

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

Honorable Kristi F. Curtis, Circuit Court Judge

RECEIVED

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S.C. SUPREME COURT

EARNEST MAURICE ALLEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-002056

APPENDIX

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ATTORNEYS FOR RESPONDENT

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- (c) 2013GS2800683 - Assault and Battery High Aggra. Nature
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) January 16, 2014 - twenty (20) years
- (b) January 16, 2014 - twenty (20) years
- (c) January 16, 2014 - twenty (20) years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty Check
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. South Carolina Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Direct Appeal/Affirmed - Petition For A Rehearing/Denied
- ii. Writ of Certiorari/Denied
- iii. _____
- (c) the date of each such result:
- i. April 6, 2016 - October 21, 2016
- ii. August 25, 2017
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

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CLERK OF COURT
BERNARD COUNTY, S.C.

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) See Attachment A
- (b) See Attachment A
- (c) See Attachment A
11. State concisely and in the same order the facts which support each of the grounds set forth in (10):
- (a) See Attachment (a)
- (b) See Attachment (b)
- (c) See Attachment (c)
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? Yes
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Motion to Recall Remittitur
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Court of Appeals 1220 Senate Street Columbia S.C. 29201
- ii. _____
- iii. _____
- iv. _____

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CLERK OF COURT
SOUTH CAROLINA

(c) the disposition thereof:

i. Granted

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. September 9, 2016

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

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KEESHAW COUNTY, S.C.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is the first opportunity to raise this issue.
 (b) This is the first opportunity to raise this issue.
 (c) This is the first opportunity to raise this issue.

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Jason Kirinchick Kesrshaw County Public Defender's Office
1121 Broad Street Camden S.C. 29020
 ii. Thomas Jarrett Bouchette
212 Main Street Conway, S.C. 29526
 iii. Robert Michael Dudek Division of Appellate Defense
1330 Lady Street, Suite 401 Columbia, S.C. 29201-3332
 (b) the proceedings at which each such attorney represented you:
 i. Trial/Sentencing
 ii. Direct Appeal
 iii. Direct Appeal

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19. State clearly the relief you seek in filing this application:

To Vacate or in alternative, Reverse and Remand.

20. Are you now under sentence from any other court that you have not challenged?

No

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CLERK OF COURT
HERSHAM COUNTY, S.C.

STATE OF SOUTH CAROLINA)

VERIFICATION

County of McCormick)

I, Earnest Maurice Allen - Pickett, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Earnest M. Allen Pickett

SWORN to and subscribed before me this 11
day of October, 2017.

J. Franklen (L.S.)
Notary Public

My Commission Expires: 12-16-2019

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Earnest Maurice Allen-Pickett, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Earnest M. Allen-Pickett
Applicant

SWORN or affirmed to and subscribed before me this

11 day of October, 2017.

(94) J. Frankler
Notary Public

My Commission Expires: 12-16-2019

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CLERK OF COURT
Kershaw County, S.C.

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- (a): Appellate counsel was ineffective for failing to raise the issue of 'specific intent to kill not being an element of attempted murder' in the Initial Brief, when it was clearly objected to at trial by trial counsel and preserved for Direct Appeal.
- (b): Trial counsel was ineffective for failing to object to the ABHAN charge being introduced as a lesser included offense when there was no sufficient evidence of a battery presented at trial to constitute such a charge.
- (c): Trial counsel was ineffective for actually suggesting that the Court erroneously re-instruct the jury that, "it does not have to find an actual battery to find an ABHAN".

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(a): At trial, the trial Court committed reversible error when it instructed the jury 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". Tr.tr.p. 268 (Lines 12-13)

The record reveals that trial counsel timely objected to this instruction at trial stating;

"Your Honor did read from what you said you would. I would disagree that specific intent is not an element of attempted murder. I'd ask you to correct that but I understand the Court's position on that. I just make my objection noted". Tr.tr.p.278 (Lines 7-10)

As such, the issue is otherwise preserved for review by the Court of Appeals. However, Appellate counsel failed to raise this very material issue in the Initial Brief.

State v. King (S.C. App. 2015) deals squarely with the specific intent issue and the elements of attempted murder. On April 22, 2015, the Court of Appeals reversed King's convictions for attempted murder because the Legislature clarified for the first time that attempted murder is in fact a specific intent crime, stating;

"Section 16-3-29 was enacted in 2010 as part of the Omnibus Crime Reduction and Sentencing Act. See Act. No 273, 2010, S.C. Acts 1947. Before 2010, our Courts held that attempt crimes require the state to prove the defendant had a specific intent to complete the attempted crime". See. e.g. State v. Sutton, 340 S.C. 393, 397, 532 S.E. 2d. 283 285 (2000) stating;

"Attempt is a specific intent crime and the act constituting the attempt must be done with the intent to commit that particular crime. (first alteration in original (quoting 21 Am. Jur. 2d. Criminal Law §176(1998); State v. Thompson, 374 S.C. 257, 262, 647 S.E. 2d. 702, 705 (Ct. App. 2007 ("A person is guilty of attempted armed robbery if the person has a specific intent to commit armed robber.") State. v. Nesbitt, 346 S.C. 226, 231, 550 S.E. 2d. 864, 866 (Ct. App. 2001) Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime. In the context of an intent crime, specific intent means that the defendant consciously intended the completion of acts comprising the attempted (offense). In other words, the completion of such acts is the defendant's purpose".

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This error of law prejudiced the Appellate greatly because it lessened the burden of proof for the state. Therefore, had it not been for Appellate counsel's ineffectiveness, the Appellate's convictions for attempted murder would have been reversed.

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(b): The Court indicated in its jury instructions on ABHAN that

"Section 16-3-600(b) of the code of laws of South Carolina states that if a person commits the offense of assault and battery of a high and aggravated nature, if the person **injures another person and** great bodily injury to another, results or the act is accomplished by means likely to produce great death or great bodily injury. Great bodily injury means bodily injury which causes a substantial risk of death or which causes serious permanent disfigurement or lost or impairment of a function of a bodily member or organ. An assault is the intentional creation of a reasonable fear of immediate bodily harm. It's not necessary that the attempted injury actually take place. For example, if I walked up to you and when we are within arms reach, I draw back to hit you, that is an assault. **The battery is the unlawful touching of another person** by a person who has committed the assault. An unlawful touching can be caused by a part of the accused body or by an object the accused puts in motion. **The battery is the completion of the assault** by using or applying force to another person, however slight, in a rude, angry or resentful manner without legal justification to do so. Using my earlier example, if I **carry through the assault by hitting you, then that is a battery**". Tr.tr.p.269-270 (Lines 8-25 and 1-9)

Therefore, trial counsel was ineffective for failing to object to ABHAN being introduced as a lesser included offense because at no time during trial was there any evidence of a battery ever presented. It is stated in the record,

"Thank God. But for the grace of God, nobody got shot".
Tr.tr.p.246 (Lines 7-8)

And it is error to charge a lesser include offense when there is no evidence presented at trial to warrant such instructions. State v. Mitchell 362, S.C. 289, 301, 608. State v. Coleman 342 S.C. 172, 175 536 S.E.2d. 387, 389 (Ct. App. 2000) And the only time it is justifiable to introduce a lesser included offense is when after all the evidence has been heard, and the Judge feels like the Appellate is more guilty of the lesser instead of the greater. State v. Mathis, 287 S.C. 589, 340 S.E. 2d 583

The 16-3-600 statute for ABHAN explains that;

"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 results; or

(b) the act is accomplished by means likely to produce death or great bodily injury.

And goes on to further explain the level of the injury that has to occur stating;

For purposes of this Section;

"Great bodily injury means bodily injury which causes substantial risk of death or which causes permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ".

"Moderate bodily injury means physical injury that involves prolonged loss of consciousness or that causes temporary or moderate loss of the function of a bodily member or organ; or injury that requires the use of regional or general anesthesia or injury that results in a fracture or dislocation".

"Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that don't ordinarily require extensive medical care".

Therefore, even after the statute states that, "a person commits the offense of ABHAN if the person unlawfully injures another person, and; it then further explains that, that injury then has to either cause "great bodily harm; or the act is accomplished by means likely to produce death or great bodily injury". Therefore, the 'and' in this section indicates that there must be two things done to determine if an ABHAN has occurred. For example, if I said that I was going to throw the ball and catch the ball, that would be an indication that I was going to do two things. Therefore, because the word 'and' is included in the first section of this statute, it's implying that the Legislature intended that an injury be coupled together with either the (a) or (b) subsection of that statute. Meaning [an injury/ where great bodily injury results], or [an injury/ where the act is accomplished by means likely to produce death or great bodily injury].

'Battery' has been defined as any injury, regardless of how small, actually done to a person, in an angry, revengeful, rude, or hostile way. Examples are spitting in a person's face, touching a person's face, touching a

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person in anger, violently pushing a person out of the way, kissing a person against their will, and putting harmful drugs into another's food - if the drugs are taken into the body of the other with harmful results. And the last example is the type of example that the (b) subsection of this statute was made for. Which "if taken into the body" would also be considered a form of touching that could likely produce death or great bodily injury.

Therefore, because ABHAN requires an injury (some form of touching), trial counsel should have objected to the charge of ABHAN being introduced as a lesser included offense. This error prejudiced the Appellate greatly because not only does ABHAN require an injury, it also carries a maximum of twenty (20) years. While assault and battery in the first degree, an offense that does not require an injury, carries a maximum of ten (10) years. Had trial counsel objected to this charge being introduced, this issue would have been preserved for Direct Appeal.

