STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Grace Gilchrist Knie, Circuit Court Judge

MAURICE ROBERTS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000652

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUES PRESENTED

1.

Whether the PCR court erred where it denied post-conviction relief where counsel asked Major Smith if he believed Petitioner's codefendants were credible witnesses, and where Major Smith said he did believe the codefendants were credible, since credibility is a matter for the jury, and since Petitioner was prejudiced by the improper testimony?

2.

Whether the PCR court erred where it denied post-conviction relief where counsel did not object to a jury instruction that specific intent to kill was not an element of attempted murder, since attempted murder required proof of a specific intent to kill, and since Petitioner was prejudiced by the improper instruction?

STATEMENT

On February 13, 2013, a Richland County Grand Jury indicted Maurice Roberts, Petitioner, for murder, first-degree burglary, two counts of attempted murder, and attempted armed robbery. App. 1058 – 1067. Petitioner was tried before the Honorable Doyet Early, III, and a jury, from February 24 – 28, 2014. Petitioner was represented by Tivis Sutherland. Luck Campbell, Nicole Simpson, and Meghan Walker represented the State. App. 1.

Petitioner stood accused of participating in a burglary gone wrong with three other men: Demetrice James, Deshawn McClary, and Vincent Nelson. The case involved the death of Brandon Jones (Decedent), and the wounding of Trenton Scott and Joshua Williams. App. 1058 – 1067; App. 202, l. 16 – 205, l. 2.

The State alleged that at approximately 10:00 p.m. on January 25, 2013, Trenton Scott and Troy Scott were in their parents' basement with friends Joshua Williams and Decedent. The Scotts had music recording equipment in the basement and Decedent was recording music that night. Vincent Nelson, a friend of the family known as "J School," came over unexpectedly and was let in by the Scotts' stepfather. App. 232, l. 21 – 234, l. 7; App. 330, ll. 10-24. Joshua Williams and the Scott brothers thought Vincent Nelson's behavior was "odd." Nelson was on the phone a lot, which was strange because Nelson did not have his own phone. Nelson also paced and repeatedly asked Decedent to come outside and smoke a cigarette. Eventually, Decedent went outside with Nelson and Joshua Williams to smoke. App. 331, l. 2 – 332, l. 1; App. 233, l. 16 – 238, l. 5; App. 442, l. 11 – 447, l. 19.

While they were outside, three strangers walked by several times before coming up to them. One of the strangers had a gun. According to Joshua Williams, the gunman pistol-whipped him and demanded keys from Decedent and from Vincent Nelson. According to Joshua

Williams, Vincent Nelson said the keys were in the house. Joshua Williams claimed the gunman went into the house and the two remaining suspects beat him. Joshua Williams alleged he heard Decedent begging not to be shot. Williams did not identify any of the suspects. Williams was shot in the side during the melee. App. 232, l. 21 – 244, l. 19.

Decedent was shot five times, with fatal wounds to his lungs and liver. App. 636, l. 9 – 641, l. 23. The wounds could have been inflicted by someone standing over him, according to the forensic pathologist who autopsied Decedent's body. App. 644, ll. 11-14.

According to Trenton Scott, a gunman ran into his basement, pointed the gun at him, and pistol-whipped him. Trenton Scott alleged he punched the gunman and the gunman dropped the gun. Trenton Scott and the gunman scuffled for the gun before a second suspect came inside and grabbed the gun. Two suspects tried to get further inside the house and Trenton Scott tried to barricade the door. The three men struggled, and the second suspect fired a shot through the open door, hitting Trenton Scott in the arm. Trenton Scott ran upstairs and heard five more shots. App. 332, l. 12 – 342, l. 25; App. 452, ll. 10-13.

Trenton Scott identified Petitioner as the gunman who pistol-whipped him after chasing Decedent in at gunpoint. Trenton Scott identified Demetrice James as the second suspect, who picked up the gun during the scuffle and shot him (Trenton Scott) through the doorway. App. 347, l. 1 – 353, l. 15. Trenton Scott's brother Troy Scott also identified Petitioner as the person he saw scuffling with Trenton. Troy Scott also identified Demetrice James has the person he saw with a gun. App. 459, l. 1 – 461, l. 21.

