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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

Honorable George M. McFaddin, Circuit Court Judge

BLATON W. SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-001590

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I.

Whether the PCR court erred by refusing to find trial counsel ineffective for failing to object to Investigator Watson's testimony because it allowed the state to bolster its case by permitting Investigator Watson to vouch for the credibility of Willie Bethea's testimony and where petitioner was prejudiced by trial counsel's deficient performance?

II.

Whether the PCR court erred by refusing to find trial counsel ineffective for failing to object to the trial court's instruction to the jury that the offense of attempted murder does not require a specific intent to kill?

STATEMENT

In February of 2013, the Marion County grand jury indicted petitioner and several co-defendants for one count of murder, one count of discharging a firearm into a dwelling, one count of possession of a weapon during commission of a violent crime, and four counts of attempted murder. App. 842-44. On August 6, 2014, petitioner proceeded to a jury trial before the Honorable D. Craig Brown. App. 1. He was tried with his co-defendant Shaheed Hayes. App. 1. Joshua Bailey represented petitioner, and solicitor E.L. Clements, III prosecuted the case. App. 1. The jury acquitted petitioner of discharging a firearm into a dwelling but returned verdicts of guilty as charged for the remaining offenses. App. 694, l. 8 – 695, l. 15. Judge Brown sentenced petitioner to life imprisonment for murder, five years for possession of a weapon during commission of a violent crime, and thirty years for each attempted murder charge. App. 708, ll. 7-21. Judge Brown imposed each of these sentences consecutively. App. 708, l. 22. Petitioner filed a timely notice of appeal, and his convictions and sentences were ultimately affirmed. App. 711-54.

On December 12, 2016, petitioner filed an application for post-conviction relief (PCR). App. 755-61. On April 24, 2017, the state filed a return and motion for a more definite statement. App. 762-66. On August 31, 2021, Johnathan D. Waller, on behalf of petitioner, filed an amended PCR application raising, as relevant, ineffective assistance of trial counsel for failing to object to an incorrect instruction on the law as to attempted murder and failing to object to improper vouching testimony. App. 767-68. On December 12, 2022, an evidentiary hearing was held before the Honorable George M. McFaddin. App. 769-816. Johanthan D. Waller represented the petitioner, and Danielle Dixon represented the state. App. 769. After the evidentiary hearing, PCR counsel supplemented the record with partial transcript from co-

defendant Hayes's PCR hearing. App. 817-824. Thereafter, on March 26, 2025, petitioner withdrew his consent for PCR counsel to represent both him and his co-defendant, and Ashley A. McMahan was appointed as substitute counsel. App. 825.

On June 23, 2025, Judge McFaddin signed an order denying PCR and dismissing petitioner's application with prejudice. App. 826-842. This petition follows.

ARGUMENTS

I.

The PCR court erred by refusing to find trial counsel ineffective for failing to object to Investigator Watson's testimony because it allowed the state to bolster its case by permitting Investigator Watson to vouch for the credibility of Willie Bethea's testimony and where petitioner was prejudiced by trial counsel's deficient performance.

Relevant facts

Trial

During petitioner's trial, the state presented evidence that on April 12, 2012, law enforcement responded to a shooting call at a trailer in Marion County. App. 103, ll. 13 – 20. The first officer on the scene saw "a bunch of bullet holes in the trailer" and shell casings on the highway. App. 105, ll. 6 – 18. Christian Drawhorn, who was also known as "Murder," suffered one wound to his arm and a fatal gunshot wound to his torso. App. 104, ll. 10 – 17; 354, l. 23 – 355, l. 18; 389, ll. 3 – 7. Drawhorn was the only person injured.

The trailer where the shooting took place was used for illegal gambling and selling drugs. App. 361, ll. 17 – 20. The trailer belonged to Gavin Graves. App. 360, ll. 10 – 12. It was located on a major highway, Highway 501. App. 360, ll. 1 – 2. A total of five men were in the trailer, including Graves, Drawhorn, Derrick Wilson, Chirstopher Kollock, and Darrell Davis. App. 360, ll. 22 – 24. They were playing cards, smoking marijuana, drinking alcohol, and selling marijuana. App. 367, ll. 12 – 19; 383, l. 17 – 21.