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(c): After the Court was finished with its instructions to the jury in regards to the charge of ABHAN and the elements that it requires, trial counsel then suggested that the Court erroneously re-instruct the jury that, "it does not have to find an actual battery to find assault and battery of a high and aggravated nature", saying;

"Your Honor, I do have one other issue. I don't know the legal solution to it. I just wanted to express this. I believe your Honor did everything you possibly could to properly charge the assault and battery of a high and aggravated nature. I understand the law, and I've got it right here in front of me. There's and/or in there. There's a battery or there could just be an assault. I'm just not sure that it's clear enough for the jury. They don't have to find an actual battery to find the assault and battery of a high and aggravated nature. Before we had commonlaw ABHAN, AHAN. Now, it's all under one." Tr.tr.p. 278 (Lines 13-25)

This erroneous suggestion caused the Court to bring the jury back out and erroneously re-instruct them, saying;

"All right. Ladies and gentlemen, the lawyers have asked me to clarify one thing on the charge. On the charge of assault and battery of a high and aggravated nature, uh, the offense says that there has to be great bodily injury to another, that which would be the assault and the battery or the act is accomplished by means likely to produce death or great bodily injury. So there doesn't actually have to be the battery in an assault and battery, you know, the unlawful touching or, uh, striking in some way. There either has to be -- there is a battery or the act is accomplished by means likely to produce death or great bodily injury. So with that said, I'm going to let you step back to the jury room. Tr.tr.p. 279-280 (Lines 19-25 and 1-8)

In 2010, the Omnibus Crime Reduction and Sentencing Reform Act that trial counsel is referring to, the Legislature abolished all commonlaw assault and battery offenses and all prior statutory assault and battery offenses. In place of those offenses, the Act codified Attempted Murder in Section 16-3-29 and four degrees of Assault and battery in Section 16-3-600. The new degrees of assault and battery are in descending order of severity, assault and battery of a high and aggravated nature (ABHAN), and assault and battery in the first, second, and third degrees. Under the statute, ABHAN is a lesser included offense of Attempted Murder, Assault and Battery in the first degree is a lesser included offense of both Attempted Murder

and ABHAN. Further, Assault and Battery in the second and third degrees are each lesser included offense of every proceeding offense.

In State v. Middleton, 407 S.C. 312, 755 S.E. 2d. 432 (2014), the defendant was charged with Attempted Murder and requested the lesser charge of Assault and Battery in the first degree. He was granted this request as to one of the victims but was denied this request as to the other victim because the Judge believed it would be inappropriate to charge Assault and Battery in the first degree when both victims were not injured. The Supreme Court found this to be error because "while subsection (a) does require an injury to the victim, assault and battery in the first degree also comprises subsection (b) of the statute"; "Offers or Attempts to injure" a person with the present ability to do so by means likely to produce death or great bodily injury constitutes assault and battery in the first degree.

Therefore, when trial counsel mentioned that, "ABHAN, AHAN. Now it's under one", it is clear that he misconstrued the statutory definition of ABHAN as not requiring an injury to the victim.

The (B)(1) Section of the 16-3-600 statute for ABHAN begins by stating that;

"A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person and;"

This makes clear that the injury itself is part of the offense. And further makes clear that the injury must then be connected to one of the subsections that follow.

The (C)(1) Section of the 16-3-600 statute for Assault and Battery in the first degree begins by stating that;

"A person commits the offense of Assault and Battery in the first degree if the person unlawfully:"

Here, the word 'injury' is not connected to the offense itself, but is

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explained in the subsections below, stating;

- (a) injures another person, and the act;
 - (i) involves nonconsensual touching of the private parts of an adult, either under or above clothing, with lewd and lascivious intent; or
 - (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or
- (b) offers or attempts to injure another person with the present ability to do so, and the act;
 - (i) is accomplished by means likely to produce death or great bodily injury; or
 - (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

In sum, if the (B)(1) Section of the statute does not require an injury, it would have been explained as thoroughly as it is in Section (C)(1) as to not confuse the people. "One of the primary rules in the construction of a statute is that the words used therein should be taken in their ordinary and popular signification unless there is something in the statute requiring a different interpretation. This is really nothing more than a rule of common sense, for it must be supposed that the Legislature, in enacting a statute, intended that the words be understood in the sense in which they are ordinarily and popularly understood by the people, for whose guidance and government the law was enacted, unless there is something in the statute showing the words in question were used in some other sense." Field v. Gregory, et. al, 230 S.C. 39, 94 S.E. 2d. 15

The fact that the Court charged ABHAN as a lesser included offense makes clear that after all the evidence was presented at trial, the Judge believed the Appellate to be more guilty of a lesser rather than the greater. But because the statute was misconstrued by both trial counsel and the Court, the Appellate was found guilty not only of the greater offense of Attempted Murder but also of the lesser included offense of ABHAN.

Therefore, had it not been for the ineffectiveness of trial counsel suggest- that the Court erroneously re-instruct the jury that, "it does not have to find an actual battery to find the assault and battery of a high and aggravated nature", the Appellate would have been found not guilty of that

charge. This error prejudiced the Appellate greatly because not only does ABHAN require a battery, it also carries a maximum of twenty (20) years. While the offense of Assault and Battery in the first degree, which does not require a battery, carries only a maximum of ten (10) years.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	
	)	2017-CP-28-904
EARNEST MAURICE ALLEN,	)	
SCDC # 310134,	)	
Applicant,	)	
	)	AMENDED APPLICATION FOR
v.	)	POST-CONVICTION RELIEF
	)	
STATE OF SOUTH CAROLINA	)	
Respondent.	)	

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KERSHAW COUNTY, S.C.

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1. Place of Detention: Lee Correctional Institution.
2. Name and location of Court which imposed sentence: Kershaw County Court of General Sessions, Kershaw County Courthouse, Camden, South Carolina.
3. Name(s) of co-defendant(s): n/a.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - a. 2013-GS-28-681 Attempted Murder
 - b. 2013-GS-28-682 Attempted Murder
 - c. 2013-GS-28-683 Assault and Battery High and Aggravated Nature
5. The date upon which sentence was imposed and the terms of the sentence:
 - a. January 16, 2014 20 years concurrent for all charges listed above.
6. A finding of guilty was made after a plea of not guilty and a trial by a jury.
7. Did you appeal the judgment of conviction or the imposition of sentence? No.
8. If you answered "yes" to (6), list
 - a. The name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. South Carolina Supreme Court
 - b. The result in each such Court to which you appealed:
 - i. Conviction Affirmed, motion for rehearing denied
 - ii. Petition for writ of certiorari denied
 - c. The date of each such result:
 - i. April 6, 2016
 - ii. August 25, 2017
 - d. If known, the citations of any written opinion or orders entered pursuant to such results:
 - i. Unpublished Opinion No. 2016-CP-135
 - ii. n/a

9. If you answered "no" to (7), state your reasons for not so appealing: n/a
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- a. Appellate counsel was ineffective for failing to raise the issue of 'specific intent to kill not being an element of attempted murder' in the Initial Brief, when it was clearly object to at trial by trial counsel and preserved for Direct Appeal (Transcript page 268);
 - b. Trial counsel was ineffective for failing to object to the ABHAN charge being introduced as a lesser included offense when there was no sufficient evidence of a battery presented at trial to constitute such a charge;
 - c. Trial counsel was ineffective for suggesting that the Court erroneously re-instruct the jury that "it does not have to find an actual battery to find ABHAN."
 - d. Trial counsel was ineffective for failing to object when the Court charged the jury that "[i]nferred malice may ... arise when the deed is done with a deadly weapon." (Transcript page 268.);
 - e. Trial counsel was ineffective in failing to clearly explain to the Applicant the nature and elements of his charges and accordingly, trial counsel failed to fully discuss with the Applicant the potential benefit that could arise from testifying in his own defense. Accordingly, the Applicant made an uninformed decision when he waived his right to testify in his own defense.
11. State concisely and in the same order the facts which support each of the grounds set out in (10).
- a. Appellate counsel failed to raise an issue in his initial (or final) brief regarding the fact that the trial court erred by instructing the jury that specific intent is not a required element in determining guilt or innocence for an Attempted Murder charge;
 - b. Trial counsel should have objected to the presentation of Assault and Battery of a High and Aggravated Nature as a lesser included offense, as is undisputed that the Applicant did not injure anyone. Trial counsel should have argued that the appropriate lesser included offense for presentment to the jury would have been Assault and Battery in the First Degree;
 - c. Trial counsel should have ensured that the jury was properly instructed according to the definition of Assault and Battery of a High and Aggravated Nature which requires one person to unlawfully injure another person;
 - d. Trial counsel should have objected with the Court informed the jury that they could infer malice from the use of a deadly weapon when facts did exist at the time which could reduce, mitigate, excuse, or justify the Attempted Murder charges;
 - e. Trial counsel failed to explain the elements required for conviction on his Attempted Murder charges nor the elements required for convictions on any charge of a lesser include offense. As a result, the Applicant did not know at the time of trial that he could provide testimony detailing facts that could have been determining factors in the jury's deliberations regarding the existence of intent, attempt and state of mind.

12. Prior to this application have you filed with respect to this conviction:

- a. Any petition in a State Court under South Carolina Law? No.
- b. Any petitions in State or Federal Courts for habeas corpus or post-conviction relief? No.
- c. Any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in # 7? No.
- d. Any other petitions, motions or applications in this or any other Court? No.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- a. The specific nature thereof: n/a.
- b. The name and location of the Court in which each was filed: n/a.
- c. The disposition thereof: n/a.
- d. The date of each such disposition: n/a.
- e. If known, citations of any written opinions or orders entered pursuant to each such disposition: n/a.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? Yes.

15. If you answered "yes" to (14) identify:

- a. Which grounds have been presented: 10(a).
- b. The proceedings in which each ground was raised: Appellate counsel filed a Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law. This motion was denied by the Court of Appeals which did not making a ruling as to the merits of this issue.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- a. n/a (see above)
- b. this issue was not properly preserved by trial counsel and is reflective of ineffective assistance of counsel;
- c. this issue was not properly preserved by trial counsel and is reflective of ineffective assistance of counsel;
- d. this issue was not properly preserved by trial counsel and is reflective of ineffective assistance of counsel;
- e. this issue was not properly preserved by trial counsel and is reflective of ineffective assistance of counsel.

17. Were you previously represented by an attorney at any time during the course of:

- a. Your arraignment and plea? Yes.

- b. Your trial, if any? n/a.
- c. Your sentencing? Yes.
- d. Your appeal, if any, from the judgment of conviction or imposition of sentence? Yes.
- e. Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction which you filed? Yes.