Petitioner's codefendants (Demetrice James, Deshawn McClary, and Vincent Nelson) testified against him at trial. Codefendant Demetrice James claimed he, Petitioner, and Deshawn McClary went to meet up with Vincent Nelson. Demetrice James claimed Petitioner ran towards

the men who were outside the Scott's house (Nelson, Decedent, and Joshua Williams) and he claimed Petitioner got in a fight. According to James, he went to help Petitioner and they were pulled into the house. James alleged Petitioner brandished a gun which went off twice during the scuffle. James claimed he ran outside and when he looked back, he saw Petitioner standing over Decedent, and he saw Petitioner shoot Decedent while Decedent was on the ground. App. 487, l. 21 – 496, l. 8. Finally, James claimed Petitioner threatened his father while the two were inexplicably being transported to the courthouse together. App. 506, ll. 8-23.

According to James, he had no intent to commit any crimes and was simply in the wrong place at the wrong time. James had a juvenile adjudication for carrying a weapon on school grounds, and faced the pending charges in this case. James also faced pending charges in additional cases of kidnapping, armed robbery, first-degree criminal sexual conduct, possession with intent to distribute marijuana, and possession with intent to distribute marijuana in proximity of a school. App. 508, l. 14 – 510, l. 24. Demetrice James did not have a plea offer but hoped his testimony would "help him out down the road." App. 503, l. 8 – 505, l. 19.

Codefendant Vincent Nelson had just pleaded guilty to a reduced charge of voluntary manslaughter, as well as first-degree burglary, attempted armed robbery, and two counts of attempted murder. His sentencing was deferred and contingent upon "truthful" testimony at Petitioner's trial. App. 515, l. 2 – 516, l. 22. Nelson was a reticent witness who consulted his attorney during his testimony and did not answer a number of questions posed to him by the solicitor. *See* App. 524, l. 3 – 527, l. 25. Nelson had told police that he took part in the attempted studio robbery, and he claimed Petitioner lent him a phone for his role. App. 528, l. 8 – 530, l. 14. Nelson claimed that after contact with Petitioner by phone, he went outside the Scotts' house with Joshua Williams and Decedent. According to Nelson, Petitioner came up to them with a .45

caliber gun and hit Decedent. Nelson alleged Petitioner and Demetrice James attempted to get into the house, but Nelson ran away. Nelson claimed he heard shots and heard either McClary or James yell, "Get that [expletive]". Nelson also claimed he later saw Petitioner put bleach on his clothes, and he claimed Petitioner told him not to "talk to anybody" about what happened. App. 534, l. 4 – 554, l. 7.

Codefendant Deshawn McClary, whose charges were still pending, testified he was part of a burglary plan with Petitioner, Demetrice James, and Vincent Nelson. McClary claimed he was the lookout, that Petitioner had a gun, and that after Petitioner and James ran back out of the house, he saw Petitioner standing over Decedent shooting him. App. 668, l. 5 – 677, l. 24. Deshawn McClary had a strong arm robbery conviction and pending charges for these offenses. McClary also faced unrelated charges of armed robbery, kidnapping, and third-degree criminal sexual conduct. App. 685, l. 9 – 687, l. 24.

Petitioner was interrogated by police and initially denied involvement. However, eventually the State alleged Petitioner confessed to being part of a "lick" at the "studio". According to Officer McDonald, Petitioner said he was part of the burglary but denied having a gun. McDonald alleged Petitioner claimed an unidentified man called "600"[1] was the gunman. McDonald also claimed Petitioner said his clothing was stained with bleach while cleaning dishes. App. 738, l. 21 – 744, l. 13. Petitioner's alleged confession was not video or audio recorded despite the availability of that technology in 2013. App. 760, l. 18 – 762, l. 1.

