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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Hampton County

Honorable R. Lawton McIntosh, Circuit Court Judge

JAMES A. GARDNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-000192

BRIEF OF PETITIONER

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ISSUES PRESENTED

1.

Whether the PCR court erred by limiting petitioner to raising only three issues which counsel found "meritorious" during his PCR hearing under threat of Rule 11, SCRCP, sanctions, since the Court has held that Rule 11 does not to apply to PCR proceedings and the PCR judge's application of Rule 11 chilled petitioner's legitimate right and his obligation to present all of his cognizable PCR issues at the PCR hearing?

2.

Whether the PCR court erred by finding defense counsel's "all or nothing" plan on not requesting jury instructions on lesser-included offenses was valid trial strategy given petitioner's advanced age where there was no evidence petitioner was consulted with or consented to waiving jury charges on lesser offenses?

STATEMENT OF THE CASE

Petitioner was indicted at the October 30, 2014, term of the Hampton County Grand Jury for three counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. App. 496 – 503. His case was called to trial on February 2, 2015, before the Honorable Perry M. Buckner and a jury. Cory Fleming represented petitioner. Tameaka Legette was the assistant solicitor. App. 1.

On February 4, 2015, the jury found petitioner guilty of the attempted murder of Major Bobby Anderson, guilty of the attempted murder of Mariam Walden, and guilty of the attempted murder of Mary Etta Montouth. The jury also found petitioner guilty of possession of a weapon during the commission of a violent crime. App. 384, l. 16 – 385, l. 7.

Judge Buckner sentenced petitioner to twenty-five years imprisonment for each count of attempted murder, and five years imprisonment for possession of a weapon during a violent crime. All sentences were concurrent. App. 401, l. 18 – 402, l. 10.

Petitioner's convictions were affirmed on direct appeal in State v. Gardner, 2016-UP-369 (S.C. Ct. App. filed July 20, 2016).

Petitioner filed an application for post-conviction relief on January 9, 2017. App. 405 – 427. A return and partial motion to dismiss dated August 3, 2017, was filed by the state. App. 428 – 435.

An evidentiary hearing was convened on January 29, 2018, before the Honorable R. Lawton McIntosh. App. 438. Petitioner was represented by James K. Falk. The state was represented by Assistant Attorney General Deshawn H. Mitchell. App. 437.

An order of dismissal was filed on April 24, 2018. App. 490-494. Petitioner then sought a writ of certiorari from this Court which was granted on September 20, 2022.

This brief of petitioner follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue raised on appeal. Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839–40 (2018). The reviewing court must defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law de novo, with no deference to the PCR court. Id.

ARGUMENT

1.

The PCR court erred by limiting petitioner to raising only three issues during his PCR hearing under threat of Rule 11, SCRCP, sanctions, where Rule 11 has been held by the Court not to apply to PCR proceedings and the PCR judge's application of Rule 11 chilled petitioner's legitimate right and his obligation to present all of his cognizable PCR issues at the PCR hearin

Relevant facts

The state alleged that petitioner attempted to murder Mary Etta Montouth, who was his girlfriend, and her sister, Mariam Walden. In addition, it was alleged that petitioner attempted to shoot Major Bobby Anderson of the Varnville Police Department upon his arrest. The girlfriend, Montouth, testified that petitioner came into the house, and he accused her of being unfaithful. He threatened to kill her. App. 157, l. 16 – 158, l. 2. Petitioner went to his truck, got a rifle, came back into the house, and shot at her. Fortunately, he missed, and Montouth left the house and walked to Mae Francis Smith's house where she met her sister, Mae Smith. App. 158, l. 5 - 159, l. 3.

According to Montouth, petitioner followed her to Ms. Smith's house in his truck. App. 159, ll. 18-23). Montouth later returned to her house, but when she saw that petitioner had followed her she ran to a church to get help. App. 164, l. 6 – 166, l. 16

Montouth's sister, Mariam Walden, testified at trial. According to Walden, petitioner came in the house with a couple of rifles and threatened to kill her. Walden dropped to her knees and heard the gun click but the gun did not fire. App. 199, ll. 16-25.