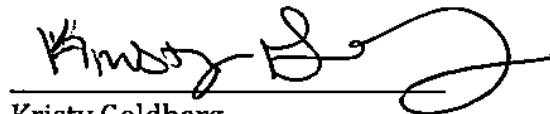
18. If you answered "yes" to one or more parts of (17), list:

- a. The name and address of each attorney who represented you:
 - i. Jason Kirinchich, Kershaw County Public Defender's Office, 1121 Broad Street, Camden, South Carolina 29020
 - ii. Thomas Jarrett Bouchette, 212 Main Street, Conway South Carolina 29526
 - iii. Robert Michael Dudek, Appellate Defense, 1330 Lady Street, Columbia South Carolina 29201
- b. The proceedings at which each such attorney represented you:
 - i. Trial
 - ii. Appeal
 - iii. Appeal

19. State clearly the relief you seek in filing this application: Conviction reversed with remand for new trial, or if appropriate, remand to appellate court to allow an initial brief to be filed regarding the additional unpreserved issue

20. Are you now under sentence from any other court that you have challenged? Yes. This Post-Conviction Relief action only challenges the convictions named herein.

Respectfully submitted,



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

Columbia, South Carolina

This 30th day of may, 2018

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

EARNEST MAURICE ALLEN,
SCDC # 310134,
Applicant,

v.

STATE OF SOUTH CAROLINA
Respondent.

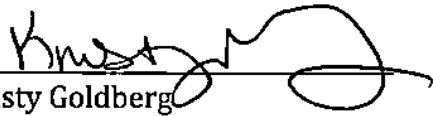
IN THE COURT OF COMMON PLEAS

2017-CP-28-904

CERTIFICATE OF SERVICE

FILED FOR RECORD
2018 JUN -1 PM 1:50
JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

I certify that on this date I served the Application for Post-Conviction Relief in this case on The State of South Carolina by delivering a copy of this Notice to the State Attorney General's Office, by delivering a copy of this motion via U.S. Mail said copy to the 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

Columbia, South Carolina

This 30th day of may 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	
	)	2017-CP-28-904
EARNEST MAURICE ALLEN,	)	
SCDC # 310134,	)	
Applicant,	)	
	)	<u>SECOND AMENDED APPLICATION</u>
v.	)	POST-CONVICTION RELIEF
	)	
STATE OF SOUTH CAROLINA	)	
Respondent.	)	

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

2018 AUG 27 PM 2:20

FILED FOR RECORD

1. Place of Detention: Lee Correctional Institution.
2. Name and location of Court which imposed sentence: Kershaw County Court of General Sessions, Kershaw County Courthouse, Camden, South Carolina.
3. Name(s) of co-defendant(s): n/a.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - a. 2013-GS-28-681 Attempted Murder;
 - b. 2013-GS-28-682 Attempted Murder;
 - c. 2013-GS-28-683 Assault and Battery High and Aggravated Nature;
 - d. 2013-GS-28-0685 Possession of a weapon during the commission of a violent crime.
5. The date upon which sentence was imposed and the terms of the sentence:
 - a. January 16, 2014 20 years concurrent;
 - b. January 16, 2014 20 years concurrent;
 - c. January 16, 2014 20 years concurrent;
 - d. January 16, 2014 4 years consecutive to indictment ending -0681.
 - e.
6. A finding of guilty was made by a jury after a plea of not guilty.
7. Did you appeal the judgment of conviction or the imposition of sentence? Yes.
8. If you answered "yes" to (6), list
 - a. The name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. South Carolina Supreme Court

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

2017-CP-28-904

EARNEST MAURICE ALLEN,
SCDC # 310134,
Applicant,

v.

AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

STATE OF SOUTH CAROLINA)
Respondent.)

JALET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

2018 AUG 27 PM 2:20

FILED FOR RECORD

1. Place of Detention: Lee Correctional Institution.
2. Name and location of Court which imposed sentence: Kershaw County Court of General Sessions, Kershaw County Courthouse, Camden, South Carolina.
3. Name(s) of co-defendant(s): n/a.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - a. 2013-GS-28-681 Attempted Murder;
 - b. 2013-GS-28-682 Attempted Murder;
 - c. 2013-GS-28-683 Assault and Battery High and Aggravated Nature;
 - d. 2013-GS-28-0685 Possession of a weapon during the commission of a violent crime.
5. The date upon which sentence was imposed and the terms of the sentence:
 - a. January 16, 2014 20 years concurrent;
 - b. January 16, 2014 20 years concurrent;
 - c. January 16, 2014 20 years concurrent;
 - d. January 16, 2014 4 years consecutive to indictment ending -0681.
 - e.
6. A finding of guilty was made by a jury after a plea of not guilty.
7. Did you appeal the judgment of conviction or the imposition of sentence? Yes.
8. If you answered "yes" to (6), list
 - a. The name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. South Carolina Supreme Court

- b. The result in each such Court to which you appealed:
 - i. Conviction Affirmed, motion for rehearing denied
 - ii. Petition for writ of certiorari denied
- c. The date of each such result:
 - i. April 6, 2016
 - ii. August 25, 2017
- d. If known, the citations of any written opinion or orders entered pursuant to such results:
 - i. Unpublished Opinion No. 2016-CP-135
 - ii. n/a

9. If you answered "no" to (7), state your reasons for not so appealing: n/a

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- a. 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. (Transcript page 268, 278).
- b. Trial counsel was ineffective for improperly requesting that an ABHAN charge be offered to the jury as a lesser included offense when there was no sufficient evidence anyone was "injured. Further, trial counsel was ineffective for not objecting when the charge was actually given to the jury, for suggesting that the 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. (Transcript page 213, 269, 279-280).
- c. Trial counsel was ineffective for failing to object when the Court charged the jury that "[i]nferred malice may also arise when the deed is done with a deadly weapon." (Transcript page 268).
- d. Trial counsel was ineffective in failing to clearly explain to the Applicant the nature and elements of his charges and accordingly, trial counsel failed to fully discuss with the Applicant the potential benefit that could arise from testifying in his own defense in regards to his specific intent. Accordingly, the Applicant made an uninformed decision when he waived his right to testify in his own defense and failed to present evidence regarding his intent.

11. State concisely and in the same order the facts which support each of the grounds set out in (10).

- a. As described above;
- b. As described above;
- c. As described above;
- d. Trial counsel failed to explain the elements required for conviction on his Attempted Murder charges nor the elements required for convictions on any charge of a lesser include offense. As a result, the Applicant did not know at the time of trial that he could provide testimony detailing facts that could have been determining factors in the jury's deliberations regarding the existence of intent, attempt and state of mind.

12. Prior to this application have you filed with respect to this conviction:

- a. Any petition in a State Court under South Carolina Law? No.
- b. Any petitions in State or Federal Courts for habeas corpus or post-conviction relief? No.
- c. Any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in # 7? No.
- d. Any other petitions, motions or applications in this or any other Court? No.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- a. The specific nature thereof: n/a.
- b. The name and location of the Court in which each was filed: n/a.
- c. The disposition thereof: n/a.
- d. The date of each such disposition: n/a.
- e. If known, citations of any written opinions or orders entered pursuant to each such disposition: n/a.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? Yes.

15. If you answered "yes" to (14) identify:

- a. Which grounds have been presented: 10(a).
- b. The proceedings in which each ground was raised: Appellate counsel filed a Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law. This motion was denied by the Court of Appeals wihtout making a ruling as to the merits of this issue.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- a. n/a (see above)

- b. this issue was not properly preserved by trial counsel and is reflective of ineffective assistance of counsel;
- c. this issue was not properly preserved by trial counsel and is reflective of ineffective assistance of counsel;
- d. this issue was not properly preserved by trial counsel and is reflective of ineffective assistance of counsel;
- e. this issue was not properly preserved by trial counsel and is reflective of ineffective assistance of counsel.

17. Were you previously represented by an attorney at any time during the course of:

- a. Your arraignment and plea? Yes.
- b. Your trial, if any? Yes.
- c. Your sentencing? Yes.
- d. Your appeal, if any, from the judgment of conviction or imposition of sentence? Yes.
- e. Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction which you filed? Yes.

18. If you answered "yes" to one or more parts of (17), list:

- a. The name and address of each attorney who represented you:
 - i. Jason Kirinchich, Kershaw County Public Defender's Office, 1121 Broad Street, Camden, South Carolina 29020
 - ii. Thomas Jarrett Bouchette, 212 Main Street, Conway South Carolina 29526
 - iii. Robert Michael Dudek, Appellate Defense, 1330 Lady Street, Columbia South Carolina 29201
- b. The proceedings at which each such attorney represented you:
 - i. Trial
 - ii. Appeal
 - iii. Appeal

19. State clearly the relief you seek in filing this application: Conviction reversed with remand for new trial, or if appropriate, remand to appellate court to allow an initial brief to be filed regarding the additional unpreserved issue. If the violent offense convictions are reversed with remand for a new trial the PCR or appellate level, the conviction for Possession of a weapon during the commission of a violent crime would also need to be reversed with remand for new trial.

20. Are you now under sentence from any other court that you have challenged? Yes. This
Post-Conviction Relief action only challenges the convictions named herein.

Respectfully submitted,



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

Columbia, South Carolina

This 24 th day of August, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FIFTH JUDICIAL CIRCUIT
COUNTY OF KERSHAW	)	
	)	
Earnest Maurice Allen, #310134,	)	Case No.: 2017-CP-28-0904
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, making its Return to the application for Post-Conviction Relief ("PCR") filed on October 13, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. In July of 2013 the Kershaw County Grand Jury indicted Appellant for four counts of attempted murder (2013-GS-28-0681; -0682; -0683; -0684); one count of resisting arrest with a deadly weapon (2013-GS-28-0811); and one count of possession of a firearm during the commission of a violent crime (2013-GS-28-0685). The charges stem from an incident in December of 2012, in which the Applicant was apprehended and arrested after he fled from and fired multiple gunshots at law enforcement officers attempting to lawfully arrest him on outstanding bench warrants. (Tr. 80-85). On January 13-16, 2014, Appellant proceeded to trial before a jury and the Honorable James R. Barber. Jason D. Kirincich, Esquire, represented Appellant, and Assistant Solicitor Brett Perry represented the State. The jury found Applicant guilty on two counts of attempted murder, one count of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN), one count of resisting arrest with a deadly weapon, and one count of possession of a

firearm during the commission of a violent crime.¹ (Tr. 281-82.) Judge Barber sentenced him to twenty years' imprisonment for the two attempted murder charges and the ABHAN charge, all to run concurrently; two years' imprisonment for the resisting arrest with a deadly weapon charge, to run concurrently; and four years' imprisonment 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. Robert M. Dudek, Esquire, of the South Carolina Commission on Indigent Defense – Office, of Appellate Defense 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).² 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

¹ The trial court directed a verdict on one attempted murder charge. (Tr. 220, lines 20-21.)