Officer McDonald observed that Petitioner had a black eye. App. 745, ll. 8-17. McDonald also read into the record text messages between Petitioner's phone (allegedly possessed by

[1] References to "600" came up a number of times during the trial. For example, Joshua Williams said he heard someone yell, "600 don't do it" just before shots were fired, and Jwuan Duckett told police that he, Petitioner, James, McClary, and Nelson were part of a rap group called "600." App. 243, ll. 16-19; App. 403, ll. 6-14; App. 432, l. 22 – 433, l. 20.

Vincent Nelson at the time of the events) and Deshawn McClary's phone which included, "Come on. I got two outside." And, "On the way," in response. App. 751, l. 4 – 752, l. 15. Although the court found Petitioner's confession was admissible, Officer McDonald admitted that when explaining Petitioner's *Miranda*[2] rights to him and the meaning of the word coercion, he told Petitioner, "I'm not putting a gun to your head to make you talk today." App. 760, ll. 8-17.

Other evidence introduced at trial included the testimony of Jwuan Duckett, who claimed he heard Petitioner and Vincent Nelson discussing plans to burglarize a home to obtain studio equipment. App. 408, l. 8 – 409, l. 25. Duckett also claimed Petitioner asked him to pull up a local news website the day after the incident. App. 426, l. 18 – 427, l. 17. However, Jwuan Duckett had prior convictions and/or adjudications for possession with intent to distribute cocaine, resisting arrest, receiving stolen goods, second-degree burglary, petit larceny, and purse snatching. App. 427, l. 20 – 428, l. 18. Authorities found clothing with bleach on it behind Petitioner's apartment complex. App. 744, ll. 14-18; App. 435, l. 17 – 438, l. 17. Shell casings that were .45 caliber were found at the crime scene. App. 569, l. 5 – 571, l. 7.

At the close of the State's case, it presented the testimony of Major James Smith, the supervisor of the criminal investigation division at the Richland County Sherriff's Department. Major Smith was an impressive witness who had been in law enforcement for thirty years. App. 799, l. 25 – 800, l. 12. The solicitor asked Major Smith which person the "credible evidence" pointed to as being the shooter, and Smith said it pointed to Petitioner. Defense counsel did not object, and the question was likely unobjectionable since the solicitor asked Major Smith about credible evidence instead of credible testimony. App. 810, ll. 1-2. However, on cross-

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

examination counsel delved specifically into whether Major Smith thought credible witnesses pointed to Petitioner being the shooter, and even seemed to concede Smith was correct that Petitioner's codefendants were credible witnesses.

> Q. [T]he credible evidence points to Maurice as shooting outside?
>
> A. Yes.
>
> Q. And that's—those fellows right there, Deshawn McClary, Demetrice James, and Vincent Nelson—
>
> A. I believe they all indicate that.
>
> Q. Okay, and so they're credible to you?
>
> A. In this particular instance they are, yes, sir.
>
> Q. Okay. Fair enough.
>
> A. They all defined their involvement. Demetrice James—

App. 810, l. 16 – 811, l. 1.

The court stopped Major Smith and *sua sponte* stated, "All right. Hold, Hold on one second. Let's—listen, fellows, ladies. This jury determines the credibility of the witnesses. Not the witnesses. So, that is y'all's sole responsibility to determine who's telling the truth. Not this witness. So, move on to another area." App. 811, ll. 2-6. However, the court did not instruct the jury to disregard Major Smith's testimony.

The State rested and the defense did not put up a case. App. 811, l. 23 – 818, l. 6. During the charge conference, the solicitor asked that the jury be charged that specific intent to kill is not an element of attempted murder, and defense counsel had no objection. App. 914 – 916, l. 20; App. 831, ll. 2-2. The court therefore instructed the jury,

> Dealing with the offense of attempted murder, a specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury. A specific intent to

> kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury.

App. 917, ll. 9-14.

The jury deliberated for about an hour and a half before it convicted Petitioner as indicted. App. 920, l. 6 – 922, l. 18.