When Walden opened her eyes, petitioner said that he was going to kill himself. "And I just said no, no, no, no, no. So he got – he was agitated. So he ran out the back door." App. 199, l. 23 – 200, l. 2.

Walden called 911 and ran out of the house to look for her sister. According to Walden, as she ran out of the house, petitioner shot her. App. 200, ll. 12-17. She remembered being in the ambulance, and "[t]hey looked at my wound and patched it up and took my vitals and then just asked me to lay down and be calm." Walden said she was in pain for a while from having been shot, but she fortunately no longer felt the pain. App. 204, l. 20 – 205, l. 11.

Major Bobby Anderson with the Varnville Police Department was one of the officers who arrived at the scene. According to Major Anderson, he and petitioner exchanged gunfire. App. 284, l. 1 – 285, l. 16. Lieutenant Luis Hernandez with the Hampton Police Department arrested petitioner and read him his Miranda[1] rights. App. 256, l. 5 – 258, l. 24.

Petitioner was transported to the Varnville Police Department where he provided a taped statement to Chief Tyrone Smith with the Varnville Police Department. A recording of petitioner's statement was introduced in evidence and played for the jury. App. 306, l. 17 – 308, l. 22.

Prior to trial, the judge held a hearing to determine if petitioner's statement was voluntarily made. The defense argument was that petitioner was so intoxicated that the police knew he could not intelligently and knowingly give a statement at that time. The judge found that the statement was voluntarily given. App. 39, l. 7 – 40, l. 10.

As stated above, petitioner was tried for three counts of attempted murder and one count of possession of a weapon during the commission of a violent crime before the Honorable Perry M. Buckner and a jury. Cory Fleming was petitioner's counsel. Tameaka Legette was the assistant solicitor. App. 1. After petitioner was found guilty, Judge Buckner sentenced him to twenty-five years imprisonment for each count of attempted murder, and five years imprisonment for possession of a weapon during a violent crime. App. 401, l. 18 – 402, l. 10.

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

Petitioner's convictions were affirmed on direct appeal following the submission of an Anders[2] brief in State v. Gardner, 2016-UP-369 (S.C. Ct. App. filed July 20, 2016). This Court can take judicial notice of the fact the issue raised on appeal for petitioner by Appellate Defender Kathrine Hudgins was whether: "The trial judge erred in finding that Appellant's statement to police was made freely and voluntarily when there was evidence that Appellant consumed a bottle of Crown Royal and more prior to giving the statement." Anders brief at 5.

In this PCR case, petitioner alleged ineffective assistance of trial and appellate counsel. App. 407. Petitioner contemporaneously attached to his PCR petition a motion in support of post-conviction relief application. App. 413 – 427.

Petitioner alleged, inter alia, that counsel was ineffective for failing to request jury instructions on lesser included offenses of attempted murder. App. 415. Petitioner also alleged trial counsel was ineffective and he denied petitioner's right to due process and a fair trial where there was a breakdown in communication from the beginning of representation. App. 414. In addition, petitioner asserted counsel was ineffective for failing to object to juror Alice Scott, who was biologically related to the victim and was still allowed to serve on the jury. App. 414.

Petitioner also alleged counsel was ineffective for failing to investigate and interview witnesses and for failing to seek funding for his defense. App. 414 & 418. In addition, petitioner alleged the breakdown in communication constituted ineffective assistance of trial counsel, especially where he was willing to enter a guilty plea to a lesser included offense for a sentence of under nine years imprisonment. App. 415.

Another allegation of ineffective assistance of counsel was counsel's failure to utilize an investigator where there was evidence of lesser included offenses available. App. 416. Petitioner

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[2] Anders v. California, 386 U.S. 738 (1967).

also alleged ineffective assistance of trial counsel for counsel seemingly not forcing the state to prove its case beyond a reasonable doubt on the charge of attempted murder. App. 416.