² At some point prior to the conclusion of the case, T. Jarrett Bouchette, Esquire became involved as appellate attorney along with Robert M. Dudek, Esquire. His name appears on the final brief of appellant, and is the only signature on a motion to supplement the final brief that was filed February 24, 2016.

November 18, 2016. The South Carolina Supreme Court denied Applicant's petition in an order dated August 25, 2017. Remittitur issued on September 22, 2017.

Attached to this return and incorporated by reference are the records of the Kershaw County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the transcript, Applicant's appellate records, and the application. Respondent reserves the right to amend this return upon receipt of any relevant materials.

II.

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

1. "Ineffective assistance of counsel", in that:
 - a. "Appellate counsel was ineffective for failing to raise the issue of 'specific intent to kill not being an element of attempted murder' in the [i]nitial [b]rief, when I was clearly objected to at trial by trial counsel and preserved for [d]irect [a]ppeal."
 - b. "Trial Counsel was ineffective for failing to object to the ABHAN charge being introduced as a lesser included offense when there was no sufficient evidence of a battery presented at trial to constitute such a charge."
 - c. "Trial counsel was ineffective for actually suggesting that the Court erroneously re-instruct the jury that, "it does not have to find actual battery to find an ABHAN."

These allegations were accompanied by citations to the transcript and case law.

III.

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, 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 that "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 v. Washington, 466 U.S. 668. First, Applicant must prove that 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). The 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 the Applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed

by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. *Pro se* filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

V.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

VI.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claim of ineffective assistance of trial counsel.

Signature follows.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JESSICA E. KINARD
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

15 Feb., 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	
	)	2017-CP-28-0904
	)	
ERNEST MAURICE ALLEN, #310134,	)	
	)	
Applicant,	)	
	)	
vs	)	CERTIFICATE OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent,	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Kristy Goldberg, Esquire
Law Office of Kristy Goldberg, LLC
1720 Main Street, Suite 303
Columbia, SC 29201

DATED this the 15th day of February, 2018.



 Camille Henry, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW) FIFTH JUDICIAL CIRCUIT
2017-CP-28-0904

EARNEST MAURICE ALLEN)
vs.) TRANSCRIPT OF RECORD
STATE OF SOUTH CAROLINA)

FEBRUARY 20, 2019
COLUMBIA, SOUTH CAROLINA

BEFORE THE HONORABLE KRISTI CURTIS

APPEARANCES:

LINDSEY A. MCCALLISTER, ASSISTANT ATTORNEY GENERAL
COLUMBIA, SOUTH CAROLINA

ATTORNEY FOR THE STATE

KRISTY GOLDBERG, ESQUIRE
COLUMBIA, SOUTH CAROLINA

ATTORNEY FOR THE APPLICANT

SHIRLEY BROOM
16TH Circuit Court Reporter

ALL FEES PURSUANT TO RULE 607 (h) (i), SCACR
COPIES AVAILABLE UPON REQUEST FROM COURT REPORTER

I-N-D-E-X

WITNESSES:	DIRECT	CROSS	RE-DIRECT	RE-CROSS
Jason Kirincich				
By Ms. Goldberg	7			
By Ms. McCallister	16			
Jarrett Bouchette				
By Ms. Goldberg	19			
By Ms. McCallister		26		
Earnest Maurice Allen				
By Ms. Goldberg	28			
By Ms. McCallister		36		
By The Court	39			

E X H I B I T S

Ex.No.	<u>DESCRIPTION:</u>	<u>ID.</u>	<u>EV.</u>
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(NO EXHIBITS)

1 MS. MCCALLISTER - May it please the Court.

2 THE COURT - Yes, ma'am.

3 MS. MCCALLISTER - This is Earnest Maurice Allen
4 versus the State of South Carolina, 2017-CP-28-0904. Your
5 Honor, Mr. Allen was indicted in July of 2013 by the
6 Kershaw County Grand Jury for four counts of attempted
7 murder, one count of resisting arrest with a deadly weapon
8 and one count of possession of a firearm during the
9 commission of a violent crime. The charges stemmed from an
10 incident in December of 2012 in which he was pulled over
11 and fled from law enforcement with multiple shots fired
12 while they were attempting to arrest him on some
13 outstanding warrants. In January, 2013 -- I mean I'm
14 sorry, January 13th through the 16th of 2014, Mr. Allen
15 proceeded to trial before a jury and the Honorable James
16 Barber. He was represented on these charges by Jason
17 Kirincich? -- okay -- and Assistant Solicitor Brett Perry
18 represented the State. The jury found him guilty on two
19 counts of attempted murder, one count of assault and
20 battery of a high and aggravated nature, one count of
21 resisting arrest, the possession of a weapon, but Judge
22 Barber directed a verdict on the fourth attempted murder
23 charge. Judge Barber then sentenced him to 20 years
24 imprisonment for the two attempted murder charges and the
25 ABHAN charge all to run concurrently, two years

1 imprisonment for resisting arrest and four years for the
2 possession of a firearm during the commission of a violent
3 crime, which was -- that four year charge was to run
4 consecutive to the other charges, so an aggregate 24. Your
5 Honor, he did file a timely notice of appeal. He was
6 represented on that appeal by Jarrett Bouchette. The South
7 Carolina Court of Appeals affirmed his convictions on April
8 6th, 2016. He then filed a pro se petition for a re-
9 hearing and that was denied on July 15th, 2016 and the
10 remittitur was issued on July 18th, 2016. Your Honor,
11 there -- there's a -- a little bit of a complication with
12 the appellate history. Then the remittitur was recalled.
13 He re-filed a pro se petition after relieving counsel. The
14 Court of Appeals heard that petition. I'm sorry, they --
15 they considered it at least, and then denied that petition
16 again in August of 2017, so the remittitur was finally
17 issued on September 22nd, 2017. He then timely filed this
18 PCR application on October 13th, 2017. He is represented
19 in this matter by Ms. Kristy Goldberg. They are both
20 present in the courtroom today. Your Honor, Ms. Goldberg
21 filed several amendments to his application. The second
22 amended application was filed August 24th, 2018. It's my
23 understanding that those are the allegations, um -- that
24 second amendment supersedes all of the other allegations.
25 There are five allegations, Your Honor, one of which is an

1 issue -- he's alleged that his trial counsel was
2 ineffective for improperly requesting an ABHAN charge as a
3 lesser included, because there was no evidence that anyone
4 was injured. Your Honor, the State has researched that
5 claim and we agree with the defendant as to that issue only
6 and we are conceding as to that issue only, the ABHAN
7 charge. So that would still leave the attempted murder and
8 the weapon charges. And I believe Ms. Goldberg has
9 indicated to me that her client wishes to withdraw the last
10 allegation, um, (b), and I'll let Ms. Goldberg speak at
11 this time.

12 MS. GOLDBERG - Thank you, Your Honor. May it
13 please the Court. We have filed a second amended
14 application as stated. I think Ms. McCallister mentioned
15 that there were five, but I think there's only four ---

16 MS. MCCALLISTER - Oh, is it only four? I'm sorry
17 ---

18 MS. GOLDBERG - It's okay. I was just making sure
19 I wasn't -- she isn't looking at a different thing than me,
20 but, Your Honor, I have also filed in this case a
21 memorandum, which I know as we begin, Your Honor, we'll
22 have to review after-the-fact. For some reason, this is
23 missing the last page.

24 MS. MCCALLISTER - It should -- is it not in the
25 packet?

JASON KIRINCICH - DIRECT BY MS. GOLDBERG

1 MS. GOLDBERG - It was filed in September, so it
2 may be ---

3 THE COURT - I do have the second -- I did look
4 through this -- all right, okay, now, here it is.
5 September 5th, 2018, applicant's memorandum in support ---

6 MS. GOLDBERG - Yes. Yes, Your Honor, that is
7 relevant. At this time I'd like to call my first witness,
8 which will be Jason Kirincich.

9 JASON KIRINCICH, AFTER BEING FIRST DULY SWORN,
10 TESTIFIES AS FOLLOWS -

11 DEPUTY CLERK - Thank you. Please have a seat in
12 the witness stand, and state your full name for the record.

13 MR. KIRINCICH - Jason Kirincich, K-i-r-i-n-c-i-c-
14 h.

15 DIRECT EXAMINATION

16 BY MS. GOLDBERG -

17 Q All right, Mr. Kirincich, just to get a little
18 baseline information for the record, where are you
19 employed?

20 A The Kershaw County Public Defender's Office.

21 Q And you're an attorney with that office?

22 A Yes.

23 Q Is that how you came to know Mr. Allen?

24 A It is.

25 Q Do you know -- you were his attorney in this case?

1 A I was.

2 Q Were you appointed through your employment with the
3 public defender's office?

4 A Appointed.

5 Q Okay. Do you know if you were the only attorney he
6 had on this case or if there were any other counsel prior
7 to you or representation?

8 A He may have consulted with a private attorney, but it
9 was my case from the day he got arrested through trial.

10 Q And this case did, actually, go to a trial. Correct?

11 A Correct.

12 Q You heard Ms. McCallister briefly state, kind of a
13 little factual snippet or synopsis of the trial on the
14 record leading up to this. Is that an accurate description
15 of the facts in this case?

16 A Yes.

17 Q Okay. There were how many charges that you recall?

18 A Ms. Goldberg, I don't -- I don't know. I'd have to go
19 back and look, but I don't know off the top of head.

20 Q Well, let me make -- let me make this part clear.
21 There were -- there was more than one attempted murder
22 charge that he was on trial for. Correct?

23 A Yes.

24 Q But that was all one incident.

25 A Correct.

JASON KIRINCICH - DIRECT BY MS. GOLDBERG

1 Q Is that accurate?

2 A That is accurate.

3 Q Okay, so there weren't multiple incidents; there was
4 just one incident with multiple shots fired. What -- what
5 is the relationship between the different warrants and the
6 individuals, I guess, regarding the one incident? Does
7 that question make sense?