After he exhausted his direct appeal remedies, on July 26, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 939 – 944. On May 14, 2018, the State made its return, partial motion to dismiss, and motion for a more definite statement. App. 945 – 960. On March 24, 2022, Petitioner amended his application. App. 961. On March 28, 2022, a hearing was held on the matter before the Honorable Grace G. Knie. Jonathan Waller represented Petitioner. David Spencer represented the State. App. 962.

Trial counsel claimed he asked Major Smith if Smith believed the witnesses against Petitioner were credible to "tak[e] a dig at" Smith. Surprisingly, counsel claimed he did not expect Major Smith to answer the question. "I wasn't expecting a sincere answer from him or an answer at all really." App. 1007, l. 14 – 1008, l. 8. However, counsel admitted he should not have asked the questions. App. 1019, l. 14 – 1021, l. 9.

Trial counsel testified that he did not object to the jury instruction that specific intent was not an element of attempted murder because he (incorrectly) thought attempted murder had the same elements as the already-repealed offense of assault and battery with intent to kill. App. 1001, l. 21 – 1002, l. 7. "[W]hat was your understanding of attempted murder at the time[?]" App. 1001, ll. 22-25. "At the time I will say it must have been it was just ABIK. You know, the old ABIK . . ." App. 1002, ll. 5-7.

On May 5, 2022, the PCR court issued an order of dismissal. App. 1043 – 1057. The order of dismissal addressed Petitioner's claim that counsel was deficient in his cross-

examination of Major Smith about the codefendants' credibility. App. 1053 – 1054. The order of dismissal concluded that counsel exercised a "reasonable trial strategy," since "This Court finds 'and so they're credible to you?' is clearly a rhetorical question that is calculated to undermine the prosecution by focusing on the prosecution's dependence on co-defendants the jury might find unsavory in character." App. 1054. The order also noted that the trial court "provided a curative instruction" and so, "Neither prong of *Strickland*[3] was proved." App. 1054.

The order of dismissal also addressed Petitioner's claim that counsel's performance was deficient when he failed to object to a jury instruction that only a general intent was required for attempted murder. 1054 – 1056. The order noted that the trial occurred in 2014, which was prior to either the Court of Appeals 2015 decision in *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015) or this Court's 2017 decision in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), decisions that concluded specific intent to kill was an element of attempted murder. App. 1054. The order noted that counsel was not required to be "clairvoyant" or to "foresee successful appellate challenges to novel questions of law." App. 1055. The order cited to Justice Kittredge's concurrence in *King* as proof that "counsel's failure to object to the general intent language does not fall below professional norms."[4] App. 1055 – 1056. The order of dismissal also concluded that Petitioner was not prejudiced "in light of the overwhelming evidence of guilt." App. 1056.

As seen, at trial, Petitioner was convicted and sentenced to serve concurrent terms of imprisonment of forty-five years for murder, forty-five years for first-degree burglary, thirty

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[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

[4] Justice Kittredge concurred in result in *King*, and concluded that the attempted murder statute "represents the codification of the common law offense of ABWIK," and "that a specific intent to kill is not an element of the offense of attempted murder[.]" *King*, 422 S.C. at 73, 810 S.E.2d at 32 (Kittredge, J., concurring in result).

years for each count of attempted murder, and twenty years for attempted armed robbery. App. 1068 – 1072; App. 937, ll. 6-18.

This petition for writ of certiorari follows.

ARGUMENT

1.

The PCR court erred where it denied post-conviction relief where counsel asked Major Smith if he believed Petitioner's codefendants were credible witnesses, and where Major Smith said he did believe the codefendants were credible, since credibility is a matter for the jury, and since Petitioner was prejudiced by the improper testimony.

Counsel's performance was deficient since he elicited damaging testimony that was otherwise inadmissible. Petitioner's codefendants—Vincent Nelson, Demetrice James, and Deshawn McClary—all had serious credibility problems, but Major Smith, an impressive prosecution witness, opined that he found the witnesses to be credible.

