

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW

December 13, 2019

RECEIVED

DEC 17 2019

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

S.C. SUPREME COURT

RE: Earnest Maurice Allen, SCDC # 310134 v. State of South Carolina
Appeal of Case No. 2017-CP-28-0904

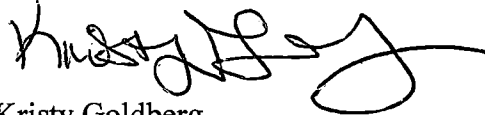
Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal and asking their office to open a file on his behalf, as I was **appointed** to represent Mr. Allen on his PCR.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,



Kristy Goldberg

CC: Lindsey McCallister
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Earnest Maurice Pickett, SCDC # 310134
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

Kershaw County Clerk of Court

ATTN: Lynn Lyons
Post Office Box 1557
Camden, South Carolina 29021 - 8557

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 17 2019

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Kristi F. Curtis, Circuit Court Judge

Case No. 2017-CP-28-0904

Earnest Maurice Allen, SCDC# 310134, Appellant

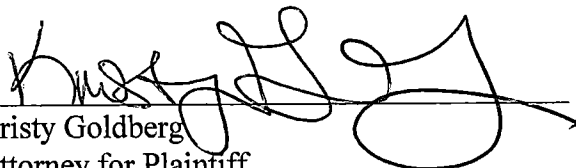
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Sylvester Johnson hereby appeals from the Order of the Kristi F. Curtis, presiding Judge for the 5th Judicial Circuit, filed December 2, 2019 and received by counsel for the Applicant on December 4, 2019.

December 13, 2019



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:

Assistant Attorney General, Lindsey McCallister
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 17 2019

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Kristi F. Curtis, Circuit Court Judge

Case No. 2017-CP-28-0904

Earnest Maurice Allen, SCDC# 310134, Appellant

v.

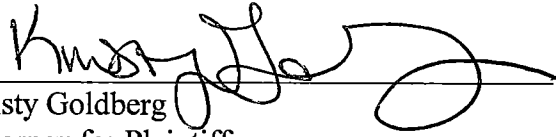
State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on December 13, 2019 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Lindsey McCallister
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.

1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Other Counsel of Record:
Assistant Attorney General, Lindsey McCallister
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

IN THE STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

Earnest Maurice Allen, #310134,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

CASE NO. 2017-CP-28-0904

ORDER DENYING APPLICANT'S
MOTION TO ALTER/AMEND
JUDGMENT

JANET C. HASLEY
CLERK OF COURT
KERSHAW COUNTY, S.C.

2019 DEC -2 PM 12:18

FILED FOR RECORD

On September 29, 2019, Applicant submitted a Motion to Alter/Amend the Court's Order

Denying Post-Conviction Relief in Part and Granting in Part dated September 9, 2019.

Applicant's Motion sought relief on the following issues:

1. Applicant disagrees with the Court's conclusion that there is no basis to which the Court could find Appellate Counsel should have known specific intent was required for attempted murder at the time of Applicant's trial;
2. Applicant reiterates that Post-Conviction Relief should be granted due to Trial Counsel's failure to object when the court "improperly charged the jury on inferred malice arising from the use of a deadly weapon," which Applicant contends was an improper charge in light of the Supreme Court's holding in State v. Belcher¹; and
3. Applicant asserts that the Court must overturn the conviction for Possession of a Firearm During the Commission of a Violent Crime if the Court now reconsiders and overturns its previous decisions and convictions in this matter.

¹ 385 S.C. 597, 608, 685 S.E.2d 802, 807 (2009).

ATTEST True, Correct & Certified
Copy of Original on File in this
Court

Janet C. Hasley
Clerk of Court

Upon reviewing the arguments raised within Applicant's Motion, the Court's Order Denying Post-Conviction Relief in Part and Granting in Part, and the submissions of both parties in this matter, this Court does not find that there is proper cause to alter or amend the Court's original order.

IT IS THEREFORE ORDERED THAT:

Applicant's Motion to Alter/Amend the Court's Order Denying Post-Conviction Relief in Part and Granting in Part is denied.

AND IT IS SO ORDERED this 25th day of November, 2019.