8 A Yeah, law enforcement had information -- and as Ms.
9 McCallister said -- and I'm not sure -- Allen Pickett --
10 how to refer to him -- sorry.

11 Q Mr. Allen for today's purpose.

12 A Mr. Allen had outstanding bench warrants from a
13 separate incident. Several officers were looking for him.
14 They got word from the driver of the car where he was going
15 to be, so multiple officers followed his vehicle, and
16 whenever he exited the vehicle -- I think there were four
17 officers that were in foot pursuit of him-- I think one
18 stayed back and three continued to chase him.

19 Q So four officers chased him on foot.

20 A I think that's right.

21 Q And those four officers were the four officers that
22 were the named or alleged victims on each of the warrants.

23 A That sounds right, yeah.

24 Q Is that accurate?

25 A (No response)

1 Q Do you recall just from the trial, though, the weather
2 conditions or the time of day in which this all took place?

3 A It was December, but I don't remember -- I don't
4 remember the weather conditions.

5 Q Do you remember that it would've been at night or in
6 the dark?

7 A I mean I don't dispute that.

8 Q Okay. Now, during your representation of the trial,
9 you asked for the lesser included offense to be presented
10 to the jury for their consideration. Correct?

11 A Correct.

12 Q Tell me what -- what happened. Tell me what you asked
13 for and ---

14 A Okay, so he had the multiple charges for attempted
15 murder. We asked that he -- the jury ---

16 MS. MCCALLISTER - I'm sorry, I just -- before
17 conceding on this, I don't know ---

18 MS. GOLDBERG - I'm not gonna -- I understand
19 you're conceding and I'm not ---

20 MS. MCCALLISTER - Okay. I'll ride it out ---

21 MS. GOLDBERG - I'm not going to elaborate too
22 much understanding you're conceding.

23 MS. MCCALLISTER - Okay.

24 MS. GOLDBERG - Go ahead.

1 A Multiple charges of attempted murder, we asked that
2 the jury consider those for assault and battery of a high
3 and aggravated nature.

4 Q And I -- understanding that the State is -- I believe
5 the State is conceding that the high -- assault and battery
6 of a high and aggravated nature should not have been the
7 charge the jury should have been considering. Is that your
8 understanding?

9 A From talking to both of y'all today, yes.

10 Q Okay. Is there a different charge that was more
11 appropriate?

12 A Yeah, assault and battery first in hindsight would've
13 been more appropriate.

14 Q And why is assault and battery first a more
15 appropriate charge for the jury to have considered than
16 assault and battery of a high and aggravated nature?

17 A Whenever they rewrote the law in 2010 or, actually,
18 probably codified ABHAN for the first time, they didn't put
19 language in the statute that required an injury, where A&B
20 first -- excuse me -- ABHAN required an injury, and A&B
21 first did not require an inquiry, and there was no injury
22 in this case.

23 Q No one was injured.

24 A No one was injured.

1 Q And was there evidence at trial that would've
2 satisfied an assault and battery first conviction?

3 A Yes.

4 Q That -- you believe that would've been an appropriate
5 request at the time of trial.

6 A Yes.

7 Q What's the difference between assault and battery
8 first and attempted murder. Why would've an assault and
9 battery first charge been appropriate?

10 A Other than just being a lesser included? I mean there
11 was -- you asking for like the statutory definition of
12 assault and battery first?

13 Q Uh, -- I'll move on. You argued during the trial --
14 you made arguments regarding the attempted murder charges.
15 Correct?

16 A Correct.

17 Q You remember that during the directed verdict.

18 A I don't remember what -- what I said. I've reviewed
19 the transcript, but it's been a long time.

20 MS. GOLDBERG - And, Your Honor, I apologize, if
21 you can bear with me a little bit. Since some of the
22 issues are being agreed to and some of the issues are being
23 withdrawn, I'm trying to not go over unnecessary facts.

24 Q All right, well, let me hand you the transcript. I'm
25 going to give you page 278.

1 (WHEREUPON, DOCUMENT IS HANDED TO THE WITNESS)

2 Q All right, so what I'm looking at is the record on
3 appeal.

4 (WHEREUPON, DISCUSSION IS HELD BETWEEN COUNSEL
5 WHICH WAS NOT REPORTED)

6 Q This is after the jury charge on page 278. If you'll
7 review that page and explain to the Court for the record
8 what argument you were making.

9 A I was arguing that with assault and battery with
10 intent to kill, the statutory language I think is even
11 separated, you know, by commas. It says with intent to
12 kill, so I interpreted that as a specific intent crime and
13 I was disagreeing at the time with Judge Barber, because I
14 asked him to charge specific intent for the murder, and he
15 declined to do so.

16 Q And, actually, we're talking about the charge of
17 attempted murder. Correct?

18 A Yeah, attempted murder.

19 Q Okay. With attempted murder that -- the argument was
20 that there should be a specific intent to kill required as
21 an element of the charge.

22 A Correct.

23 Q And you made that objection; Judge Barber denied your
24 request.

25 A That's right.

1 Q And what was the basis of that objection that you
2 made?

3 A The statute that was written in 2010 says that it has
4 to be done with intent to kill, and, in fact, the
5 indictments in this case, you know, echoed the statutes and
6 they had the phrase separated by commas, with intent to
7 kill.

8 Q So based on the black letter law statutory language.

9 A Correct.

10 Q Defining the crime. Were you aware that there were
11 other discussions in the legal community making this
12 argument, other lawyers making this argument at the time?

13 A Yeah, you know, with the public defender's office, we
14 share a lot of information. We're part of the fifth
15 circuit, so Richland and Kershaw County, we share a lot of
16 information and also share information with other offices
17 around the State, so we were aware.

18 Q Do you recall how new that particular statute was at
19 the time of this trial?

20 A It would've been June of 2010.

21 Q So less than four years or about four years?

22 A Oh, yeah, yeah. So he was arrested in 2012 and this
23 went to trial -- it was set a few times before this, but it
24 finally went in January of 2014, so, yeah, less than four
25 years.

1 Q Now, page 268 of the jury instructions, the Court gave
2 the jury an instruction regarding their ability to infer
3 malice from the use of a deadly weapon. Are you familiar
4 with the Belcher case?

5 A Yes.

6 Q All right, is there any particular reason why you
7 didn't object to the Court's instruction?

8 A Yeah. I didn't think Belcher applied to this case.
9 Belcher, from what I remember, dealt more with mitigating
10 circumstances, such as self defense or the like. We didn't
11 have anything to mitigate in this particular case. At
12 least I did not think Belcher lined up, and we didn't have
13 any mitigation that would defeat this malice inferring from
14 use of a deadly weapon.

15 Q But you agree that there was evidence that the jury
16 could've found, would've convicted the defendant more
17 appropriately of assault and battery in the first degree.

18 A Yes.

19 Q So there was evidence that existed that could have
20 reduced or mitigated the charge?

21 A I'm trying to follow your -- I mean ---

22 Q The language in Belcher is that the inference of
23 malice from a deadly weapon is not appropriate when
24 evidence exists to reduce, mitigate, excuse or justify. Do

1 you agree there was evidence they could've found him guilty
2 only of assault and battery first degree?

3 A Yeah, if that's the language from Belcher -- I don't
4 know the specific language, but -- yeah, there -- I mean
5 they could've found him guilty of assault and battery first
6 degree.

7 Q It could've also -- the charge itself could've been
8 reduced or mitigated by a general finding by the jury that
9 there was a lack of intent to kill. Correct?

10 A Correct.

11 Q You understand that the attempted murder statute
12 requires proof of intent to kill and also malice?

13 A Um, I mean if I read the statute again -- I'm not
14 disagreeing with you.

15 MS. GOLDBERG - Beg the Court's indulgence.

16 All right, no further questions.

17 CROSS EXAMINATION

18 BY MS. MCCALLISTER -

19 Q Okay, just picking back up from where we left off on
20 Belcher, you were familiar with that case and you sort of
21 applied your analysis of Belcher's ruling to this case and
22 decided that it was not an appropriate objection. Is that
23 correct?

24 A That's correct.

JASON KIRINCICH - CROSS BY MS. MCCALLISTER

17

1 Q Okay. And your reading of Belcher is that there has
2 to be some sort of mitigating circumstances for the
3 conduct. Is that fair to say?

4 A Yeah, if you would -- yeah, excuse me.

5 Q So there would've needed to have been evidence of some
6 sort of self defense or for some other valid reason for him
7 to be shooting at these officers in order for you to object
8 to the applied malice charge.

9 A Yeah, I would agree with that.

10 Q And there was not. Is that right?

11 A That's right.

12 Q In fact, the officers testified that he turned around
13 and like squared off at them to fire. Correct?

14 A I believe one officer testified to that.

15 Q Okay. And they were serving lawful warrants. I mean
16 they weren't just -- is that -- is that right?

17 A Yeah, there was an active bench warrant for Mr. Allen.

18 Q Okay.

19 MS. MCCALLISTER - Your Honor, I think that's all
20 I have.

21 THE COURT - Anything else?

22 MS. GOLDBERG - No, Your Honor.

23 THE COURT - Thank you, sir. You can step down.

24 MR. KIRINCICH - Ms. Goldberg, you want this back?

25 MS. GOLDBERG - Oh, thank you.

1 MS. MCCALLISTER - I'm sorry. Your Honor, I say
2 that, but I just want to clarify, you are withdrawing the
3 fourth allegation.