This return also noted many of petitioner's allegations of ineffective assistance of trial counsel and appellate counsel. App. 429 – 430.

At the beginning of the PCR hearing, the judge said he understood PCR counsel Falk had matters to bring up with the court. PCR counsel Falk then marked the amended PCR application as Court's Exhibit #1. App. 440, l. 25 – 441, l. 11; App. 504.

The judge then asked PCR counsel Falk to state his amended grounds for the record. PCR counsel Falk responded, "In addition to other grounds raised in his original application, we would add that trial counsel had a conflict of interest in its representation of the applicant in this case." PCR counsel Falk told the judge that "Trial counsel was a close friend of a gentleman named Adonis Coker, and he [Coker] was the son of the victim in this case. This relationship between trial counsel and the victim's family was not made apparent to my client, was not disclosed to my client prior to the trial. And once the conflict became—or my client became aware of a conflict, he sought to have—" App. 442, l. 24 – 443, l. 13.

The PCR judge interrupted at this point: "Which ethical rule are you making [that ground] under that he should have advised his client, do you know?" PCR counsel Falk responded, "I don't have that at hand." The judge then told PCR counsel, "Well, it's a serious claim, so you need to know." The following then occurred between PCR counsel and the PCR court:

> MR. FALK: It's my understanding that a breach of an ethical rule is not necessary grounds under published South Carolina case law as far as PCR-related, but we're just saying, so that's why I'm not prepared under the rule. I would just say that as far as --
>
> THE COURT: Well, by an order for him, I know that it may raise a duty. Would you agree?

MR. FALK: Yes, your Honor.

THE COURT: And then, if there's an ethical rule that would make a duty attach, and so, I guess what I'm asking, and very in-artfully, Mr. Falk, is that, if, in fact, there is an obligation for him to recuse himself or at least advise his client of the potential there, I want to know what rule that is so I can gauge his conduct accordingly in this case. All right, sir?

MR. FALK: Okay, your Honor. All right, your Honor.

THE COURT: Okay, sir? And maybe that's not hitting the mark, but that's the way I look at it. If you have it, just give it to me.

MR. FALK: Okay. We would go forward under violation of the *Sixth Amendment* right to counsel and the corresponding South Carolina constitutional provision.

THE COURT: Very good. Of the allegations out, that's the only other ground in the amended grounds?

MR. FALK: Yes, your Honor.

THE COURT: And then, of the allegations under ineffective assistance.

MR. FALK: Failure to charge a lesser-included offenses and failure to object to the composition of jury.

THE COURT: Okay.

MR. FALK: There was a particular juror. Her name was Neece Scott, and he brought this to an addendum that was attached to his original application. So the fact --

THE COURT: According to the State, I'm just looking at their brief, they have ineffective trial counsel, it's a breach of communication. *And what I want you to do, again, <u>not only like we did in the last case, but all cases under Rule 11, I don't want there to be any claims that are specious or not recognized or non-meritorious.</u> I want claims that <u>are recognized and meritorious to be presented,</u> and you, as an officer of the court, to tell me which ones should not be considered.*

MR. FALK: Yes, your Honor. I think that under his 1(b) (i), failure to object to the jury composition, because the juror -- it's unclear if it's Neece or Alice -- Scott is biologically related to one of the alleged victims.

THE COURT: Is Scott related to who?

MR. FALK: One of the victims. The victim. One of the jurors --

THE COURT: Okay. Okay. Juror related to victim. Okay. I'm sorry. I'm -- sometimes I'm hard of hearing. Okay. Go ahead.

MR. FALK: And possibly, this should -- could have been better stated, but failure of trial counsel to seek the charge on the lesser-included offenses in this case. I mean, he set that up as ineffective assistance of appellate counsel in the original claim, but I think that's best stated as ineffective assistance of trial counsel.

THE COURT: Okay.

MR. FALK: And then our concern about Adonis Coker. And then our concern about the conflict of interest.

