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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Hampton County

Honorable Dale E. Van Slambrook, Circuit Court Judge

JAMES A. GARDNER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2026-000653

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred by finding trial counsel was not ineffective for failing to request jury instructions on lesser-included offenses, particularly where there is no evidence in the record that Petitioner was consulted with or consented to waiving jury charges on lesser offenses?

STATEMENT

Facts

The state alleged that Petitioner shot at his then-girlfriend Mary Montouth, her sister Mariam Walden, and police officer Bobby Anderson. The state's theory was that Petitioner became "enraged with jealousy" after Montouth arrived home later than Petitioner expected. App. 115, l. 4.

Montouth testified that she arrived home to find Petitioner drinking directly from a "pint" of Crown Royal. App. 157, ll. 18-20. He told her that he would kill her and then himself. App. 157, ll. 21-22. At some point during this encounter, Montouth walked outside of their shared home, at which time Petitioner shot at her with the bullet missing her arm. App. 158, ll. 8-21. Montouth then walked to neighbor Mae Francis Smith's home. App. 159, ll. 12-13. Notably, while Montouth testified that Petitioner followed her to Smith's home and glared menacingly at her from his vehicle, Montouth said nothing to Smith about what had just occurred; rather, the two engaged in general conversation about Montouth's nephew's basketball game and Smith's cooking. App. 143, ll. 1-3; 196, ll. 7-8.

Mariam Walden testified that, after leaving Smith's house, Petitioner came to her house with two rifles and threatened to kill her. App. 199, ll. 8-11. Walden fell to her knees and closed her eyes, at which time she heard Petitioner's gun "click" twice. App. 199, ll. 21-24. At this point, Petitioner said he was going to kill himself, of which Walden attempted to dissuade him. *Id.* Walden then ran out of her house, at which time Petitioner shot her in the leg. App. 207, ll. 14-15. Petitioner then attempted to shoot himself, but the gun "clicked." App. 208, ll. 18-19.

Among the officers that responded to this scene was Major Bobby Anderson. Major Anderson testified that he and Petitioner shot at each other before Petitioner was eventually arrested. App. 284-86.

Trial

Petitioner was indicted by a 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. 554-564. His trial began February 2, 2015, before the Honorable Perry M. Buckner and a jury. Trial 1. Cory Fleming represented Petitioner;¹ Tameaka Legette represented the state. Trial 1.

Petitioner's defense at trial was that he did not specifically intend to kill any of the three alleged victims. App. 354, ll. 17-23. During the charge conference, trial counsel did not request charges on any lesser-included offense to attempted murder.

The jury convicted Petitioner as charged. App. 384-385. Judge Buckner sentenced Petitioner to concurrent terms of twenty-five (25) years' imprisonment for each attempted murder charge and five (5) years' imprisonment for the weapons charge. App. 401-402.

Post-Trial Procedural History

Petitioner appealed his conviction and sentences to the Court of Appeals. His appeal was dismissed pursuant to *Anders v. California*.² *State v. Gardner*, 2016-UP-369 (S.C. Ct. App. July 20, 2016). Petitioner then filed a timely application for post-conviction relief (PCR). App. 408-454. An evidentiary hearing on Petitioner's application was held on January 29, 2018, before the Honorable R. Lawton McIntosh. App. 464. James K. Falk represented Petitioner; Deshawn H. Mitchell represented the state. App. 464. Prior to the hearing, Petitioner attempted to amend his

¹ This Court disbarred trial counsel on November 30, 2023. *Matter of Cory Howerton Fleming*, App. Case No. 2023-001443 (Nov. 30, 2023) (Order).

² 386 U.S. 738 (1967).

PCR application. App. 477-478. However, the first PCR court, relying on Rule 11, SCRCivP, limited the number of issues that Petitioner could present. *Gardner v. State*, 2024-UP-066 (S.C. Ct. App. Feb. 28, 2024). After that limitation was put in place, the PCR court denied relief and dismissed the application as to the other issues. App. 464-476.

Petitioner appealed this dismissal on two grounds: (1) that the PCR court erred in applying Rule 11, SCRCivP, and (2) that the PCR court erred in finding that trial counsel was not ineffective for failing to request jury instructions on lesser-included offenses. App. 478, n. 1.