4 MS. GOLDBERG - Yes.

5 MS. MCCALLISTER - Okay, then yes.

6 THE COURT - And just to be clear, you said the
7 fourth allegation, I'm looking at on the second amended
8 application for PCR, number 10, state the grounds ---

9 MS. GOLDBERG - Section ---

10 THE COURT - --- section (B) is what the State is
11 conceding and section (D) ---

12 MS. GOLDBERG - Yes.

13 THE COURT - --- is what you're withdrawing.

14 MS. GOLDBERG - Correct.

15 THE COURT - Okay, thank you.

16 MS. GOLDBERG - Okay. All right, at this time the
17 applicant would call Mr. Jarrett Bouchette.

18 JARRETT BOUCHETTE, AFTER BEING FIRST DULY SWORN,
19 TESTIFIES AS FOLLOWS -

20 DEPUTY CLERK - Thank you. Please have a seat in
21 the witness stand and state your full name for the record.

22 MR. BOUCHETTE - Thomas Jarrett Bouchette, B-o-u-
23 c-h-e-t-t-e.

24 DIRECT EXAMINATION

25 BY MS. GOLDBERG -

1 Q Good afternoon.

2 A Good afternoon.

3 Q All right, sir, where are you employed?

4 A Johnny Gardner Law Group in Conway.

5 Q And when -- how long have you been an attorney?

6 A November would've been five years.

7 Q So 2013?

8 A Correct, November, 2013.

9 Q How long have you worked with Johnny Gardner Law
10 Group?

11 A Right at three years.

12 Q Where did you work prior to that?

13 A The Floyd Law Firm in Surfside in Horry County.

14 Q What type of work or what type of law do you usually
15 practice?

16 A For the first couple of years it was probably 80
17 percent, 85 percent, civil litigation, commercial disputes,
18 contractual disputes. As the current time it's probably
19 about half criminal defense and about half either
20 commercial litigation or some domestic litigation.

21 Q How did you receive this case?

22 A I was I guess appointed to this case through the
23 appellate practice program coordinated through the -- I
24 guess through the Bar or through the Court of Appeals.

1 Q And do you know when you were appointed to represent
2 Mr. Allen on this appeal?

3 A I don't -- I would think probably that would've been
4 late 2014, maybe early 2015. I'm not sure when it first
5 came through the -- through the system.

6 Q Now, procedurally, do you know how the -- you were
7 appointed to this appeal -- it came from appellate defense.
8 Is that right?

9 A I think probably the best way to describe it is I
10 believe we -- it is, um -- it was noticed through appellate
11 defense. It was in -- my understanding his representation
12 was in conjunction with Bob Dudek, and they sort of would
13 forward me the record on appeal, the transcript as it came
14 in. I would then send briefs, whatever, to their office
15 for printing and filing and things of that nature, so I
16 guess that answers your question. I'm not sure if I got
17 there or not.

18 Q No, it does. And the -- how -- do you have any
19 knowledge about how they came to like pick this particular
20 case to send out in the appellate practice or anything like
21 that?

22 A No, not -- none at all.

23 Q Okay. When they sent you Mr. Allen's case, did they
24 hand you the case and tell you what issues were going to
25 need to be presented?

1 A No, I don't -- I don't believe there was any
2 discussion or, actually, I'm pretty sure there was no sort
3 of brief on the case in advance of receiving it. We got
4 the transcript, formulated, sort of an initial -- these are
5 my words -- kind of outline of what would be addressed.
6 There was some discussion of some kind with Bob Dudek to
7 the effect of this is what it -- this is what it's looking
8 like to me, this is something I see, what's the best way to
9 go about that or how to address it, etcetera, but that
10 would've been sort of after my review of the transcript and
11 after we were getting into the file.

12 Q So they were not the one -- it was a -- a discussion
13 about it, but they weren't directing you as to which issues
14 you were to raise or were not to raise.

15 A No, I wouldn't say they were directing me.

16 Q All right, so whatever issues were raised, that was
17 your legal opinion, ---

18 A That's correct.

19 Q --- your legal judgments and all that ---

20 A Correct.

21 Q Okay. You also did the -- ended up -- did the oral
22 argument in this case as well.

23 A That's correct.

1 Q Now, after the oral arguments were heard, you filed a
2 motion to supplement your final brief with recently decided
3 case law. What led up to you filing that motion?

4 A After the -- I know certainly after the filing of the
5 briefs -- and I don't recall if it was after the oral
6 argument or if it -- well, let me back up. After the oral
7 argument was made -- I don't remember if it was a letter
8 from a family member or maybe something brought by a family
9 member, but some way, shape or form I got a correspondence
10 that was wanting to draw my attention to an appellate case
11 -- I think it was State v. King -- that -- that case was
12 decided after the -- certainly after the briefs were
13 submitted, but I don't recall if it was decided before the
14 oral argument, but that case addressed or established what
15 had not previously been established because it related to
16 the attempted murder statute, and that was not something
17 that had been directly addressed in the brief, so I didn't
18 feel like the rule that, basically, where you supplement a
19 case citation was appropriate, but we had to file a motion
20 to ask the appellate court to say you've not decided on
21 this issue, we're asking based on the newly decided case
22 law to supplement the briefs and evaluate this issue in
23 conjunction with what we've already sent in.

24 Q What did the Court do with your motion?

1 A At some point -- I don't recall how long it was -- but
2 that motion was denied.

3 Q Because of the timing of the new issue?

4 A I don't -- I don't recall the exact basis, but I
5 presume that that was because the final briefs were already
6 in and that kind of thing denied it.

7 Q Now, the State v. King Opinion really addresses what
8 elements are required in the attempted murder statute.
9 Correct?

10 A Correct, and I think it -- I don't recall the exact
11 posture of the case, but as I recall there was a -- I think
12 the Trial Court gave an incorrect instruction as it related
13 to the relatively new attempted murder statute, and the
14 appellate court reserved.

15 Q Stating that an attempt to kill was required --
16 specific intent is required.

17 A Yeah, it went into detail about what the specific
18 intent and the corresponding jury instruction needed to be
19 in that scenario.

20 Q That exact argument had been raised by Mr. Kirincich
21 during Mr. Allen's trial. Correct?

22 A I don't know if -- if I'd say exact, but certainly
23 very close. Um, you know, it was very similar factual
24 scenario to what the appellate court addressed after the
25 fact.

1 Q It would -- so it wouldn't been preserved for
2 appellate review.

3 A Um, I -- I don't recall from the transcript, but my --
4 my recollection was I -- I do think it would've been
5 preserved, or at least that would've been my position that
6 it was preserved or would've been preserved.

7 Q And even at the time that you filed this motion to
8 file the supplemental brief with this -- this new
9 supporting case law, your argument was that it had been
10 preserved.

11 A Correct.

12 Q In reviewing Mr. Kirincich's original objection in the
13 jury instruction, did you also look at the actual statute
14 of attempted murder?

15 A I'm sure I did. I don't recall at this point.

16 Q You're aware that the statute does have in it the
17 language intent to kill.

18 A Correct.

19 Q Is there a particular reason why you didn't raise this
20 in your initial brief?

21 A You know, I don't recall. I think in -- as I was
22 trying to prepare for today, I was looking at -- I forget
23 what exactly the Court's position was on that, and I think
24 there may have been some reliance on the case law that had
25 been decided, maybe under the previous statute and some

1 interpretations from there, but as I was going through it,
2 you know, my -- whatever the arguments were, it seemed to
3 me at the time that the Court's ruling -- it just -- it
4 seemed to match up, and I didn't see that as an appellate
5 issue, at least at that time.

6 MS. GOLDBERG - Beg the Court's indulgence.

7 Q I'm going to hand you also page 278, which I had also
8 -- the same page I showed Mr. Kirincich earlier, ---

9 A Okay.

10 Q --- and if you'll look at the top of that page where
11 he makes his argument, and the Judge tells him that's it's
12 -- his argument's been noted, ---

13 A Okay.

14 Q --- the Judge doesn't explain on that page his
15 reasoning for denying Mr. Kirincich's objection to the jury
16 charge. Correct?

17 A That's correct.

18 Q Are you aware of anywhere in the transcript where the
19 Judge, actually, explains why he disagreed with Mr.
20 Kirincich's opinion?

21 A I -- I don't recall; I'm not sure.

22 MS. GOLDBERG - I'll take that back.

23 MR. BOUCHETTE - Okay.

24 MS. GOLDBERG - No further questions.

25 CROSS EXAMINATION

1 BY MS. MCCALLISTER -

2 Q Mr. Bouchette, you testified a minute ago that you --
3 you kind of got the transcript and got some documents in
4 this case and went through it and made yourself kind of an
5 outline of the transcript. Is that right?

6 A Yeah, that -- I mean my words, sort of an outline of
7 possible issues. It was a relatively short transcript. I
8 want to say it was maybe a two-day trial, but, yeah, I kind
9 of made an outline of how to go about preparing the brief
10 for the appeal.

11 Q Okay, so you read through the transcript and flagged
12 some issues that you thought were promising.

13 A Correct. If I recall, there were not a whole lot of
14 issues that were, um, or cases cited or things raised at
15 the trial, because it was fairly short.

16 Q Okay. And you did -- it sounds like from your
17 testimony that you did do some research into what the law
18 was of attempted murder based on the fact that Mr.
19 Kirincich had objected to that instruction.

20 A Yeah. I -- and I couldn't recall what exactly I went
21 through. Obviously, I didn't raise it in the brief, but
22 when I had gone through it, whatever the existing case law
23 was, I know I researched it in some capacity. I don't
24 recall what exactly cases I relied on or things of that
25 nature.

1 Q Okay. So is it fair to say that when you were doing
2 this research at some point in 2014 or early 2015, that you
3 did not find a case that was, specifically, on point to
4 support Mr. Kirincich's argument?

5 A Yes, that would be correct.

6 Q Okay. If you had found something, specifically, on
7 point, would you have raised that argument?

8 A Yeah, I would have.

9 Q Okay. Because you testified you felt that it was
10 preserved or you argued that it was preserved.

11 A That's correct.

12 Q Okay. If -- if King had been decided a few months
13 earlier, would you have used King in your brief?

14 A Yeah, I mean I -- I certainly hope that if -- had King
15 been decided at the time I was doing the brief or prior to
16 that time, that we would've raised and cited King in the
17 brief and addressed that issue.

18 Q Okay. And the reason that it wasn't raised and cited
19 is because your final briefs had already been submitted by
20 the time it was decided.

21 A That's correct.

22 Q Okay. Or just -- okay. Your brief -- and did you say
23 oral argument had already been held or you're not sure?

1 A King -- I'm not sure. I know King was decided after
2 the briefs. I'm not sure if it was after oral argument or
3 not.