Deficiency

Absent counsel's deficient performance Major Smith would not have been permitted to opine on the credibility of witnesses. "[T]he credibility of a witness is exclusively for the jury to decide." *State v. Reyes*, 432 S.C. 394, 401, 853 S.E.2d 334, 338 (2020). "[W]itnesses are generally not allowed to testify whether another witness is telling the truth." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). "Similarly, witnesses may not improperly bolster the testimony of other witnesses." *Id. See also Tappeiner v. State*, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016) (assessment of witness credibility is within the exclusive province of the jury); *State v. Kromah*, 401 S.C. 340, 358–59, 737 S.E.2d 490, 500 (2013) (it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter); *Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (asking one witness to comment on truthfulness of adverse witness is improper argumentative questioning or "pitting").

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. *Id.* at 687.

All three codefendants had serious credibility problems. All were originally charged with the same offenses as Petitioner in this case, and none had been sentenced. Demetrice James, who was alleged to have been party to an agreement to burglarize the Scott's home and alleged to have shot Trenton Scott, testified he was simply in the wrong place at the wrong time. James' charges were still pending in this case. James had a juvenile adjudication for carrying a weapon on school grounds, and also faced pending charges in additional cases of kidnapping, armed robbery, first-degree criminal sexual conduct, possession with intent to distribute marijuana, and possession with intent to distribute marijuana in proximity of a school. App. 508, l. 14 – 510, l. 24.

Vincent Nelson pleaded guilty in this case earlier in the week to a reduced charge of voluntary manslaughter, as well as first-degree burglary, attempted armed robbery, and two counts of attempted murder. His sentencing was deferred and dependent upon "truthful" testimony at Petitioner's trial. App. 515, l. 2 – 516, l. 22. Nelson consulted his attorney during his testimony and repeatedly refused to answer questions posed to him by the solicitor. *See* App. 524, l. 3 – 527, l. 25.

Deshawn McClary, whose charges in this case were still pending, had a strong arm robbery conviction. McClary also faced additional unrelated charges of armed robbery, kidnapping, and third-degree criminal sexual conduct. App. 685, l. 9 – 687, l. 24.

Major Smith was the supervisor of the criminal investigation division at the Richland County Sherriff's Department and he had been in law enforcement for thirty years. App. 799, l. 25 – 800, l. 12. Counsel asked Major Smith if he found Petitioner's codefendants be credible and Smith bolstered their testimony, saying he did find them credible. Counsel then conceded, "Okay. Fair enough." App. 810, l. 16 – 811, l. 1. This was deficient performance since "witnesses are generally not allowed to testify whether another witness is telling the truth . . . [and] may not improperly bolster the testimony of other witnesses." *State v. McKerley*, 397 S.C. at 464, 725 S.E.2d at 141; *Strickland v. Washington*, 466 U.S. at 687–88 (defendant must show that counsel's representation fell below an objective standard of reasonableness; the proper measure of attorney performance is reasonableness under prevailing professional norms).

Prejudice

"To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Counsel's deficient performance prejudiced Petitioner. The evidence of Petitioner's guilt aside from the codefendants' testimony consisted primarily of Petitioner's partial confession, the Scott brothers' identification of Petitioner as an armed burglar, Petitioner's cell phone records (from when the State alleged Petitioner's cell phone was possessed by Vincent Nelson) with

texts to include "Come on. I got two outside." And, "On the way," from Deshawn McClary in response. Bleached clothing was found behind Petitioner's apartment complex, and Jwuan Duckett claimed that he overheard Petitioner planning the burglary.