The Court of Appeals granted certiorari and reversed, finding that the first PCR court had misapplied Rule 11, and erred by limiting Petitioner to three issues. *Gardner, supra*, 2024-UP-066. Because the Court of Appeals found that its holding on the Rule 11 issue was dispositive, it did not address the lesser-included offense issue.

Operative PCR Proceeding

After remand, a new PCR hearing was held on November 13, 2025, before the Honorable Dale E. Van Slambrook. App. 483. Chelsey F. Marto represented Petitioner; Danielle Dixon represented the state. App. 483. Among Petitioner's allegations was the second issue raised in his first PCR appeal, that trial counsel was ineffective for failing to request lesser-included offenses be charged to the jury.

Petitioner testified that he wanted trial counsel to request a lesser-included offense. App. 493, ll. 9-14. Petitioner believed this would have resulted in a lesser conviction at least, because he case "wasn't no attempted murder." App. 493, l. 17. Trial counsel testified that Petitioner had previously rejected a plea offer for nine years' imprisonment. App. 518, ll. 17-21. Trial counsel did not request any lesser-included offenses to be charged to the jury because he felt that charging the jury on more offenses would increase the probability of a compromise verdict. App.

503, ll. 15-24. Knowing that Petitioner had already rejected a plea offer for nine years, trial counsel believed that the only way for Petitioner to get a better outcome was to be acquitted in full, as any conviction on a lesser-included offense would result in Petitioner serving more than nine years in prison. App. 503, ll. 15-24. Like the first PCR proceeding, there was again no evidence presented that trial counsel had discussed the matter with Petitioner before deciding not to request lesser-included offenses.

The PCR court denied relief and dismissed the application with prejudice. App. 536. As to the lesser-included offense allegation, the PCR court found that trial counsel's rationale—that an “all-or-nothing” strategy was the only way to create the potential for a result better than the nine-year plea offer Petitioner rejected—was a valid strategic decision. App. 545-546. The PCR court found that the evidence was so overwhelming that “a request for a charge on a lesser-included offense would have absolutely led to a conviction on *something*.” App. 546 (emphasis in original). Trial counsel “weighed [Petitioner's] desire for a sentence of less than nine years and determined the only reasonable way to achieve that was through an acquittal....” App. 546. Thus, trial counsel was not ineffective.

This petition follows.

ARGUMENT

The PCR court erred by finding trial counsel was not ineffective for failing to request jury instructions on lesser-included offenses, particularly where there is no evidence in the record that Petitioner was consulted with or consented to waiving jury charges on lesser offenses.

The PCR court was presented with no evidence that trial counsel consulted Petitioner in any way before deciding not to request charges on lesser-included offenses. Further, because there was evidence supporting a jury charge on assault and battery of a high and aggravated nature (ABHAN) and assault and battery in the first degree (A&B First), Petitioner was prejudiced by this failure. Accordingly, trial counsel rendered ineffective assistance to Petitioner, and the PCR court erred by concluding otherwise. This Court should grant certiorari and reverse.

A. There was evidence to support charges on ABHAN and A&B First.

A trial court is required to charge the jury on a lesser-included offense if it is requested by one of the parties and there is any evidence “from which it could be inferred that a defendant committed the lesser offense rather than the greater.” *State v. Dennis*, 402 S.C. 627, 637-38, 742 S.E.2d 21, 27 (2013) (*quoting State v. Drafts*, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986)).

Attempted murder has three elements: (1) malice; (2) specific intent to kill a person; and (3) an attempt to kill that person. *State v. Geter*, 445 S.C. 139, 146, 912 S.E.2d 255, 258 (2025). Attempted murder is a “specific intent crime,” which means that “the defendant consciously intended the completion of acts comprising the choate offense,” *see State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000), here: the death of the alleged victim.

