

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Hampton County

Honorable J. Derham Cole, Circuit Court Judge

MALCOLM ANTWON ORR,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-001396

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Mar 27 2025

S.C. SUPREME COURT

INDEX

INDEX i

ISSUE PRESENTED1

STATEMENT OF THE CASE.....2

ARGUMENT

Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the jury instruction that “specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury” where the opinion of the Court of Appeals in State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015) was published several months before Petitioner’s trial, and where Petitioner was prejudiced by counsel’s failure to object because there is a reasonable probability the outcome of Petitioner’s trial would have been different if the jury had been correctly instructed that specific intent to kill is an element of attempted murder.....5

CONCLUSION.....7

PETITION TO BE RELIEVED AS COUNSEL8

ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the jury instruction that "specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury" where the opinion of the Court of Appeals in State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015) was published several months before Petitioner's trial, and where Petitioner was prejudiced by counsel's failure to object because there is a reasonable probability the outcome of Petitioner's trial would have been different if the jury had been correctly instructed that specific intent to kill is an element of attempted murder?

STATEMENT OF THE CASE

On January 1, 2016, Officer Quincy Smith, who had been a member of the Estill Police Department for approximately six months, was dispatched to a store regarding “a black male with camouflage clothing” trying to steal groceries from another individual. On his way to the store, Smith activated the camera on his glasses. App. 123, l. 16 – 125, l. 24. Smith had purchased the glasses from Amazon for thirty dollars. App. 136, ll. 1-8. When Smith arrived at the store, he saw a man matching the description of the suspect outside near a wooded area. Smith briefly went inside the store to confirm that this man “was the guy they [were] talking about.” App. 126, ll. 11-25. By the time Smith walked back outside, the suspect had started walking away. Smith got into his patrol car, activated his blue lights, and drove down a side street where the man was walking. He then parked his car and began following the man on foot. Smith ordered the man to stop several times and to take his hand out of his pocket. When the man failed comply, Smith threatened to tase him. The man then pulled out a handgun, fired eight shots, and fled. Smith was struck in the left arm and the neck. App. 128, l. 2 – 129, l. 21; App. 132, l. 7 – 134, l. 11. Smith immediately ran back to this patrol car and notified dispatch that he had been shot.

Responding officers were able to view the footage from the camera on Smith’s glasses through a USB port in one of their patrol vehicles. The footage captured the shooting and clearly showed the suspect’s face. Two members of the Estill Fire Department identified the man as Petitioner. App. 178, l. 2 – 179, l. 17; App. 181, l. 12 – 185, l. 12. Shortly thereafter, police apprehended Petitioner behind a house several blocks away. App. 194, l. 21 – 197, l. 4.

A Hampton County grand jury indicted Petitioner on February 1, 2016, for attempted murder and possession of a weapon during the commission of a violent crime. App. 396-399.

His case was called to trial on August 7, 2017, before the Honorable Roger M. Young, Sr., and a jury. App. 1. Solicitor Duffie Stone and Assistant Solicitor Brian Hollen represented the state. Robert Hughes represented Petitioner. App. 1.

During trial, the court instructed the jury, “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. 284, l. 25 – 285, l. 3. Trial counsel did not object to this charge. App. 263, ll. 14-17.

At the conclusion of the trial, the jury found Petitioner guilty as indicted. App. 289, ll. 8-15. He was sentenced to thirty years for attempted murder and five years consecutive for the weapons offense. App. 298, ll. 11-15.

The Court of Appeals dismissed Petitioner’s appeal after a review pursuant to Anders v. California, 386 U.S. 738 (1967). App. 320-321.

On June 4, 2020, Petitioner filed an application for post-conviction relief (PCR). App. 324-329. The state filed a return to this application on October 19, 2020. App. 330-341. With the assistance of counsel, Petitioner filed an amended application dated April 29, 2024. App. 352-354. An evidentiary hearing was convened on May 7, 2024, before the Honorable J. Derham Cole. App. 355. Assistant Attorney General Danielle Dixon represented the state. Chelsey Marto represented Petitioner. App. 355.

Petitioner testified at the evidentiary hearing that trial counsel should have objected to the jury instruction stating, “specific intent to kill is not an element of attempted murder, but there must be a general intent to commit some serious bodily injury.” He asserted this instruction was not a correct statement of law. Petitioner believed the outcome of his trial would have been different if counsel had properly objected to this erroneous charge. App. 363, ll. 4-24.

Robert Hughes, Petitioner’s trial counsel, testified that he thought the trial court’s instruction on specific intent was “appropriate.” He stated that he “rarely, if ever,” objects to a court’s jury instructions. Hughes testified that, in Petitioner’s case, “there was nothing [in the jury instructions] that was blatantly argumentative or blatantly in favor of the State” so he did not object. App. 365, l. 22 – 366, l. 19.

By order filed August 3, 2024, the PCR court denied Petitioner relief. App. 386-395. The court acknowledged that the trial court’s instruction to the jury on specific intent was an incorrect statement of law pursuant to State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), and that trial counsel failed to object. However, the court concluded Petitioner failed to prove he was prejudiced by counsel’s failure to object to the erroneous charge. The court found “there is no reasonable probability this charge affected the outcome [of Petitioner’s trial] due to the overwhelming evidence of guilt.” App. 389-390.

Because Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the jury instruction that "specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury" where the opinion of the Court of Appeals in *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015) was published several months before Petitioner's trial, and where Petitioner was prejudiced by counsel's failure to object because there is a reasonable probability the outcome of Petitioner's trial would have been different if the jury had been correctly instructed that specific intent to kill is an element of attempted murder.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Strickland*, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Cherry v. State*, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing *Strickland*, 466 U.S. at 688). "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) (citing *Strickland*, 466 U.S. at 668).

Nearly four months before Petitioner's trial, the Court of Appeals held in State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), that specific intent to kill is an element of attempted murder and that the trial court in King erred when it instructed the jury, "A specific intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily harm." Id. at 407, 772 S.E.2d at 191. Despite this published opinion, trial counsel did not object to this exact same instruction given in Petitioner's case. Counsel testified at the evidentiary hearing that he thought the instruction was "appropriate" but he provided no reasoning as to why. The instruction was an incorrect statement of law given the holding of the Court of Appeals in King, and counsel was deficient for failing to object.¹

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if counsel had properly objected and the jury had been correctly instructed that specific intent to kill is an element of attempted murder. There was evidence presented during trial counsel's cross-examination of Smith that Petitioner was potentially defending himself from an unlawful arrest or detention when he shot Smith. Accordingly, the jury could have reasonably found Petitioner did not act with a specific intent to kill when he fired at Smith.


Petitioner respectfully requests this Court reverse his convictions and remand for a new trial.

¹ Our Supreme Court subsequently agreed in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), that a specific intent to kill is an element of attempted murder and that the trial court in King erred by instructing the jury a specific intent to kill is not an element of attempted murder. Id. at 64, 810 S.E.2d at 26-27.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented. Petitioner ultimately requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of March, 2025.

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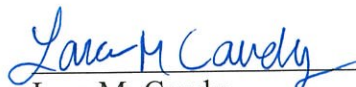
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Malcolm Antwon Orr states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.
2. She has reviewed the record of Petitioner's post-conviction relief hearing, which was held on May 7, 2024, before the Honorable J. Derham Cole, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests the Court relieve her as counsel for Malcolm Antwon Orr.

Respectfully Submitted,



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of March, 2025.

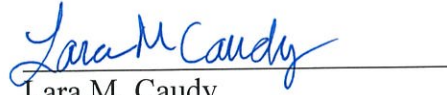
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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her ability this Johnson 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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