4 Q Okay.

5 MS. MCCALLISTER - I think that's all the
6 questions I have, Your Honor.

7 MS. GOLDBERG - Nothing further.

8 THE COURT - Thank you, sir. You can step down.

9 MR. BOUCHETTE - Okay.

10 Your Honor, am I excused?

11 THE COURT - Any objections to Mr. Bouchette being
12 excused?

13 MS. MCCALLISTER - No, no objection.

14 MS. GOLDBERG - Thank you, Your Honor. At this
15 time I'd call Earnest Allen.

16 EARNEST ALLEN, AFTER BEING FIRST DULY SWORN,
17 TESTIFIES AS FOLLOWS -

18 DEPUTY CLERK - Thank you. Please have a seat in
19 the witness stand and state your full name for the record.

20 MR. ALLEN - Earnest Allen.

21 DIRECT EXAMINATION

22 BY MS. GOLDBERG -

23 Q Good morning, sir. Now, just for a little clarity,
24 your name as it is reflect on the trial transcript as it

1 was reflected on the Post Conviction application is Earnest
2 Maurice Allen. Correct?

3 A Yes, ma'am.

4 Q Is that the name you're currently incarcerated under
5 at the department of corrections?

6 A No.

7 Q What -- and tell me -- the Court why not? Just so if
8 anybody reads this record later, they'll know who was where
9 and your identity.

10 A Well, uh, I got -- I was sent to prison a while back
11 before I ever got a identification card, and, uh, when I
12 did -- when I was sent to prison, then I went under the
13 name Pickett, and so when I came -- when I was released, I
14 had to get an identification card and I had to get it in
15 Allen, because my birth certificate was under the name
16 Allen.

17 Q Your birth certificate is under the name Allen.

18 A Yes.

19 Q Your Social Security card ---

20 A Is Pickett.

21 Q --- is under the name Pickett.

22 A Yes.

23 Q So because of that confusion in your records from when
24 you were a child, that's resulted in this confusion today.

25 A Yes.

1 Q Okay. I wanted to make sure for the record that was
2 clear. Mr. Allen, where are you currently incarcerated?

3 A Lee County Correctional Institution.

4 Q There -- in association with -- well, what convictions
5 are you serving time for right now?

6 A Two attempted murders, ABHAN, a resisting arrest with
7 deadly weapon and a possession of a firearm during the
8 commission of a violent crime.

9 Q Any other convictions that you're serving for right
10 now?

11 A No.

12 Q Okay. The resisting arrest with a deadly weapon,
13 you're not challenging that conviction through this PCR.
14 Correct?

15 A No.

16 Q Okay. It's just the attempted murders, the ABHAN and
17 the possession of a firearm during the violent crime.

18 A Correct.

19 Q Do you recall what day you were arrested?

20 A I think it was December 21st, 2012.

21 Q And your trial was in January of 2014?

22 A I think so.

23 Q You were in jail during that time ---

24 A Yes.

25 Q --- waiting on trial?

- 1 A Yes.
- 2 Q And was -- who was your attorney?
- 3 A Kirincich.
- 4 Q Mr. Kirincich?
- 5 A (Indicating yes)
- 6 Q Was he the only attorney you ever had?
- 7 A Yeah, on this case, yeah.
- 8 Q And he represented you through the trial in this.
- 9 Correct?
- 10 A (Indicating yes)
- 11 Q The jury trial.
- 12 A Correct.
- 13 Q Did you and your lawyer during the jury trial discuss
- 14 anything about lesser included offenses, ---
- 15 A No.
- 16 Q --- what they meant?
- 17 A No.
- 18 Q You don't -- you never had any discussions?
- 19 A No, I had no idea what a lesser included -- I never
- 20 had an idea that he could -- something else could be
- 21 included.
- 22 Q You didn't know there was even that option.
- 23 A No.

1 Q Do you recall during the trial that he asked for a
2 lesser included offense of assault and battery of a high
3 and aggravated nature?

4 A Do I recall when he asked it?

5 Q Yeah.

6 A Yes.

7 Q Or, generally, that he asked for it.

8 A Yeah. I remember him requesting it.

9 Q At the time of your trial, did you know what that was?

10 A No.

11 Q Or what the difference was?

12 A No.

13 Q Do you know now ---

14 A Yeah.

15 Q --- about, generally, the attempted murder and the
16 assault statutes?

17 A Yes.

18 Q All right. And what is your allegation or opinion on
19 that now?

20 A Well, first I noticed that there wasn't an injury.

21 Um, after doing some research, I found out that -- exactly
22 what a attempted murder was. I knew that it required two
23 elements, specific intent and malice afterthought. The
24 lesser included offenses -- he was correct when he said
25 that, uh, in 2010 when the omnibus crime sentencing reform

1 act -- when they gave -- in 2010 they gave it new degrees
2 of lesser included offenses, ABHAN, assault and battery
3 first, second or third degree, and they -- they descended
4 in the -- according to the severity of the -- of the
5 offense. ABHAN carries 20, and it required an injury, not
6 only an injury but an injury where someone could've died.
7 Assault and battery in the first degree carried ten years
8 and it, according to the State vs. Middleton, it said that,
9 um, if one offers or attempts to ---

10 MS. MCCALLISTER - Your Honor, I'm sorry ---

11 THE COURT - Just a minute.

12 MS. MCCALLISTER - So, I'm -- I understand sort of
13 what she's trying to get at him, but if he's going to be
14 quoting the statute and case law, I think he's not an
15 attorney and I don't think he can give a legal opinion
16 about what the case law is or elements that it required on
17 offenses and things of that nature. And I understand what
18 she's trying to do, but ---

19 MS. GOLDBERG - Well, and, Your Honor, they're his
20 allegations, they're -- it's information he's obtained
21 since trial, so I'd ask that he be allowed to testify as to
22 what his knowledge is, and not that it has any weight or is
23 a legal argument, but he can testify as to what he's aware
24 of.

1 THE COURT - I'm going to give you a little leeway
2 with that.

3 MS. GOLDBERG - Thank you, ma'am.

4 Q Go ahead, sir.

5 A Okay, um, I noticed that -- I just -- I, basically,
6 noticed that it was a error for him to include the ABHAN as
7 the lesser included offense, because there was no injury,
8 and I also sought from State vs. Middleton that he could
9 have introduced assault and battery in the first degree,
10 which would have been the correct charge, because it says
11 that if one offers or attempts to injure with the present
12 ability to do so by means likely to produce death or great
13 bodily harm, so I noticed that it was a huge error.

14 Q You haven't now or in your jury trial denied that this
15 was you. Correct?

16 A No.

17 Q You haven't denied that you were present at the scene?

18 A No.

19 Q You haven't denied you were in possession of a weapon?

20 A Never.

21 Q Your denial was just simply what?

22 A Basically, that I was charged with the wrong -- the
23 wrong charge, the wrong offense.

24 Q And you believe you should've been charged with what?

25 A Assault and battery in the first degree.

1 Q And you believe you're guilty of assault and battery
2 in the first degree?

3 A Yes.

4 Q What is it about attempt -- the attempted murder
5 statute that is inappropriate for what happened?

6 A Well, the specific intent element is a huge -- it's a
7 -- because the Judge introduced -- instructed the jury that
8 it's a specific -- it's a general intent, excuse me,
9 instead of a specific intent, he lessened the burden of
10 proof for the State. Um, -- it -- a specific intent means
11 that one has to, specifically, prove that I intended to
12 commit that particular -- that particular crime. There --
13 I didn't express verbally -- I mean I didn't express, you
14 know, that I, uh, -- my actions didn't show that I wanted
15 to kill them. From the moment -- moment I got out of the
16 vehicle, I went away from the police, and I never said
17 verbally that I wanted to kill them. This is why it should
18 be a specific intent. It has to be proof, because the
19 crime wasn't committed yet. It was -- you know, it was,
20 basically, an attempted -- attempt, and, uh, that's the
21 difference between a general and a specific, the level of
22 proof that it requires.

23 Q When you -- when your attorney represented you during
24 the jury trial, he never made an objection to the fact that
25 there's a jury charge regarding inferred malice. Did you

1 know anything about that at the time or did you have any
2 discussions with him about that at the time?

3 A No.

4 Q He never asked you your -- your consent to waive that
5 issue or anything like that?

6 A No. I had no idea what it was.

7 Q Now, when Mr. Bouchette was appointed to represent
8 you, did he contact you?

9 A Mr. Bouchette?

10 Q Your appellate attorney.

11 A Yeah, he did. Well, I contacted him, actually. At
12 the time I was still clueless as to the law, period. You
13 know, I didn't know anything, so when I got the information
14 about State vs. King and the specific intent, you know, uh,
15 I contacted him to see if he would, uh, try to submit it,
16 and, uh, after a while of talking with him, he decided that
17 he should, and, um -- of course, at the time it was too
18 late.

19 Q Had he -- had -- I withdraw that.

20 MS. GOLDBERG - All right, no further questions.

21 CROSS EXAMINATION

22 BY MCCALLISTER -

23 Q Mr. Allen, I understand that you take objection to the
24 specific intent requirement, and your testimony here today
25 seems to be that because you didn't say that you wanted to

1 kill those officers, that the State wasn't able to prove
2 that you had a specific intent to kill?

3 A I don't understand your question.

4 Q Your testimony earlier was that the State couldn't
5 prove that you had a specific intent to kill the officers,
6 because you weren't saying that you wanted to kill them.

7 A The question she asked me was, what do I know about
8 specific intent, so I was explaining that this is the level
9 of proof that you need simply to give the Court
10 understanding of what it is since it wasn't broken down by
11 Mr. Kirincich. Um, it's simply a higher level of evidence
12 that has to be provided.

13 Q Okay. I understand that. I'm trying to get something
14 different here. I -- is it your understanding that
15 specific intent is expressed verbally?

16 A No. Specific intent, uh -- it's, basically, that it
17 has to be proof ---

18 Q Okay.

19 A --- given to the Court that state -- that would show
20 that I, specifically, intended to commit this particular
21 crime. I think that's the exact language used.

22 Q Okay, and there was proof presented to the Court at
23 trial, at least through the testimony of the officers, that
24 they were chasing you and you were running away and you
25 stopped and turned around and shot at them. Correct?