Shortly after midnight, the men in the trailer heard a soft knock at the door. App. 367, ll. 20 – 24. When they looked out the door, no one was there. App. 368, ll. 1 – 10. About three minutes later, the trailer was riddled with bullets. App. 368, ll. 1 – 10. None of the men left the

trailer until after the shooting had stopped and could not identify any person or vehicle involved in the shooting. App. 459, ll. 17-21.

Petitioner denied having anything to do with the shooting. App. 297, ll. 10 – 12. Petitioner voluntarily went to the police station and gave a statement. App. 298, l. 5 – 299, l. 6. The police admitted they had no physical evidence linking petitioner to the shooting. App. 306, l. 24 – 307, l. 3. The state's entire case rested on the testimony of two co-defendants: Jamie Williams, also known as "Lil Boosie," and Willie Bethea.

Importantly, while the state examined Investigator Charlie Watson, an investigator who responded to the shooting incident, it inquired:

> Q: Okay. When you talked to Willie Bethea, can you describe for us what was his demeanor and how did he act?
>
> A: Mr. Willie Bethea was very cooperative. Out of all the co-defendants involved in this, he was probably the only person that I can give an honest opinion of 18 years of law enforcement to be sincere and apologetic and remorseful for what happened.

App. 230, ll. 9-15. Bethea later testified during petitioner's trial and detailed that during the incident petitioner was driving the car, stopped in front of Derrick Wilson's house, and said "this is the house right here." App. 541, ll. 2-14. He testified that co-defendant Hayes started shooting. App. 544, ll. 12-13. He explained that petitioner did not shoot, but he passed one gun. App. 545, l. 24 – 546, l. 4. He testified that Wilson was the target. App. 554, ll. 1-5. He testified that he turned himself in, was arrested, and testified during trial to the same thing he told law enforcement when he was arrested. App. 559, ll. 8-22; 561, ll. 10-12. Petitioner's trial counsel elicited on cross-examination that Bethea had been diagnosed with schizophrenia. App. 586, ll. 16-17. The state objected on relevancy grounds, and trial counsel explained that mental health went to Bethea's credibility. App. 588, l. 2 – 590, l. 22. The court did not allow trial

counsel to address Bethea's statement that he had visual hallucinations when he smoked marijuana because it did not go to his ability to tell the truth. App. 592, ll. 18-22.

During its closing argument, the state acknowledged that its case boiled down to the credibility of Williams and Bethea. App. 634, ll. 8-9. The state conceded that, if the jury did not accept the state's contention that the testifying co-defendants were credible, "the state [did not] have that much of a case." App. 634, ll. 9-10.

Evidentiary hearing

During his post-conviction relief evidentiary hearing, trial counsel testified that he did not recall if he had a trial strategy for not objecting to Investigator Watson's testimony on page 230 of the trial transcript. App. 794, ll. 9-17. He further testified that there "[p]robably" should have been an objection, but he did not know what it would have been. App. 794, ll. 18-25.

The PCR court's ruling

In the order of dismissal, the PCR court found trial counsel was not deficient for failing to object to Investigator Watson's testimony because the question was framed to him as inquiring about Bethea's demeanor. App. 837. The PCR court determined that Investigator Watson made no comments on the credibility or truthfulness of Beathea's testimony in his answer. App. 837. Rather, the PCR court found that Investigator Watson described Bethea's emotional demeanor. App. 837. The PCR court concluded that Investigator Watson's testimony that Bethea was cooperative, sincere, apologetic, and remorseful did not rise to improper vouching, citing to *Chappell v. State*, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019). App. 837.

The PCR court also found that petitioner was not prejudiced because the outcome of petitioner's trial "did not hinge on this one-off statement nor would the outcome of the trial have been different had this statement from the investigator had not been made at all." App. 838. The

PCR court noted that petitioner cross-examined Bethea on his inconsistent statement made to law enforcement. App. 838. Thus, the PCR court denied this claim. App. 838.