However, Jwuan Duckett had credibility problems since he had prior convictions and/or adjudications for possession with intent to distribute cocaine, resisting arrest, receiving stolen goods, second-degree burglary, petit larceny, and purse snatching. App. 427, l. 20 – 428, l. 18. The bleached clothing found behind Petitioner's apartment complex could have been accidentally bleached during cleaning, as law enforcement claimed Petitioner said during interrogation. App. 744, ll. 14-18; App. 435, l. 17 – 438, l. 17; App. 738, l. 21 – 744, l. 13. Petitioner's alleged confession was suspect as it was not video or audio recorded despite that technology being widely available in 2013. App. 760, l. 18 – 762, l. 1. And, Petitioner initially denied any involvement in the crime according to Officer McDonald. Officer McDonald also admitted he told Petitioner, "I'm not putting a gun to your head to make you talk today." App. 760, ll. 8-17. That statement could be interpreted by the jury as an explanation of the word "coercion" as McDonald claimed, or it could be viewed as a veiled threat. This leaves the Scott brothers' identifications. But the reliability of eyewitness identification testimony has long been viewed with skepticism. *See generally State v. Whaley*, 305 S.C. 138, 142, 406 S.E.2d 369, 372 (1991) ("certain aspects of every day experience shown by the record can affect human perception and memory, and through them, the accuracy of eyewitness identification").

The trial court's attempted curative instruction did not correct the error, since it did not tell the jury to disregard Major Smith's testimony, and Major Smith's testimony was not stricken. "Great care should be exercised in the 'delicate, difficult, and important matter' of instructing the jury to disregard incompetent evidence." *State v. Smith*, 290 S.C. 393, 395, 350

S.E.2d 923, 924 (1986) (quoting 75 Am.Jur.2d, Trial, Section 748). "The jury should be specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations. A mere general remark excluding the evidence does not cure the error." *Id.* The trial court admonished counsel, "All right. Hold, Hold on one second. Let's—listen, fellows, ladies. This jury determines the credibility of the witnesses. Not the witnesses." Then the court instructed the jury, "So, that is y'all's sole responsibility to determine who's telling the truth. Not this witness." The court then told defense counsel, "So, move on to another area." App. 811, ll. 2-6. Although the court's attempt to cure the error did inform the jury that the credibility of witnesses was its province, the court did not tell the jury to disregard the testimony. The attempted curative instruction here was insufficient to rectify the error.

Therefore, absent counsel eliciting Major Smith's improper comments, there was a fair chance the jury could have found Petitioner not guilty. Petitioner established *Strickland* prejudice. *See State v. McKerley*, 397 S.C. at 467, 725 S.E.2d at 143 ("In light of expert's extensive inadmissible testimony bolstering the credibility of the victim, considered in the context of the other testimony and evidence of McKerley's guilt, we cannot say the erroneous admission of expert's testimony did not contribute to the jury's decision"); *Strickland v. Washington*, 466 U.S. at 694 (applicant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability is one sufficient to undermine confidence in the outcome).

2.

The PCR court erred where it denied post-conviction relief where counsel did not object to a jury instruction that specific intent to kill was not an element of attempted murder, since attempted murder required proof of a specific intent to kill, and since Petitioner was prejudiced by the improper instruction.

Counsel provided deficient representation when he failed to argue that attempted murder statute required a specific intent to kill. Defense counsel did not object to the trial court's jury charge that specific intent to kill was not an element of attempted murder and that only general intent need be shown. Counsel's performance was deficient since attempted murder requires specific intent to kill.

Deficiency

S.C. Code Ann. § 16-3-29 was enacted in 2010, and it provides in relevant part 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." The statute contains the words "with intent to kill." At the time of Petitioner's trial, specific intent to kill was an element of attempted murder. *King*, 422 S.C. at 63-64, 810 S.E.2d at 26-27, later confirmed this. However, *King* did not change the law. The statute's 2010 enactment changed the law. *King* merely clarified what the statute mandated.