THE COURT: Right. Right. Okay. *So those are the three grounds that you say are non-specious and meritorious and should 1proceed on*?

MR. FALK: *Yes, your Honor*. Yes, sir, your Honor.

THE COURT: Thank you so much, Mr. Falk. All right. Would you call your first witness.

App. 443, l. 19 – 446, l. 10. (emphasis added).

Petitioner James A. Gardner was then called as a witness. Petitioner testified he became concerned with trial counsel Fleming's representation when he learned Fleming was "a friend of my stepson." App. 448, l. 24 – 449, l. 8. Petitioner said he was "cleaning my stepson's room out, and I ran upon Mr. Fleming's picture. I know they was friends, you know, and I ask him about it. And he [Fleming] told me he didn't know Adonis [the stepson]." The stepson's mother, Mary Etta Montouth, was one of the attempted murder victims in this case. App. 449, l. 3 – 450, l. 15.

Petitioner said he wrote Fleming a letter, "and I told him I don't know what you and Mr. Alex Murdaugh [the solicitor], is trying to pull on me, but I don't want you as my lawyer, you know, I want my money back." App. 450, ll. 9 -20. Petitioner related that the judge refused to

relieve Fleming on this basis, which was about two or three months before trial, and that he was forced to go to trial with Fleming as his lawyer. App. 450, l. 23 – 453, l. 2.

Petitioner also complained that defense counsel Fleming did not exercise a preemptory challenge to remove Alice Scott, who was related to the victim's family. Petitioner said at one point he thought he told Fleming about Alice's relationships to the victims, but that Fleming nonetheless did not strike Scott. App. 453, l. 3 – 454 l. 25.

On cross-examination, petitioner acknowledged he remembered the judge asking potential jurors if anyone was related to the victim. Petitioner did not remember if Alice stood when that question was asked. Nonetheless, Assistant Attorney General Mitchell noted that on page 58 of the trial record that the question was asked and "Ms. Scott does not stand. Note that for the record. That's all the questions I have for the applicant." App. 459, l. 24 – 460, l. 16.

Defense counsel Fleming then testified if he had known Scott was related to the victim, "I am certain I would have written it down next to her name here, because that would have been a reason for the strike." App. 462, l. 14 – 463, l. 5. Fleming explained that his trial strategy was to try to convince the jurors that petitioner did not have the specific intent necessary to commit the crime since "James had drunk a lot of Crown Royal in the process of whatever happened." Fleming noted that petitioner was so intoxicated that he wanted the police to kill him that day when he shot at the victims and the police. App. 463, l. 8 – 464, l. 21; App. 470, l. 15 – 475, l. 5. Fleming said his strategy on petitioner not having the intent necessary to commit the crimes of attempted murder was very much harmed by petitioner telling the police in his videotaped confession that "I wanted the bleep dead, etc. And that's a mountain to climb at that point." App. 474, l. 21 – 475, l. 5.

Defense counsel noted that the entire incident started because petitioner thought his girlfriend or common-law wife was having an affair at the time. Petitioner "grabbed a rifle,

[and] either intentionally or unintentionally shot her in the leg." Petitioner was then involved in a shootout with the Varnville Police Department. Counsel also said petitioner's statement, which was apparently given when petitioner was grossly intoxicated, stated that he wanted to kill the victims. App. 473, l. 7 – 475, l. 5.

Fleming opined there was overwhelming evidence of petitioner's guilt given the "thorough confession." App. 471, l. 25 – 472, l. 3. Fleming said he did not ask for instruction on any lesser-included offenses because he had an "all-or-nothing kind of strategy." App. 476, ll. 14 – 24. Fleming reasoned that petitioner was sixty years old at the time and that petitioner had turned down a nine-year plea offer as being "too much time." Therefore, a "compromise verdict," as Fleming saw it, on ABHAN still meant as a practical matter to Fleming that petitioner would not leave prison alive. App. 476, l. 14 – 478, l. 1.