Discussion

The PCR court erred by refusing to find trial counsel was ineffective for failing to object to the testimony the state elicited from Investigator Watson concerning Beatha's demeanor because it permitted Investigator Watson to bolster the state's case and vouch for its own witness.

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). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and that the deficient performance prejudiced the petitioner. *Strickland*, 466 U.S. at 687. Under the second prong, petitioner must show "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." *Thomspon v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (citing *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016).

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). Generally, witnesses are not allowed to testify whether another witness is telling the truth and may not improperly bolster the testimony of other

witnesses. *Id.* Improper bolstering also occurs where "a witness testifies for the purpose of informing the jury that the witness believes" the witness or where there is no other interpretation than to mean the witness believes the witness is telling the truth. *Chappell*, 429 S.C. at 75, 837 S.E.2d at 499-500.[1]

Moreover, "[t]he legal concept of vouching prohibits a prosecutor from giving the jury any indication she knows something about the credibility of a witness that the jury does not know, or that is based on an event or proceeding outside the presence of the jury." *State v. Busse*, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023) (citing *State v. Kelly*,[2] 343 S.C. 350, 367-370, 540 S.E.2d 851, 859-861 (2001)). Thus, neither a solicitor nor a government law enforcement official witness should be allowed to bolster the state's case by vouching for the credibility of a prosecution witness as it invades the province of the jury and places the government's prestige behind that witness. *See Kelly*, 343 S.C. at 367-370, 540 S.E.2d at 859-861.

In *Chappell*, which the PCR court relied upon, the Court noted testimony of any witness is improper bolstering if: (1) the witness directly states an opinion about the victim's credibility, (2) the sole purpose of the testimony is to convey the witness's opinion about the victim's credibility, or (3) there is no way to interpret the testimony other than to mean the witness believes the victim is telling the truth. 429 S.C. at 75-76, 837 S.E.2d at 499-500 (citing *Briggs v. State*, 421 S.C. 316, 325, 806 S.E.2d 713 (2017); *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); *McKerley*, 397 S.C. at 465, 725 S.E.2d at 142; *see also State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) (improper bolstering of victim's credibility where a

[1] Certiorari was denied by this Court on September 21, 2020.

[2] *Rev'd on other grounds, Kelly v. South Carolina*, 534 U.S. 246 (2002).

forensic interviewer testified she recommended that the defendant not be allowed around the victim); *Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002) (witness's credibility was essential to the decision to convict because it was the only evidence of guilt).

In addition, the determination of whether petitioner was prejudiced by trial counsel's deficient performance "depends on whether the case turned on the credibility," of the witness. *Chappell*, 429 S.C. at 80, 837 S.E.2d at 502 (alterations omitted). Thus, the outcome of the trial turns on the credibility of the witness when the state presents no physical evidence or relies solely on the witness's testimony to establish the crime. *Id.*

In this case, trial counsel was deficient for failing to object to the testimony the state elicited from Investigator Watson concerning Beatha's demeanor because it allowed Investigator Watson to bolster the state's case by informing the jury that he believed Bethea. *Chappell*, 429 S.C. at 75, 837 S.C. at 499-500. Importantly, Investigator Watson opined that considering his 18 years of law enforcement experience, Bethea was sincere, apologetic, and remorseful. App. 230, ll. 9-15. The PCR court's conclusion that trial counsel was not deficient because Investigator Watson's testimony offered no opinion on the credibility or Bethea's testimony is inapposite. App. 837. Investigator Watson's testimony can only be interpreted to convey that Bethea was telling the truth. *Chappell*, 429 S.C. at 75, 837 S.C. at 499-500. That the state inquired as to Bethea's demeanor did not negate that Investigator Watson's response functioned to impart to the jury that Bethea was credible and to be believed. The result is that Investigator Watson was permitted to bolster the state's case by vouching for Bethea's credibility which invaded the exclusive province of the jury to assess witness credibility. *See Busse*, 439 S.C. at 109, 886 S.E.2d at 211 (citing *Kelly*, 343 S.C. at 367-370, 540 S.E.2d at 859-861); *McKerley*, 397 S.C. at 464, 725 S.E.2d at 141. Even further, trial counsel acknowledged that he could not

identify a trial strategy for failing to object and admitted that there should have been an objection. App. 794, ll. 18-25. Therefore, trial counsel was deficient for failing to object to Investigator Watson's improper testimony. *Strickland*, 466 U.S. at 687.

