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S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

June 26, 2018

The Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Christopher Middleton, #213662 v. State of South Carolina
2017-CP-42-2751

Dear Mr. Shearouse:

Enclosed are the following:

1. Notice of Appeal
2. Proof of Service of the notice of appeal on the Respondent
3. A copy of the order which is to be challenged on appeal.

Sincerely,

Jordan A. Cox
Assistant Attorney General

JAC/lm
Enclosures

cc: Susannah C. Ross, Esquire
The Honorable M. Hope Blackley, Clerk of Court of Spartanburg County
The Honorable Barry J. Barnette, Seventh Circuit Solicitor
SCCID, Division of Appellate Defense
Vincent J. Barton, Esquire
Victims Advocacy Division

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS

The Honorable Michael G. Nettles, Circuit Court Judge

Case No. 2017-CP-42-2751

CHRISTOPHER MIDDLETON, #213662,

Respondent,

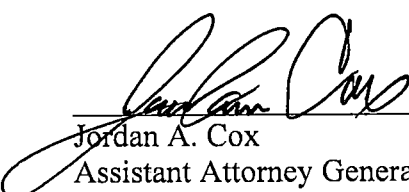
v.

STATE OF SOUTH CAROLINA

Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Michael G. Nettles' order dated May 29, 2018 and filed June 8, 2018 granting post-conviction relief to the Respondent. The State received notice of entry of the order on June 12, 2018 by electronic mail. A copy of the order on appeal is attached to this notice.



Jordan A. Cox
Assistant Attorney General
South Carolina Bar No. 103157
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

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THE STATE OF SOUTH CAROLINA
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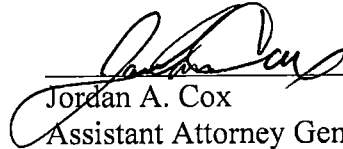
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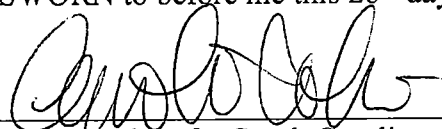
PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on June 26, 2018, to Susannah C. Ross, Esquire, his attorney of record, to the address below.

Susannah Conyers Ross, Esquire
Ross & Enderlin, PA
330 East Coffee Street
Greenville, South Carolina 29601


Jordan A. Cox
Assistant Attorney General

SWORN to before me this 26th day of June, 2018.


Notary Public for South Carolina.
My Commission Expires: 5/20/2025

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)	IN THE SEVENTH JUDICIAL CIRCUIT
)	
CHRISTOPHER MIDDLETON)	
APPLICANT,)	
)	
VS.)	ORDER GRANTING
)	POST-CONVICTION RELIEF
THE STATE OF SOUTH CAROLINA)	
)	
RESPONDENT.)	CASE NO: 2017-CP-42-2751

This matter comes before the Court by way of Mr. Middleton's application for post conviction relief filed August 9, 2017, alleging ineffective assistance of counsel for failing to object to trial counsel's erroneous jury charge on attempted murder, failing to make proper objections to preserve his motions for a self-defense charge to the jury, failing to properly motion the trial court for a directed verdict of acquittal, and failing to object to the trial judge's unconstitutional charge that malice may be inferred by conduct showing a total disregard for human life. A evidentiary hearing was held at the Spartanburg County Courthouse on February 22, 2018. The Applicant was present represented by Susannah Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented State.

At the hearing, the Applicant waived his right to testify and all allegations concerning ineffective assistance of counsel for failing to object to trial counsel's erroneous jury charge on attempted murder. E. Joshua Schultz, Esquire, testified on behalf of the State. The court had before it a copy of the Spartanburg County Clerk of Court Records, Applicant's records from South Carolina Department of Corrections, the trial transcript, the Respondent's Application, the State's Return, and the Applicant's appellate records.

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PROCEDURAL HISTORY

Applicant is serving a thirty year sentence in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In March 2015, the Spartanburg County Grand Jury indicted Applicant for one count of attempted murder and one count of possession of a weapon during the commission of a violent crime (2015-GS-42-1128). The allegation was that Applicant stabbed his wife a number of times on or between June 19 and 20, 2014.