Kristi Curtis
KRISTI F. CURTIS
Presiding Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)
)
 Earnest Maurice Allen, #310134,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 IN THE FIFTH JUDICIAL CIRCUIT

Case No.: 2017-CP-28-0904

**MOTION TO ALTER/AMEND
 JUDGMENT**

FILED FOR RECORD
 2019 SEP 30 AM 9:25
 JANET C. HASTY
 CLERK OF COURT
 KERSHAW COUNTY, S.C.

Counsel for the Applicant has received the Order of the Court dismissing Applicant's claims for Post-Conviction Relief on September 9, 2019. Pursuant to South Carolina Rule of Civil Procedure Rule 59(e), the Applicant hereby requests this Court consider to Alter or Amend the current Judgment based upon the following argument:

1. Ineffective Assistance of Appellate Counsel – Failure to Raise the Issue of Specific Intent on Appeal

In the written order, this Court holds that there is no basis to find that Appellate Counsel should have known specific intent was required for attempted murder, because at the time of Applicant's trial, the existing authority supported the attempted murder instruction as given. Order, page 9. The Applicant disagrees with this conclusion.

As an initial matter, the existing authority at the time of the Applicant's trial only related to the previous offense of Assault and Battery with Intent to Kill. There was no existing authority yet directly related to the newly codified Attempted Murder statute until the Court of Appeals Opinion in the State v. King matter in 2015. 412 S.C. 403, 412 S.C. 403 (2015). The

Applicant would also disagree that the Supreme Court opinion in King states that the existing authority at the time supported the attempted murder instruction as given. This opinion clearly concluded that the trial judge erred in charging the jury that specific intent to kill is not an element of attempted murder, and attempted murder is not simply a codification of the former offense of ABWIK. 422 S.C. 47, 63, 810 S.E.2d 18,26 (2017).

Secondly, Appellate Counsel not only should have known, but did know that a legitimate legal issue regarding the requirement of specific intent existed when he was placed on notice by trial counsel's objection in the trial transcript.

The Order in this matter states a finding that "South Carolina law was unclear as to the level of intent required for attempted murder, especially given the conflicting language of the statute." Order, page 10. Accepting this Court's belief that the law was unclear and unsettled would only further support the argument that Appellate counsel should have fought for his client and raised this legitimate legal issue on appeal. The duty of Appellate counsel is not simply to raise issues that are well settled and firmly defined that support their client. If that were the case appeals would be far and few between and the court would have no meaningful issues to rule upon in the future. Rather, appellate counsel should be expected to raise legitimate legal issues where the law is unclear or ambiguous or based on newly codified statutes. It does not make sense to find that appellate counsel exercised reasonable professional judgment in failing to challenge what the State has conceded to be an ambiguous 2010 statute simply because he was unable to find "any cases directly supporting" the issue at the time of the brief was drafted in 2015. The court process simply does not work that fast.

In King, the Court found that an erroneous charge that specific intent to kill is not an element of attempted murder cannot be harmless. 422 S.C. at 64, 810 S.E.2d at 27 (2017). This

makes sense, as the jury was clearly considering an incorrectly defined offense. Therefore, the Applicant would also argue that this matter should not be denied using a harmless error analysis.

2. Ineffective Assistance of Trial Counsel – Failure to Object to Implied-Malice Jury Charge

The Applicant would reiterate that the court improperly charged the jury on inferred malice arising from the use of a deadly weapon based upon the holding in State v. Belcher where our Supreme Court held that such an instruction is improper “where evidence is presented that would reduce, mitigate, excuse or justify” the act. 385 S.C. 597, 608, 685 S.E.2d 802, 807 (2009). Trial counsel unreasonably believed that Belcher did not apply to this case when lesser included offenses were presented to the jury. If evidence existed to justify the presentation of lesser included offenses to the jury, then evidence existed to reduce or mitigate the original charges.

Further, the erroneous jury instruction that Attempted Murder did not require a specific intent to kill compounds this error. If the jury found the existence of only a general intent to cause serious injury, but then inferred malice simply from the use of the weapon, it is possible that the jury convicted the Applicant of attempted murder without actually finding that specific intent or malice existed.

In reaching a conclusion on this motion the Applicant would simply ask that this Court consider the findings in State v. Shands, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018), and the recent decision of the South Carolina Supreme Court in State v. Shane Adam Burdette, South Carolina Supreme Court Opinion No. 27910, Filed July 31, 2019, 2019 WL 3437783.