Without hearing arguments, the judge then ruled that "You've alleged three what I consider recognizable, potentially meritorious claims." App. 478, ll. 12 – 17. The judge opined that petitioner "presented zero credible evidence" about there being an improper relationship between trial counsel Fleming and petitioner's stepson, whose mother was a victim in this case. The judge also observed that juror Scott did not stand when the trial judge inquired if anyone was related to the victims, so the PCR judge concluded "So you failed to meet your burden there."

Finally, the judge noted that defense counsel said he did not request instructions on a lesser-included offense because it would have subjected petitioner to twenty years imprisonment, "which you do not want, you know, certainly and understandably did not want to do." App. 478, l. 12 – 479, l. 22. The judge said to the extent petitioner's "testimony is otherwise, I just don't find it to be convincing or credible. Also, there's just overwhelming evidence of your guilt in this case. So your application is denied." App. 479, l. 23 – 480, l. 4.

An order of dismissal was filed on April 24, 2018. The order stated that petitioner had failed to prove that juror Alice Scott was related to the victim, and therefore he had failed to prove the first prong of Strickland v. Washington, 466 U.S. 668 (1984). App. 490 – 491.

The order also found that defense counsel's "all-or-nothing" strategy on a verdict of attempted murder with no request for lesser-included offenses was a legitimate trial strategy. The order noted petitioner's age and that not "requesting a lesser-included charge as to avoid a compromised (sic) verdict [was legitimate]." App. 491 – 492.

In addition, the order stated that petitioner's allegation that trial counsel Fleming had a conflict of interest because he was a friend of petitioner's stepson, Adonis Coker, was not credible. The order concluded petitioner presented no witnesses to substantiate this allegation. App. 492 – 493.

Finally, citing Harris v. State, 377 S.C. 66, 79, 658 S.E.2d 140, 147 (2008), the order stated petitioner could not prove prejudice in any of his claims because of "overwhelming evidence of guilt." App. 493 – 494.

Discussion

As seen at the beginning of the PCR hearing, the PCR judge cited Rule 11, SCRCP, in admonishing or threatening PCR counsel that he could only the raise three recognizable meritorious PCR claims -- after they initially talked about them -- during the PCR hearing. The judge cited Charles Green Jr. v. State, which was a PCR hearing held immediately before the one in this case. A petition for writ of certiorari in Charles Green Jr. v. State, appellate case number 2018-001204, was filed on January 28, 2019, with this Court. An oral argument in that case was held on November 16, 2022 after certiorari was granted. (Williams, CJ., Thomas, and Lockemy, JJ), and it is pending upon the filing of this brief of petitioner.

In Hiott v. State, 381 S.C. 622, 674 S.E.2d 491 (2009), the Supreme Court reversed this Court, and held as a matter of public policy, "that Rule 11 of the South Carolina Rules of Civil Procedure does not apply to PCR proceedings." Hiott v. State, 381 S.C. 622, 630, 647 S.E.2d 491, 495 (2009). In Hiott, this Court explained that several factors led the Court to hold that Rule 11 does not apply to PCR cases.

First, this Court noted that a petitioner must raise all available grounds for relief in his first PCR application since successive actions are usually barred. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); S.C. Code § 17-27-90 (2003). Next, the PCR applicant must file for PCR within one year of the final resolution of the criminal conviction or within one year of newly discovered evidence or asserting a newly created standard or right. Wade v. State, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002).

Thus, "these provisions effectively grant an individual 'one chance to argue for relief' within a year of the final appeal; consequently, '[T]hese limitations adequately prevent inmates from abusing the PCR process.' Wade, 248 S.C. at 264, 559 S.E.2d at 847." Hiott v. State, 381 S.C. 622, 629, 674 S.E.2d 491, 494 (2009). The Court therefore held that Rule 11 of the South Carolina Rules of Civil Procedure did not apply in PCR proceedings, and it further found that it could discern no practical benefit being served by imposing Rule 11 sanctions on PCR petitioners who are often indigent.