ABHAN is committed if a person unlawfully injures another person and “(a) great bodily injury to another person results; or (b) the act is accomplished by means likely to produce death or great bodily injury.” S.C. Code Ann. § 16-3-600(B)(1). Unlike attempted murder, ABHAN is

a general-intent crime. *State v. Smith*, 430 S.C. 226, 234 n.9, 845 S.E.2d 495, 499 n.9 (2020). Relevant here, A&B First is committed if a defendant “*offers or attempts to injure another person...*,” and the act “*is accomplished by means likely to produce death or great bodily injury.*” S.C. Code Ann. § 16-3-600(C)(1)(b)(i) (emphasis added). Like ABHAN, A&B First is a general intent crime. *Compare United States v. Clemons*, 442 S.C. 670, 676, 901 S.E.2d 280, 283 (2024) (A&B Second is a general intent crime), *with Smith*, 430 S.C. at 234 n.9, 845 S.E.2d at 499 n.9 (ABHAN is a general intent crime). Both ABHAN and A&B First are lesser-included offenses of attempted murder. *See* S.C. Code Ann. §§ 16-3-600(B)(3) and (C)(3). In short, if a defendant gravely injures someone while specifically trying to kill that person, he is guilty of attempted murder; if the defendant is not trying to kill the person, he is guilty of ABHAN. If the defendant tries, but fails, to gravely injure someone with the intent to kill them, he is guilty of attempted murder; if he tries but fails to gravely injure someone without the intent to kill them, he is guilty of A&B First.

Here, Petitioner’s strategy at trial was that he did not actually intend to kill any of the three alleged victims that he shot at. He only hit one of the three: Walden. Evidence was presented that Petitioner was extremely intoxicated and suicidal. From the evidence, the jury could have inferred that Petitioner was trying to wound the three alleged victims but not kill them. In that case, the proper charge would have been ABHAN as to Walden and A&B First as to Montouth and Anderson. Therefore, there was evidence in the record to support the charging of lesser-included offenses.

B. Trial counsel was ineffective for failing to request charges on lesser-included offenses.

No evidence was presented at either PCR hearing that trial counsel discussed the possibility of asking for lesser-included offenses with Petitioner. Under prevailing professional norms, such a failure to communicate about the key issue at Petitioner's trial constitutes deficient performance.

Attorneys in South Carolina have an affirmative ethical duty to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Rule 1.4(a)(2), RPC; Rule 407, SCACR. An attorney's failure to communicate with his client can constitute ineffective assistance of counsel depending upon the circumstances. *Cf. Davie v. State*, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009) (adopting bright-line rule that failure to communicate a plea offer constitutes deficient performance); *overruled on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

A similar factual situation to this case has been addressed only once before by this State's appellate courts. In *Abney v. State*, 408 S.C. 41, 757 S.E.2d 544 (Ct. App. 2014), the Court of Appeals addressed whether a trial counsel was ineffective for failing to request lesser-included offenses be charged to the jury. However, in that case, the defendant was both aware of the decision and consented to it. *Id.* at 47, 757 S.E.2d at 547 (Trial counsel "testified that during a break in the trial, he *and Abney* felt they were willing the case...." (emphasis added)).

In this case, trial counsel would not have been ineffective had he discussed the "all-or-nothing" strategy with Petitioner. In fact, such a hypothetical would be identical to *Abney*. However, there is no evidence that trial counsel did so. This is not a case where Petitioner's attorney made a poor but reasonable strategic decision after discussing it with Petitioner. Rather,

Petitioner was left entirely in the dark while trial counsel pursued a trial strategy that had, at best, a minuscule chance of success. *Cf. Abney*, 408 S.C. at 57, 757 S.E.2d at 552 (Few, C.J., dissenting) (“Counsel’s all or nothing strategy depended on the jury applying the state’s burden of proof in a purely technical fashion and finding an admitted robber not guilty. Such optimism is refreshing, but it has no place at the defense table of a criminal trial when the defendant’s right to the effective assistance of counsel is at stake.”).

Trial counsel’s mere assumption that he was acting in Petitioner’s best interests cannot rescue his unreasonable faith in the jury to set free a defendant that had shot at three people, including a police officer, based on a hyper-technical understanding of the law of attempted murder. Because Petitioner had a right to consult with trial counsel about such a decision, trial counsel rendered deficient performance in this case.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to allow for fuller briefing of the issue.



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This 27th day of July, 2026.