3. The Possession of a Firearm During the Commission of a Violent Crime Conviction should be Overturned

The Applicant would remind this Court that, if this Court reconsiders the decision

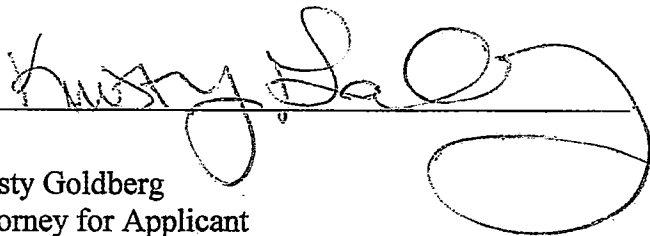
previously reached and overturns the convictions in their entirety remanding this matter for a new trial, the conviction for Possession of a Firearm During the Commission of a Violent Crime must be overturned as well pursuant to South Carolina Code of Laws § 16-23-490(A).

Remaining Claims

As to the Applicant's remaining claims not addressed in this Motion, Applicant hereby asserts that all allegations offered in his Post-Conviction Relief application and during the hearing were valid claims for Post-Conviction Relief that were sufficiently addressed on the record. Applicant would ask the Court to reconsider all allegations but does not have argument in addition to what has already been presented and intends to file a Notice of Appeal regarding the Court's decision on those grounds upon the final conclusion of this case after a ruling on this Motion to Alter/Amend Judgment is received.

Conclusion

The Applicant respectfully requests that this Court overturn the Applicant's convictions and remand for a new trial on all charges.



Kristy Goldberg
Attorney for Applicant

Kristy Goldberg
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
803-667-6633
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina

This ____th day of September, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)
Earnest Maurice Allen, #310134,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

Case No.: 2017-CP-28-0904

**ORDER OF DENYING POST-
CONVICTION RELIEF IN PART AND
GRANTING IN PART**

This matter is before the court on an application for post-conviction relief (PCR) filed by Earnest Maurice Allen (Applicant) on October 13, 2017. Respondent made its Return on February 15, 2018. Applicant amended the application on June 1, 2018, and August 24, 2018. An evidentiary hearing into the matter was convened on February 20, 2019, at the Richland County Courthouse before the Honorable Kristi F. Curtis. Kristy Grafton Goldberg, Esquire, represented Applicant. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General’s Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant also presented testimony from Jason Kirincich, Applicant’s trial counsel, and Thomas Jarrett Bouchette, Applicant’s appellate counsel. Applicant submitted a pre-trial Memorandum in Support of Post-Conviction Relief on September 15, 2018, when this case was originally scheduled for an evidentiary hearing. At the close of all the evidence, the Court indicated it would take this matter under advisement in order to give the State time to respond to Applicant’s arguments. After reviewing the submissions of both parties, this Court finds relief should be granted as to Applicant’s allegation his trial counsel was ineffective for requesting a charge on count of assault and battery

on the possession of a firearm during the commission of a violent crime charge, to run consecutive to the others. Sent. Tr. 10.

Applicant filed a timely notice of appeal. Thomas Jarrett Bouchette, Esquire (Appellate Counsel),² perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on April 6, 2016. State v. Allen, Op. No. 2016-UP-135 (S.C. Ct. App. filed October April 6, 2016). Following the issuance of that opinion, Applicant filed a *pro se* petition for rehearing while still represented by appellate counsel on April 20, 2016, and the State objected to that petition as an improper *pro se* filing. On May 3, 2016, the Court of Appeals notified Applicant it would not take action on his *pro se* petition based on the fact it was filed while he was still represented by counsel. On that same date, Applicant's Appellate Counsel filed a motion to be relieved as counsel, and, on May 10, 2016, Applicant refiled his *pro se* petition for rehearing. Subsequently, on July 15, 2016, the Court of Appeals granted Appellate Counsel's motion to be relieved, and remittitur was issued on July 18, 2016. Following that, Applicant moved for the remittitur to be recalled on August 23, 2016, and the Court of Appeals granted that motion on September 9, 2016. Thereafter, on October 21, 2016, the Court of Appeals denied Applicant's *pro se* petition for rehearing. Applicant then filed a petition for writ of certiorari with the South Carolina Supreme Court on November 18, 2016. The South Carolina Supreme Court denied Applicant's petition in an order dated August 25, 2017. The remittitur was issued on September 22, 2017.