On October 12, 2015, Applicant proceeded to trial before the Honorable J. Mark Hayes. He was represented by E. Joshua Schultz, Esquire, and Assistant Solicitor Meghan Gilmer prosecuted the case. The jury convicted Mr. Middleton on both counts and Judge Hayes sentenced him to thirty years for attempted murder and five years for possession of a weapon during the commission of a violent crime, to be served concurrently.

Mr. Middleton filed a timely Notice of Appeal. Appellate Defender David Alexander filed an Anders brief in the matter, The South Carolina Court of Appeals dismissed Applicants appeal and granted counsel's motion to be relieved. State v. Middleton, Op. No. 2017-UP-178 (S.C. Ct. App. filed April 19, 2017). The remittur was returned to the circuit court on May 5, 2017.

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SUMMARY OF PCR HEARING

Mr. Middleton waived his right to testify and waived all allegations except ineffective assistance of counsel for failing to object or voice exceptions to trial counsel's jury charge on attempted murder which is found on page four-hundred and fourteen (414), line eleven (11), of the trial transcript. It reads, "A specific intent is -- to kill is not

an element of attempted murder but there must be a general intent to commit serious bodily injury." Mr. Middleton's counsel submitted *State v. King* decided six months prior to his trial, where the Court of Appeals found that the exact same charge was erroneous because attempted murder requires proof a specific intent to kill. *State v. King*, 412 S.C. 403, 408, 772 S.E.2d 189, 192 (Ct. App. 2015), S.C. Code Ann. § 16-3-29 (Supp.2014). She further referenced the Supreme Court opinion which Affirmed as Modified the Court of Appeals' opinion and further ruled that the error of charging the jury that a specific intent to kill is not an element of attempted murder cannot be held harmless. *State v. King*, App. Case No. 2015-001278, Opinion No. 27744 (2017).

Joshua Schultz, Esquire, was called to the stand on behalf of the State. His testimony pertaining to his failure to object to the jury charge was that he was aware of the *King* opinion but did not object because he believed it was not necessary because Supreme Court had taken certiorari.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard and weighed the testimony at the post-conviction relief hearing. In accordance with S.C. Code Ann. § 27-80 (2003) this Court's finding of fact and conclusions of law are set forth below.

The burden of proof is on the applicant in post-conviction proceedings to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show counsel was

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deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms. *Strickland*, 466 U.S. at 688; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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. *Strickland*, 466 U.S. at 694; *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Johnson*, 325 S.C. at 186, 480 S.E.2d at 735.

The transcript of Mr. Middleton's trial clearly shows the trial judge gave an erroneous jury charge on attempted murder. (Trial p. 414, l.11) Although he claimed to have been fully aware of the *King* opinion that found a specific intent to kill was an element of attempted murder, trial counsel failed to submit a compliant proposed instruction. He further failed object or take exception after the improper jury charge was given. (Trial p. 418) *State v. King*, 412 S.C. at 411, 772 S.E.2d at 194. I find this was error and amounted to ineffective assistance of trial counsel. I further find no strategic basis for allowing the improper jury charge which was clearly prejudicial to his defense.

The jury charge in this case negated the requirement of any proof of an element of the charge against the Applicant. This error substantially undermines confidence in the outcome of trial. If the error had been properly preserved for appeal, the appellate court would likely have reversed as evidenced by the *King* opinions. Furthermore, to underscore the prejudicial nature of the improper charge, the Supreme Court held that the error cannot be harmless. *State v. King*, App. Case No. 2015-001278, Opinion No. 27744, Page14 (2017)

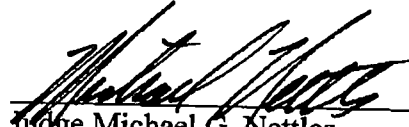
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CONCLUSION

Based on the above, this Court grants the Applicant post-conviction relief in this matter.

IT IS THEREFORE THE ORDER OF THIS COURT that the Applicant's conviction and sentence be vacated and this case remanded to General Sessions. If the State chooses to appeal this Order, I retain jurisdiction to address the appeal bond.

AND IT IS SO ORDERED this 29 day of May, 2018.



Judge Michael G. Nettles
Presiding Judge
Seventh Judicial Circuit

Spence, South Carolina.

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