The PCR judge in this case erred by threatening to impose Rule 11 sanctions where that threat had a chilling effect and limited PCR counsel to raising only three "recognizable or recognized PCR issues" in this case. This Court can take judicial notice from the SCDC website that, as of the filing of this certiorari petition, petitioner is 72 years old. He legally had one opportunity to raise to raise all PCR grounds he thought entitled him to relief.

Petitioner raised grounds of failure to investigate and failure to seek funding for his defense that PCR counsel apparently did not pursue given the threat of Rule 11 sanctions. See Application for post-conviction relief at App. 414 & app. 416 & app. 418. See, also, Return and Partial Motion to Dismiss at 429, item b. ii, and Return to petition for writ of certiorari at 3, item ii.

On their face, the failure to investigate and the failure to seeks funding are cognizable PCR grounds. See Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (Defense counsel's decisions regarding the investigation of, and failure to challenge, the gunshot residue evidence were unreasonable and clearly deficient); Dove v. State, 337 S.C. 298, 523 S.E.2d 459 (1999) (trial counsel was ineffective where he did not investigate the victim's medical background in a murder case, and counsel consequently did not subpoena the victim's medical records and present evidence to show the victim's past suicidal tendencies where Dove had told the police he believed the victim had committed suicide).

Admittedly, it is not easy to determine whether these were very meritorious or barely meritorious PCR issues since they were not raised or developed during the hearing. However, once they were not raised by PCR counsel and petitioner during the PCR hearing, and there was no mention of them in the order of dismissal, they were forever waived.

Further, the very chilling effect of being threatened with Rule 11 sanctions, which were inapplicable to PCR proceedings, makes it impossible to determine what other PCR issues PCR counsel was deterred from raising given the PCR courts improper Rule 11 threats. This was essentially a structural error within our state's PCR statutory scheme. Petitioner should be granted a new PCR hearing where he can have a full and fair hearing – his "one bite at the apple" in post-conviction relief. See Graham v. State, 378 S.C. 1, 3, 661 S.E.2d 337 (2008).

2.

<u>The PCR court erred by finding defense counsel's "all or nothing" plan on not requesting jury instructions on lesser-included offenses was valid trial strategy given petitioner's "advanced age" where there was no evidence petitioner was consulted with or consented to waiving jury charges on lesser-included offenses.</u>

A defendant is entitled to a jury instruction on a lesser-included offense or a defense if there is any evidence of that lesser offense. <u>State v. Mekler,</u> 368 S.C. 1, 15, 626 S.E.2d 890, 897 (Ct.App. 2005).[3] <u>State v. Chatman,</u> 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999). "Stated another way, if there is any evidence from which the jury could infer the defendant committed a lesser rather than a greater offense, the trial judge must charge the lesser-included offense. *<u>State v. White,</u>* 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004)." <u>State v. Mekler,</u> 368 S.C. at 15, 626 S.E.2d at 897.

Here, petitioner was charged with three counts of attempted murder. Petitioner, as seen, argued at trial that his confession should have been suppressed because the police should have known he was grossly intoxicated from drinking an entire bottle of "Crown Vic" or more that day. There was evidence others knew petitioner was "out of his mind drunk" that day, including Mariam Walden, who had pled with petitioner not to kill himself before petitioner shot her. She was not badly wounded, and attempted murder required proof of a specific intent to kill. Defense counsel Fleming, as seen above, had his doubts whether petitioner even intentionally shot his girlfriend given his grossly intoxicated state. <u>See State v. King,</u> 422 S.C. 47, 810 S.E.2d 18 (2017).

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[3] *Aff'd* in <u>State v. Mekler,</u> 379 S.C. 12, 664 S.E.2d 477 (2008).