² Robert M. Dudek, Esquire, of the South Carolina Commission on Indigent Defense – Office of Appellate Defense, is also listed as appellate counsel because this case was part of the Supreme Court's Appellate Practice Project. However, testimony at the evidentiary hearing established Bouchette selected the issues for appeal and wrote all briefs and motions submitted in the course of the appeal.

ALLEGATIONS

In his application for post-conviction relief and the amendments filed thereafter, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Appellate counsel was ineffective for failing to raise the issue of “specific intent” as an element of attempted murder in the Initial Brief, when the jury instruction was clearly objected to at trial by trial counsel and preserved for direct appeal;
2. Trial counsel was ineffective for improperly requesting an ABHAN charge be offered to the jury as a lesser-included offense when there was no evidence anyone was injured. Further, trial counsel was ineffective for not objecting when the charge was actually given to the jury, for suggesting the trial court erroneously re-instruct the jury that “it does not have to find an actual battery to find ABHAN,” and for failing to object when the ABHAN verdict was announced to the court;
3. Trial counsel was ineffective for failing to object when the trial court charged the jury inferred malice may arise when from the use of a deadly weapon;
4. Trial counsel was ineffective for failing to explain the elements and the nature of the charges with Applicant, and therefore failed to adequately explain the potential benefit that could arise from testifying in his own defense regarding specific intent. Accordingly, Applicant’s decision to waive his right to testify was uninformed, and he did not present evidence of intent.

SUMMARY OF TESTIMONY

Trial Counsel testified the charges arose when law enforcement initiated a traffic stop of Applicant’s vehicle in order to serve several outstanding warrants. Applicant fled on foot, four officers gave chase, and multiple shots were fired. The four pursuing officers were the victims listed on the arrest warrants for the attempted murder charges.

Trial Counsel testified he asked for lesser-included offenses to be considered by the jury, but he agreed he should have asked for assault and battery in the first degree rather than ABHAN. He explained ABHAN requires an injury, so the evidence at trial was insufficient to support that charge, but it did support a charge on assault and battery in the first degree. Trial Counsel also explained he did not object to the implied malice charge because he did not believe it fell under the Belcher rule. State v. Belcher, 385 S.C. 597 (2009) (holding jury charge instruction malice may be inferred from the use of deadly weapon was no longer good law in

South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify a homicide). Trial Counsel testified there was no evidence to mitigate or defeat the implied malice, unless the jury found assault and battery instead of attempted murder as to all of the officers.

Appellate Counsel testified he was appointed through the Bar's Appellate Practice Project, and although he met with Mr. Dudek, the Chief Appellate Defender, for guidance, Mr. Dudek did not direct him as to which issues to raise or arguments to make. Appellate Counsel testified he believed the specific-intent issue was preserved by Trial Counsel, but he did not raise it because, in his professional judgment, the trial court's ruling was consistent with the law at the time of the trial. Appellate Counsel explained he researched the attempted murder statute and noted it contained the language "with intent to kill." However, Appellate Counsel stated he felt the specific-intent issue was not the most appropriate issue for appeal, but because the Court of Appeal's decision in King was issued while Applicant's appeal was still pending, he petitioned to amend his brief to include it. State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015) (finding attempted murder requires proof of a specific intent to kill). Appellate Counsel further stated if the King decision had been issued prior to submission of his brief, he would have raised the specific-intent issue. However, he explained he could not find any cases directly supporting Trial Counsel's argument at the time he prepared the brief.

Applicant testified he and Trial Counsel never discussed lesser-included offenses, and he did not know that was an option for the jury. Applicant stated he recalled Trial Counsel requesting the ABHAN instruction, but he did not understand what that was at the time. Applicant explained he has since learned what a lesser-included offense is, what ABHAN means, and that it was not an applicable charge because none of the victims were injured. Applicant agreed he was guilty of assault and battery in the first degree. Further, Applicant testified he now

understands the importance of the specific-intent issue, and he felt Appellate Counsel should have raised it because, in his opinion, the State failed to prove he had a specific intent to kill. Applicant testified he believed there was no specific intent because he never verbally expressed any intent to kill the officers.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The State conceded at the evidentiary hearing ABHAN was not an appropriate lesser-included charge based on the evidence presented at trial, as there was no evidence of an injury to any of the officers. See S.C. Code Ann. § 16-3-600(B)(1) (“A person commits the offense of assault and battery of a high and aggravated nature *if the 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.”) (emphasis added). This Court agrees and therefore finds it appropriate to grant post-conviction relief as to Applicant’s second allegation.