Petitioner was also prejudiced by trial counsel's deficient performance. As the state conceded, Bethea's credibility was a central issue of the case. App. 634, ll. 8-10; *Chappell*, 429 S.C. at 80, 837 S.E.2d at 502. Although the PCR court determined that petitioner could not demonstrate prejudice because the outcome of petitioner's trial did not hinge on Investigator Watson's single statement, App. 838, such a finding was belied by the record. Bethea's credibility *was* the state's case, and without it, by the state's own admission, the state did not "have that much of a case." App. 634, ll. 8-10. Thus, there is a reasonable probability that but for trial counsel's deficient performance by failing to object to Investigator Watson's testimony which bolstered the state's case by vouching for Bethea's credibility, the result would have been different. *Cherry*, 300 S.C. at 117-118, 386 S.E.2d at 625; *Thomspon*, 423 S.C. at 245, 814 S.E.2d at 492.

In addition, the PCR court's findings that Bethea was thoroughly cross-examined as to his "inconsistent statements" is contrary to the record. App. 383. In fact, Bethea testified several times that he told the same story during his trial testimony as he did to law enforcement on the day he was arrested. App. 559, ll. 8-22; 561, ll. 10-12. Moreover, Investigator Watson's testimony was additionally prejudicial because it compared Bethea's credibility against all of the co-defendants, which included petitioner, and implied that petitioner's character lacked credibility, sincerity, or remorse. App. 230, ll. 9-15. The improper testimony thus prejudiced petitioner because his case turned on the credibility of his co-defendant's testimony. *Chappell*, 429 S.C. at 80, 837 S.E.2d at 502.

Accordingly, the PCR court erred by denying petitioner's claim because he showed that trial counsel's performance was deficient and that he was prejudiced by the deficient performance. *Strickland*, 466 U.S. at 688.

II.

The PCR court erred by refusing to find trial counsel ineffective for failing to object to the trial court's instruction to the jury that the offense of attempted murder does not require a specific intent to kill.

Relevant facts

Trial

After the conclusion of evidence, the trial court conducted a brief charge conference, wherein the court noted that the parties went over the jury charges in chambers. App. 623, ll. 22-24. Trial counsel raised no objections to the court's charge on the law at that time. App. 625, ll. 22-25. Thereafter, following closing arguments, the trial court gave its charge on the law and stated that petitioner was charged with four counts of attempted murder. App. 686, ll. 15-20. The trial court charged that, in order to prove the crime, the state had to prove that petitioner attempted to kill the four individuals with malice aforethought, either express or implied. App. 686, ll. 20-24. The trial court then specifically charged that "[a] specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury." App. 687, ll. 17-19. Trial counsel made no objection to the trial court's charge to the jury on the law. App. 690, l. 23 – 691, l. 5.

The jury ultimately returned a guilty verdict as to each count of attempted murder. App. 694, ll. 11-22.

Evidentiary hearing

During petitioner's post-conviction relief evidentiary hearing, petitioner testified that his trial counsel should have objected to the trial court's charge that a specific intent to kill was not an element of attempted murder, but rather that a general intent to commit serious bodily injury

was required. App. 807, ll. 10-20. On cross-examination, petitioner testified that *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000), which he cited in his PCR application, "stated that a common-law attempted murder charge would require the specific intent to kill." App. 811, ll. 12-20. He believed that he was charged under the attempted murder statute. App. 811, ll. 21-25. He agreed that his trial was in 2014. App. 812, ll. 11-12.

