction on attempted murder the judge told the jury, "Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon." (App. p. 268, lines 9-12). Trial counsel did not object. In the second amended application Petitioner alleged that, "Trial counsel was ineffective for failing to object when the Court charged the jury that '[i]nferred malice may also arise when the deed is done with a deadly weapon.' (Transcript page 268)." (App. p. 524).

When trial counsel was questioned about the failure to object to the implied malice charge during the PCR hearing he testified, "Yeah. I didn't think Belcher applied to this case. Belcher, from what I remember, dealt more with mitigating circumstances, such as self-defense or the like. We didn't have anything to mitigate in this particular case. At least I did not think Belcher lined up, and we didn't have any mitigation that would defeat this malice inference from use of a deadly weapon." (App. p. 549, lines 8-14). Trial counsel admitted, however, that there was evidence from which a jury could find Petitioner guilty of the lesser included offense of assault and battery first degree. (App. p. 549, line 15- p. 550, lines 1-10).

The judge charged the jury with the lesser included offense of ABHAN. (App. p .269, line 3 – p. 270, lines 1-15). While this was error because ABHAN requires an injury, See State v. Middleton, 407 S.C. 312, 755 S.E.2d 432, (2014), it demonstrates that charging assault and battery first degree, a lesser included offense not requiring an injury, would be proper. The jury found Petitioner guilty of the lesser included offense as to one of the attempted murder charges.

There was evidence presented at trial from which a jury could find Petitioner guilty of the lesser included offense.

In the order of dismissal the PCR judge wrote:

> Applicant also argues Belcher required counsel to object. 385 S.C. 597, 685 S.E.2d 802 (2009) (holding jury charges instructing malice may be inferred from the use of a deadly weapon are improper where evidence is presented that would reduce, mitigate, excuse or justify the homicide). However, Trial Counsel testified he felt Belcher was not applicable to Applicant's case as there was no evidence of self-defense or other mitigation factors. This Court agrees, at least as far as the two attempted murder convictions. The evidence presented at trial clearly showed Applicant fled from officers attempting a valid traffic stop and fired multiple shots at the officers closest to him. Applicant himself admitted he had to stop and turn to face the two officers in order to fire at them. Therefore, the Court agrees there was no evidence to reduce or mitigate the attempted murder charge, at least to the two officers who were closest to Applicant. Therefore, the Court finds Trial Counsel was not deficient in failing to object to this instruction for the two counts of attempted murder which resulted in a conviction as indicted.

(App. pp. 597-598). The PCR judge erred in finding there was no evidence to reduce or mitigate the attempted murder charge. There was evidence that Petitioner committed the lesser included offense of assault and battery first degree.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland,

466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In the present case trial counsel was ineffective in failing to object to the implied malice charge. In State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009), overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the South Carolina Supreme Court wrote:

> Today we return to the rationale underlying Hopkins, Levelle and Jackson and hold that where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon.[9] The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill).

While in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the South Carolina Supreme Court held that regardless of the evidence presented at trial, trial courts shall not instruct the jury that the element of malice may be inferred when the deed is done with a deadly weapon, Belcher was the law at the time of Petitioner's 2014 trial. There was evidence that could have reduced the charge from attempted murder to assault and battery first degree. The judge erred in giving the implied malice instruction.

Assault and battery first degree is defined by S.C. Code §16-3-600 which provides:

> (C)(1) A person commits the offense of assault and battery in the first degree if the person unlawfully:
>
> (a) injures another person, and the act:
> (i) involves nonconsensual touching of the private parts ... with lewd and lascivious intent; or

(ii) occurred during the commission of a robbery, burglary, kidnapping, or theft, **or**

(b) offers or attempts to injure another person with the present ability to do so, and the act:
(i) is accomplished by means likely to produce death or great bodily injury; or
(ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

S.C. Code §16-3-600(C)(3) provides, "Assault and battery in the first degree is a lesser-included offense of assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29." There is evidence in the record from which the jury could have determined that Petitioner committed the lesser included offense of assault and battery first degree by attempting to injure the officers with the present ability to do so, and the act was accomplished by means likely to produce death or great bodily injury pursuant to S.C. Code §16-3-600(C)(1)(b)(i). Trial counsel was ineffective in failing to object to the inferred malice instruction.

Petitioner was prejudiced by the ineffective assistance of trial counsel. In order to prove attempted murder the State had to prove that Petitioner acted with malice. S.C. Code §16-3-29 provides, "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." Instructing the jury that malice could be inferred from the use of a deadly weapon diluted the State's burden of proof as to the malice element of attempted murder. The jury should have decided if malice existed without the erroneous inference.

In the context of direct appeal this Court in State v. Campbell, 435 S.C. 528, 537, 868 S.E.2d 414, 419 (Ct. App. 2021), cert. granted (Sept. 8, 2022), wrote:

> An erroneous instruction alone is insufficient to warrant this [c]ourt's reversal." Id. at 496, 832 S.E.2d at 578. "[E]rroneous jury instructions are subject to a harmless error analysis." State v. Smith, 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020). "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error

> complained of did not contribute to the verdict.' " Burdette, 427 S.C. at 496, 832 S.E.2d at 578 (quoting State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Id. at 496, 832 S.E.2d at 578-79 (quoting State v. Kerr, 330 S.C. 132, 145, 498 S.E.2d 212, 218 (Ct. App. 1998)).

The standard for determining harmless error in the context of an erroneous jury instruction is whether *beyond a reasonable doubt* the erroneous instruction did not contribute to the verdict. See Burdette. In Campbell this Court found that the trial judge committed reversible error by giving both an inferred malice charge and an accomplice liability charge. Campbell was charged with murder and two counts of attempted murder. This Court rejected the State's argument in Campbell that any error in giving the inferred malice charge was harmless because the jury could find express malice based on a prior altercation, driving across town and fourteen rounds fired into an apartment. This Court distinguished Campbell from State v. Brooks, 428 S.C. 618, 837 S.E.2d 236 (Ct. App. 2019), finding the evidence of express malice was significantly less than in Brooks. The evidence of express malice in the present case is less than in Campbell. The erroneous charge contributed to the verdict in the present case. The error is compounded by the fact that the jury was not instructed that attempted murder required a specific intent to kill, as discussed in issue one above. The error is not harmless.

The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the inference of malice charge. There is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. The error requires reversal.

CONCLUSION

Based on the above arguments, this Court should reverse the two attempted murder charges and the possession of a firearm during the commission of a violent crime and remand for a new trial.

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This 19th day of October, 2022.