However, after a review of the record and all evidence presented at the evidentiary hearing, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application as to all remaining allegations. This Court finds the combined record of the trial transcript and the testimony from the evidentiary hearing establishes Applicant received effective assistance of counsel, and this application should be denied. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as

having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-18, 386 S.E.2d at 625.

Applicant also alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, “appellate counsel is **not** required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)) (emphasis added). “For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . .”

Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Jones, 463 U.S. at 754).

Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel.

Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. Thus, in this case, we ask first whether appellate counsel's performance was deficient, and two, whether Applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, an applicant must show that, but for appellate counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

However, the standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

1. Ineffective Assistance of Appellate Counsel – Failure to Raise the Issue of Specific Intent on Appeal

Applicant contends Appellate Counsel was ineffective for failing to raise the issue of specific intent as an element of attempted murder in his initial appellate brief, because the jury instruction was objected to at trial and preserved for direct appeal. For the reasons set forth below, this Court disagrees and denies relief as to this allegation.

In 2010, the General Assembly replaced the offense of assault and battery with intent to kill (ABWIK)³ with the offense of attempted murder and codified ABHAN, along with three other lesser degrees of assault and battery, as a lesser-included offense. S.C. Code Ann. §§ 16-3-29, 16-3-600; see State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). Attempted murder is defined by statute as: “A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied[.]” S.C. Code Ann. § 16-3-29. In 2017, the Supreme Court decided State v. King, 422 S.C. 47, 56-57, 810 S.E.2d 18, 23 (2017), aff’g as modified State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), and found “[T]he Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder....”

However, the Court of Appeals’ decision was delivered in June 2015 and the Supreme Court’s decision in October 2017, years after Applicant’s trial. Applicant relies on the opinion in State v. King as support for his contention Appellate Counsel should have known specific intent was required for attempted murder and therefore should have raised the issue on appeal. However, this Court finds, at the time of Applicant’s trial, the existing authority supported the attempted murder instruction given, as evidenced by both the majority opinion and by Justice Kittredge’s concurring opinion in King. Accordingly, this Court finds Appellate Counsel was not deficient for choosing not to raise the issue. 422 S.C. at 74-74, 810 S.E.2d at 32 (Kittredge, J., concurring in result only); see also State v. Kinard, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (Ct. App. 2007) (“malice aforethought encompasses both the specific and general intent to commit murder”); State v. Foust, 325 S.C. 12, 14-15, 479 S.E.2d 50, 51 (1996) (for ABWIK, the required finding of “malice aforethought, either express or implied,” encompasses a requirement of

³ Formerly S.C. Code Ann. §16-3-620. See legislative history of S.C. Code Ann. § 16-3-29.

general intent). Indeed, this Court finds the very fact the Supreme Court went to such lengths to discuss the history of ABWIK and attempted murder in this state and to clarify the standard demonstrates the law was not clearly defined until that decision was rendered.

Importantly, the relevant lens for analysis is “counsel’s perspective at the time” of trial or appeal. Strickland, 466 U.S. at 689; see also Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) (“The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements.”). Further, attorneys are not required “to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.” Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765. At the time of Applicant’s trial and appeal in 2014 and 2015, respectively, this Court finds South Carolina law was unclear as to the level of intent required for attempted murder, especially given the conflicting language of the statute. As noted by the Supreme Court itself, King “acknowledge[s] the ambiguity created by the language in section 16-3-29. . . .” 422 S.C. at 62, 810 S.E.2d at 25-26.

Similarly, Justice Kittridge, writing separately, noted, “The majority and I agree that the statutory language creates an ambiguity – ‘with intent to kill’ speaks to a specific intent crime while ‘malice aforethought, either expressed or implied’ points to a general intent crime.” Id. at 72, 810 S.E.2d at 31 (Kittridge, J., concurring in result only). As Justice Kittridge explained, given the legislative history of the attempted murder statute, it was not unreasonable for Appellate Counsel to interpret the elements of attempted murder as requiring only general intent. See id. at 73, 810 S.E.2d at 32 (“If the legislature intended to create a specific intent crime, why did it use verbatim the language of the repealed common law offense of ABWIK that had a settled understanding as a general intent crime?”) Justice Kittridge concluded he would “affirm

the trial court's finding and related jury instruction that "[a] specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily harm." Id. at 75, 810 S.E.2d at 32.