Defense counsel admitted he could not remember if he ever discussed his "all or nothing" strategy of waiving jury instructions on lesser-included offenses in this case with petitioner. App. 465, l. 22 – 467, l. 17. Petitioner had tried to fire defense counsel, but the judge would not relieve him. Petitioner and trial counsel obviously did not get along, which even the truncated regimented record in this case shows. Defense counsel's assumption that petitioner would not want to risk a ABHAN conviction because of his age, and the fact petitioner would not accept a sentence over nine years at eighty-five percent, was an assumption counsel should have at least *consulted with petitioner about* before going "*all or nothing*" based on his assumption.

Again, the state had to prove a specific intent to kill for attempted murder, and there was evidence in this record which would have supported a jury instruction on ABHAN, *and a jury verdict on ABHAN, a general intent crime was certainly a possibly, if not a good one* since "ABHAN requires proof of an unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation. Circumstances of aggravation include the use of a deadly weapon, the infliction of serious bodily injury, the intent to commit a felony, a great disparity between the ages and physical conditions of the parties, a difference in the sexes, indecent liberties or familiarities with a female, the purposeful infliction of shame and disgrace, resistance of lawful authority, and others." Stevenson v. State, 335 S.C. 193, 200-201 n. 6, 516 S.E.2d 434, 439 n. 6 (1999).

The state cites Abney v. State, 408 S.C. 41, 757 S.E.2d 544 (Ct.App. 2014) where the majority of this Court found counsel was not ineffective, because Abney was not prejudiced, where his defense attorney did not request a jury instruction on strong armed robbery in an armed robbery case: "Trial counsel was able to articulate a valid reason for employing his strategy. He testified that during a break in the trial, he and Abney felt they were winning the case and he would be found not guilty of armed robbery. Therefore, the trial counsel did not feel

it was in his client's best interests to ask for a jury instruction on strong arm robbery." Abney v. State, 408 S.C. at 47, 757 S.E.2d at 547.

There was no such consultation -- much less any agreement in this case -- on waiving the submission of the lesser-included offense of ABHAN in this case. Cf. State v. Grier, 171 Wash2d 17, 32, 246 P.3d 1260, 1268 (2011) ("In sum, Washington's RPCs, *as well as standards promulgated by the ABA*, indicate that the decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and her counsel but ultimately rests with defense counsel). (emphasis added).

Here, an intoxicated petitioner used a deadly weapon, and one victim was seriously wounded. ABHAN was a proper lesser-included offense in this case. App. 476, l. 14 – 478, l. 1. Again, there was no evidence petitioner waived jury consideration of that verdict option where there was evidence justifying a jury verdict of ABHAN, since the jury could have found petitioner did not have the specific intent to kill any or all of the three victims. See State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) (specific intent to kill is required for attempted murder and it is not required for ABHAN).[4] Defense counsel's assumption that he was acting in petitioner's best interests in his "all or nothing" strategy, particularly given the evidence of the lesser-included offense in this case, constituted ineffective assistance of counsel. Petitioner should be granted a new trial.

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[4] As Judge Pieper wrote in his dissent in Abney v. State, 408 S.C. 41, 57, 757 S.E.2d 544, 552 (Ct. App. 2014) as to proving prejudice in a similar instance: "Our experience in criminal trials teaches us that no result is certain. This is particularly true when it comes to factual findings regarding mental state, such as whether the victim's belief was "reasonable." The standard for prejudice is not whether Abney *would* have been convicted of the lesser offense, but whether there is a reasonable probability he would. *See* McHam, 404 S.C. at 474–75, 746 S.E.2d at 46. (Court's emphasis) [*abrogated on other grounds* in Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).] If one juror stood firm on his or her position that the State failed to prove beyond a reasonable doubt that the victim's belief that Abney had a gun was reasonable, that would have been enough to prevent a conviction for armed robbery, and could have been enough for the jury to find him guilty of the lesser charge."

CONCLUSION

By reason of the foregoing arguments, petitioner should be granted a new trial pursuant to issue two. In the alternative, this case should be remanded to the Hampton County Court of Common Pleas for a new PCR hearing pursuant to petitioner's issue one.

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This 18th day of January, 2023.