The PCR court's ruling

In the order of dismissal, the PCR court found trial counsel was not deficient for failing to object to the jury instruction regarding attempted murder. App. 836. Particularly, the PCR court determined that the jury charge was a correct statement of the law at the time of the trial and that trial counsel was not expected to anticipate changes in the law, citing to our Supreme Court's decision in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), which was decided after petitioner's 2014 trial. App. 836. The PCR court also concluded that petitioner's reliance on *Sutton* was misplaced because it concerned common-law attempted murder rather than the attempted murder statute under which petitioner was charged. App. 836-37. Thus, the PCR court denied petitioner's claim. App. 837.

Discussion

Trial counsel was deficient for failing to object to the trial court's instruction that attempted murder did not require a specific intent to kill. First, although petitioner proceeded to trial in August of 2014, 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), less than a year later on April 22, 2015. Specifically, in *King*, the Court of Appeals wrote, "[w]e 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." 412 S.C. at 411, 772 S.E.2d at 193. The South Carolina Supreme Court affirmed, as modified, the finding by the Court of Appeals writing, "[c]onsidering 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." *King*, 422 S.C. at 63–64, 810 S.E.2d at 26–27 (n. #5 omitted).

Although the PCR court relies on *Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993), for the proposition that our Supreme Court has never required an attorney to anticipate or discover changes in the law, such reliance is inapplicable in petitioner's case. *See* App. 836. The PCR judge overlooked the fact that case law existed at the time of petitioner's 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, the South Carolina Supreme Court in *Sutton* 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 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.

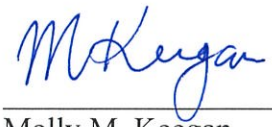
Trial counsel was ineffective in failing to object, based on the *Sutton* case and general laws of statutory construction discussed in *King*, that attempted murder requires a specific intent to kill. While trial counsel was not expected to "anticipate" changes in the law, the status of the law concerning the attempted murder charge at the time of petitioner's 2014 trial did not require trial counsel to "discover" changes in the law, given that *Sutton* established that an attempt offense is generally a specific intent crime. *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285. That *Sutton* concerned common-law attempted murder was of no consequence as the PCR court suggests. App. 836-37. In fact, the text of 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." S.C. Code Ann. § 16-3-29 (Supp. 2010) (emphasis added). The plain language and general laws of statutory construction support that the General Assembly intended for attempted murder to require a specific intent to kill. Moreover, trial counsel failed to articulate a basis for his failure to object or any trial strategy related to his decision. App. 795, ll. 8-20. Trial counsel's performance therefore fell below reasonable professional norms by failing to object to the trial court's general intent attempted murder charge. *Strickland*, 466 U.S. at 687.

Petitioner was also prejudiced by trial counsel's deficient performance. In evaluating whether petitioner "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) (internal quotations omitted). Viewing the charge on attempted murder as a whole, trial counsel's deficient performance by failing to object to the general intent instruction was prejudicial. App. 687, ll. 17-18. Based on the facts of this case, there is a reasonable probability that, but for trial counsel's deficient performance, the outcome of the proceeding would have

been different. *Cherry*, 300 S.C. at 117-118, 386 S.E.2d at 625 (1989) (citing *Strickland*, 466 U.S. at 688). Particularly, the error diluted the state's burden of proof by omitting the specific intent to kill element of attempted murder, which the state would have been required to prove beyond a reasonable doubt had the proper attempted murder instruction been charged. *See King*, 422 S.C. 47 at 64, 810 S.E.2d at 27 (noting that charging the jury that specific intent to kill is not an element of attempted murder is an error that cannot be deemed harmless). Notably, petitioner received four consecutive, thirty-year terms of imprisonment as to each attempted murder conviction. App. 708, ll. 15-18. Thus, petitioner was prejudiced by counsel's failure to object the defective charge on attempted murder.

CONCLUSION

Therefore, based on the foregoing arguments, this Court should grant the petition for writ of certiorari to allow full briefing on the issues.



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Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of November, 2025.