This Court therefore finds Appellate Counsel was not deficient based on King. Because the law was ambiguous as to the required intent at the time of Applicant's trial and appeal, Appellate Counsel was not on notice he needed to raise the issue. See, e.g., Frierson v. State, 417 S.C. 287, 297-98, 789 S.E.2d 762, 767-68 (Ct. App. 2016) (finding counsel was not deficient for failing to advise defendant of potential violation of statutory warrant requirement where law at the time of trial was unsettled on the issue); see also Hill v. State, 350 S.C. 465, 567 S.E.2d 857 (2002) (holding failure of trial counsel to object to erroneous jury instruction was ineffective where appellate decision announcing change in law had already become final by the time of defendant's trial). As evidenced by Justice Kittridge's concurrence, even five justices of the Supreme Court could not agree on the appropriate level of intent, and therefore, Appellate Counsel's decision not to raise the issue was not unreasonable.

Appellate Counsel testified he researched the issue and did not find any cases directly supporting the argument for a specific-intent instruction. He also testified if the decision in King had come out prior to the submission of his initial brief, he would have raised that issue. Thus, this Court finds Appellate Counsel's decision not to raise the issue was not based on neglect, but rather was a considered choice based on his professional judgment, made after researching the law *as it existed at the time*. See Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985) (holding where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel); see also Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (finding there is a strong presumption that counsel's

decisions are based on tactical strategy rather than neglect). Therefore, this Court finds Appellate Counsel's performance was not deficient.

Furthermore, as discussed more fully below, the Court finds Applicant was not prejudiced because the State presented significant evidence of specific intent, at least as it relates to the officers who were the victims in two counts for which Applicant was actually convicted of attempted murder. Testimony at trial established Applicant stopped his flight, turned around, and fired multiple shots in the direction of pursuing officers. Trial Tr. pp. 102, 108-09, 138-39, 153, 161-62.

Accordingly, the Court finds Appellate Counsel was not constitutionally ineffective because his performance was not deficient, nor was Applicant prejudiced by his representation. Post-conviction relief is therefore denied as to this allegation.

2. Ineffective Assistance of Trial Counsel – Failure to Object to Implied-Malice Jury Charge

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object when the trial court charged the jury on inferred malice arising from the use of a deadly weapon. This Court disagrees and denies relief as to this allegation.

For the same reasons discussed above, this Court finds Trial Counsel was not constitutionally ineffective for failing to object to the implied-malice jury instruction. Applicant argues State v. Shands supports his claim the instruction was improper. 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018) (finding jury instruction that malice could be inferred from the use of a deadly weapon was no longer proper in a prosecution for attempted murder). Shands, however, is a 2018 case which relies entirely on King for this holding, and, as discussed above, given the ambiguous nature of the statutory language, Trial Counsel could not reasonably have known to object at the time of Applicant's trial in 2014.

This Court has reviewed King and notes that decision does not directly address the issue, but acknowledges the conflict, suggesting “the General Assembly... re-evaluate the language following ‘malice aforethought’ as the inclusion of the word ‘implied’ in section 16-3-29 is *arguably* inconsistent with a specific intent crime.” 422 S.C. at 64 n. 5, 810 S.E.2d at 27 n. 5 (emphasis added). Justice Kittridge’s concurrence also touches on the issue, stating he would affirm the implied-malice instruction, but noting since he is “in the minority in believing that the attempted murder statute requires only a general intent, I would caution against any implied malice instruction *in a future prosecution* under section 16-3-29.” Id. at 74 n. 13, 810 S.E.2d at 32 n. 13 (Kittridge, J., concurring in result only) (emphasis added). Trial Counsel, however, did not have the benefit of this guidance from the Supreme Court, and the statute itself references implied malice. Therefore, based on the state of the law at the time of trial in 2014, this Court finds Trial Counsel reasonably believed the implied-malice jury instruction was proper.