"Attempted murder was codified as part of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which abolished several common law assault and battery offenses including assault and battery with intent to kill, also known as ABWIK. *See* Act No. 273, 2010 S.C. Acts 1947-49." *State v. Taylor*, 434 S.C. 365, 369, 862 S.E.2d 924, 927 (Ct. App. 2021). "It replaced these with new, codified offenses including the crime of attempted murder." *Id.* "[A] specific

intent to kill is an element of attempted murder." *State v. King*, 422 S.C. at 56, 810 S.E.2d at 22. "[T]he General Assembly created the offense of attempted murder by purposefully adding the language 'with intent to kill' to 'malice aforethought, either expressed or implied' to require a higher level of *mens rea* for attempted murder than that of murder." *Id.*, 422 S.C. at 61, 810 S.E.2d at 25. "While it may seem counterintuitive for the attempt of a crime to require a higher level of *mens rea* than that of the completed crime, this is the majority rule and a rule that our appellate courts and General Assembly have followed." *Id.*, at 56, 810 S.E.2d at 22.

The PCR court here noted that counsel is not required to be clairvoyant and anticipate changes in the law. App. 1055. However, *King* was not a change in the law. *King* merely confirmed that the statute requires proof of specific intent to kill. *King*, 422 S.C. at 56, 810 S.E.2d at 22. Defense counsel was therefore not required to anticipate a change in the law, and that is particularly true since prior South Carolina case law explained that the offense of attempted murder was a specific intent crime at common law. "Attempted murder would require the specific intent to kill and conduct towards that end." *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000). *Sutton* was published fourteen years before Petitioner's trial. As this Court explained in *King*, the appellate decisions of this state, when read as a whole, reflect that specific intent is an element of attempted murder. *King*, 422 S.C. at 57, 810 S.E.2d at 23.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. *Id.* at 687. Counsel's performance was deficient here. The

statutory language, the existence of *Sutton* at the time of Petitioner's trial, and the appellate decisions of this state when read as a whole should have put counsel on notice to object to the State's request that only general intent was required and instead request that the jury be charged on specific intent to kill. *Strickland*, 466 U.S. at 687-88; S.C. Code Ann. § 16-3-29; *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285; *King*, 422 S.C. at 57, 810 S.E.2d at 23.

Prejudice

"To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

The PCR court erred by finding overwhelming evidence precluded Petitioner from proving prejudice. *See* App. 1056. "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). "In rare cases, using "overwhelming evidence" as a categorical bar to preclude a finding of prejudice is not error." *Id.*, 422 S.C. at 190, 810 S.E.2d at 844.

> However, for the evidence to be "overwhelming" such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of "a reasonable probability . . . the factfinder would have had a reasonable doubt" cannot possibly be met.

Id., 422 S.C. at 191, 810 S.E.2d at 845. Here, the evidence was not overwhelming for the same reasons as discussed in the prejudice analysis section of Issue 1, *supra*.[5]

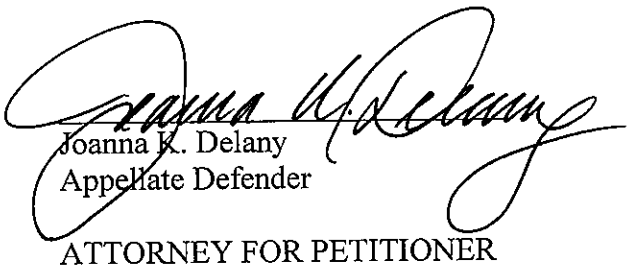
"In evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed in its entirety and not in isolation." *Gibbs v. State*, 403 S.C. 484, 495, 744 S.E.2d 170, 176 (2013) (quoting *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) (internal quotations omitted). "A charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003)). "The substance of the law is what must be charged to the jury, not any particular charge." *Id.*

Applying the instructions as given, the jury did not have to find Petitioner possessed a specific intent to kill as to the two attempted murder charges. The State was relieved of its burden of proof as to this essential element of the offenses. The charge as a whole failed to correctly define the offense as requiring a specific intent to kill and failed to adequately cover the law; Petitioner was prejudiced. *Gibbs*, 403 S.C. at 495, 744 S.E.2d at 176; *Adkins*, 353 S.C. at 318, 577 S.E.2d at 464; *Strickland*, 466 U.S. at 695.

[5] Petitioner hereby incorporates the prejudice analysis section from Issue 1, *supra*, into Issue 2.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on these issues.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of October, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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This 28th day of October, 2022.