Applicant also argues Belcher required counsel to object. 385 S.C. 597, 685 S.E.2d 802 (2009) (holding jury charges instructing malice may be inferred from the use of a deadly weapon are improper where evidence is presented that would reduce, mitigate, excuse or justify the homicide). However, Trial Counsel testified he felt Belcher was not applicable to Applicant’s case as there was no evidence of self-defense or other mitigating factors. This Court agrees, at least as far as the two attempted murder convictions. The evidence presented at trial clearly showed Applicant fled from officers attempting a valid traffic stop and fired multiple shots at the officers closest to him. Applicant himself admitted he had to stop and turn to face the two officers in order to fire at them. Therefore, the Court agrees there was no evidence to reduce or mitigate the attempted murder charge, at least as to the two officers who were closest to Applicant. Therefore, the Court finds Trial Counsel was not deficient in failing to object to this

instruction for the two counts of attempted murder which resulted in a conviction as indicted. Additionally, even if Trial Counsel was deficient in failing to object to the charge as to the third officer, Applicant was not convicted of attempted murder as to the third officer, but rather of ABHAN, and the State has conceded relief is appropriate for that conviction on other grounds. Therefore, because Applicant has failed to meet his burden of proof as to the deficiency prong for the two attempted murder convictions and the prejudice prong for the ABHAN conviction, this Court finds Counsel was not constitutionally ineffective and denies relief as to this allegation.

3. Ineffective Assistance of Trial Counsel - Failure to Properly Explain Elements and Nature of the Charges to Applicant

Applicant alleges Trial Counsel was ineffective for failing to explain the elements and the nature of the charges against Applicant, and therefore, Trial Counsel failed to adequately explain the potential benefit that could arise from Applicant testifying in his own defense regarding specific intent. Accordingly, Applicant claims his decision to waive his right to testify was uninformed, and he did not present evidence of intent. For the reasons set forth below, this Court disagrees and denies relief as to this allegation.

First, the Court finds, based on Trial Counsel's arguments regarding the jury charge, Trial Counsel believed the State was required to prove a specific intent to kill, and therefore, logically, Trial Counsel prepared his defense with this consideration in mind. Regardless, Applicant's testimony at the evidentiary hearing was that, if he had testified, he would have told the jury he did not intend to kill the officers, and since he did not verbally announce an intent to kill, he believed the State would not have been able to prove specific intent. Applicant misapprehends the standard for specific intent.

“Specific intent means that the defendant consciously intended the completion of acts comprising the [attempted] offense.” State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000). Testimony at trial established Applicant stopped his flight, turned around, and fired multiple shots in the direction of pursuing officers. Trial Tr. pp. 102, 108-09, 138-39, 153, 161-62. This Court finds the State presented significant evidence of specific intent, and Applicant’s testimony at the evidentiary hearing in no way negated the State’s proof at trial. Therefore, this Court finds, even if Trial Counsel was deficient in his preparation of Applicant for trial, Applicant has failed to prove any prejudice as a result. This allegation is therefore denied.

CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has established a constitutional violation as to his ABHAN conviction in that trial counsel was ineffective for requesting an ABHAN charge when the evidence presented at trial did not meet the elements of the offense. Therefore, this application for post-conviction relief must be granted as to Applicant’s ABHAN conviction only. As to all other allegations, the Court finds Applicant has failed to establish any constitutional violations, and the remaining allegations are denied and dismissed with prejudice.

The Court notes Applicant and/or the State must file and serve a notice of appeal within thirty days from post-conviction relief counsel’s receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel’s assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a

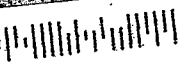
notice of appeal on Applicant's behalf. The parties are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for post-conviction relief is granted as to Applicant's conviction for ABHAN;
2. The application for post-conviction relief is denied and dismissed with prejudice as to all other allegations;
3. Applicant's conviction and sentence for ABHAN shall be vacated and his case remanded to the Court of General sessions for retrial;
4. However, Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentences for attempted murder, resisting arrest with a deadly weapon, and possession of a weapon during the commission of violent crime.

AND IT IS SO ORDERED this _____ day of _____, 2019.

KRISTI F. CURTIS
Presiding Judge
Fifth Judicial Circuit



U.S. POSTAGE
 \$1.90
 FCM LG ENV
 29206 0000
 Date of sale
 12/16/19K
 06 25K
 11488004\$

FOLD HERE

OF
 dberg, LLC
 LAW
 SUITE 303
 COLINA 29201

RECEIVED

DEC 17 2019

S.C. SUPREME COURT

The Honorable Daniel Shearouse
 Clerk of Court - South Carolina Supreme Court
 PO Box 11330
 Columbia, SC 29211