1 A Um, no.

2 Q I'm not asking you if you agree that that's what
3 happened. Do you agree that that's what was testified to?

4 A No. Um, ---

5 Q You don't agree?

6 A No, I don't. At the trial it was testified to that
7 the time that I turned around, I had to turn around,
8 because it was a fence there. That was, basically, uh,
9 what I know as far as turning around and aiming and, um,
10 anything according to that nature.

11 Q Okay, so if I told you today that the transcript
12 reflects that two of the officers testified that you were
13 fleeing from them and you stopped and turned around and
14 squared off at them, that would be a surprise to you?

15 A No, it wouldn't. Um, I'm -- I'm not saying that they
16 didn't say what they said. I'm saying that it wasn't
17 proven. First -- first, um, it was -- they ---

18 Q Okay. I understand. You -- you're saying that that's
19 not sufficient proof.

20 A Exactly.

21 Q But you'd agreed with me that they did testify to
22 that.

23 A I do.

24 Q Okay. That's what I'm trying -- that's all I'm trying
25 to get at.

1 A Yeah.

2 Q Okay.

3 MS. MCCALLISTER - I think that's all I have, Your
4 Honor.

5 MS. GOLDBERG - Nothing else.

6 THE COURT - Let me ask you a two questions.

7 EXAMINATION

8 BY THE COURT -

9 Q How do you spell your first name, Mr. Allen?

10 A E-a-r-n-e-s-t.

11 Q Okay, because it's -- I see on a number of things as

12 E-r, but it's E-a-r?

13 A Yes, ma'am.

14 Q Secondly, you understand that there are only two
15 things that I can do with your PCR application.

16 A Yes, ma'am.

17 Q I can either grant it or I can deny it.

18 A Yes, ma'am.

19 Q I can't sentence you. I can't change the sentence of
20 the Court. So if I deny your claim, it means that you just
21 continue to serve out the remainder of your sentence.

22 A Yes, ma'am.

23 Q If I grant your claim for relief, it means that you
24 now go back for another trial just as if the first one had
25 not occurred.

1 A Yes, ma'am.

2 Q That means you'd be facing the four charges for
3 attempted murder, the resisting arrest with a deadly
4 weapon, the possession of a weapon during a violent crime.
5 Those would all be crimes that you would be facing trial
6 and/or a plea. There'd be no guarantee that the State
7 would offer you any plea negotiations, and there'd be no
8 guarantee that if you were found guilty a second time, that
9 the Trial Judge would give you less time than what you
10 currently are sentenced to.

11 A Yes, ma'am.

12 Q You understand that?

13 A Yes, ma'am.

14 Q And that the Judge in this case gave you concurrent
15 sentences for three of these offenses. He did not have to
16 give you concurrent sentences.

17 A Yes, ma'am.

18 Q He could've made all of those consecutive.

19 A Yes, ma'am.

20 Q So if you are -- were to go back, you understand that
21 your exposure is significantly more jail time than what
22 you're currently sentenced to?

23 A Yes, ma'am.

24 Q Okay. And understanding that, you still want to go
25 forward with your application today?

1 A Yes, ma'am.

2 THE COURT - Thank you.

3 I'm sorry. You can step down.

4 (WHEREUPON, WITNESS COMPLIES)

5 MS. GOLDBERG - Your Honor, at this time the
6 applicant has no further witnesses, but I do have argument.

7 THE COURT - Okay. I'm glad to hear from you.

8 MS. GOLDBERG - Thank you so much, Your Honor.

9 May it please the Court. I just want to clarify our
10 arguments. Some of it can get a little bit washed away in
11 the testimony, but, you know, tries to get -- what it has
12 to out there to protect the record, but the legal argument
13 here, I'm not arguing or attempting to argue that attempted
14 murder was an inappropriate charge in this case or a charge
15 for the jury. The problem in this case is, essentially, on
16 -- or the first problem is, eventually, on page 268 of the
17 trial transcript, and let me make sure -- I know there's a
18 couple different page numbers with the record on appeal, so
19 let me make sure that's right.

20 THE COURT - That's the charge with inferred
21 malice and specific -- or general intent.

22 MS. GOLDBERG - It's -- it's, actually, all of it,
23 and just to read into the record since it's short, the
24 issues are, starting on line 9, malice may be inferred from
25 conduct showing disregard for human life. Inferred malice

1 may also arrive when the deed is done with a deadly weapon.
2 As specific intent to kill is not an element of attempt or
3 attempted murder -- he kind of misspeaks -- but there must
4 be a general intent to commit serious bodily injury. So
5 that is the problem with this case. The jury instructions
6 were wrong. The elements of attempted murder and what's
7 required to be proven to that level were incorrect. The
8 jury did not consider the -- the correct elements. They
9 are based on the clear statutory language. Specific intent
10 to kill is required. The Judge clearly said it is not
11 required, and therefore, the jury used the wrong law in
12 making their decision. The appellate counsel -- it was
13 objected to; it was properly preserved. It was not raised
14 on appeal. If appellate counsel had raised it in their
15 briefs, there's a reasonable likelihood that the applicant
16 could've prevailed on appeal, because the jury instructions
17 were clearly incorrect in this particular instance, and,
18 again, you know, I'm sure Your Honor's familiar with State
19 vs. King. State v. King, my argument is, doesn't change
20 the law. It's not new law. It says that -- the statute
21 says exactly what it says. It -- the statute says with
22 intent to kill, and that is always what it has said, and
23 that is always what it has been. It's not some odd
24 interpretation. It's not some adaption based on new facts.
25 It's what the statute has always said. As an additional

1 matter, the attempted murder statute also requires malice,
2 and the Court again told the jury that they don't have to
3 find specific intent and now tells the jury that they can
4 infer malice just because a weapon is used. Also, again, I
5 know your Court's familiar with Belcher, because that's a
6 very famous, very important case. I do think it is
7 misconstrued a lot in that the people believe Belcher
8 applies mostly to self-defense situations, because the
9 facts in that case were, I believe, self defense, but it
10 does, specifically, state that if there is any evidence
11 that can reduce or mitigate or justify, then it is
12 inappropriate to allow the jury to infer malice. Malice
13 should be proven. Mr. Kirincich stated -- and I don't
14 think the attorney general would disagree that assault and
15 battery in the first degree with the charge that should've
16 gone to the jury instead of the ABHAN; it's an appropriate
17 charge. The difference is assault and battery in the first
18 degree may require -- it doesn't require that specific
19 intent to kill and doesn't require malice. That's the
20 difference the jury would be looking at in deciding between
21 those two charges. They never had the opportunity to
22 decide on the assault and battery first degree, because it
23 didn't go to them. Clearly, they didn't find attempted
24 murder on at least one, because the ABHAN conviction did
25 happen. But, Your Honor, it is completely possible that

1 the jury could have found just a general intent to cause
2 serious injury and inferred malice in this case and
3 convicted him of attempted murder based on the facts and
4 circumstances in the way the jury was instructed, and that
5 would be inappropriate. That is -- those are not the
6 elements of attempted murder.

7 And, Your Honor, finally, he does have the
8 possession of a weapon during a violent crime conviction,
9 and, essentially, if the attempted murder convictions and
10 the ABHAN conviction are overturned by this Court as a
11 result of this argument, that would have to necessarily be
12 overturned as well since the violent crimes themselves are
13 overturned, so there's not a separate issue to overturn
14 that. It just obviously -- because the violent crimes
15 would no longer exists. Your Honor, we are asking that all
16 of the convictions be -- not the resisting arrest with a
17 deal weapon. He's not challenging that. We've got no
18 argument to challenge that, but all of the other
19 convictions arising out of this, we ask that they be
20 overturned and remanded for a new trial. I would argue
21 that it is possible that this Court could -- if the Court
22 found that appellate counsel was the only counsel who was
23 ineffective in failing to raise the specific intent issue
24 in a timely manner, this Court could order that the case be
25 remanded to the appellate court for appellate consideration

1 of that issue, so I think there are -- that's a potential
2 outcome depending on how the Court sees the issues in this.

3 THE COURT - Thank you. Ms. McCallister?

4 MS. MCCALLISTER - Thank you, Your Honor.

5 Your Honor, first of all, I want to clarify, the
6 State is not arguing with Mr. Allen about the
7 appropriateness of the specific intent charge. Based on
8 the law as it stands today, if his trial were today,
9 specific intent should be charged based on the law of the
10 State of South Carolina. At the time in 2014, however,
11 although there was, you know, some -- there was a split
12 thoughts, (sic) I mean among the bar. Obviously, -- and, I
13 mean it's clear from the record in this case that not
14 everybody agreed that that was the appropriate charge. I
15 think -- I don't want to -- I don't want to say wrong, so
16 I'm going to say I'm about 90 percent sure, but I believe
17 Judge Cooper says that this is the charge that was in his
18 bench book, and that's what he is gonna use. So this is
19 the charge that was being used, I would assume, all over
20 the State in trials at this point in 2014 and ---

21 THE COURT - But you agree -- I mean trial counsel
22 knew enough to challenge it in the jury charges, ---

23 MS. MCCALLISTER - He did. He did.

24 THE COURT - -- and if no one had ever appealed it
25 in King, I mean -- that's how it got to the Supreme Court

1 in King is that trial counsel objected to it based on the
2 wording of the statute, it then went up on appeal. In that
3 case -- I mean somebody has to bring it up the first time.

4 MS. MCCALLISTER - I agree. Somebody has to bring
5 it up every time. I agree, but -- but in this case we're
6 looking at whether counsel's representation and his conduct
7 was reasonable, and I think that it's also reasonable when
8 there's no clear law out there on appeal. Even though it's
9 preserved, if you're the appellate attorney and you're
10 looking at it and you're going to research cases and
11 there's nothing that comes up that's, specifically, on
12 point to support the argument that was made below, then
13 it's reasonable not to raise that argument as it -- as
14 appellate counsel, and I think if -- in reading the King
15 decision, it's clear that the Court was trying to, um --
16 the record recognized that there was this kind of mishmash
17 of case law out there based on the old statute and the new
18 statute and then it was clear that, um, in the State of
19 South Carolina that the law was not -- that attorneys and
20 Judges did not know for sure what the law was supposed to
21 be and what it was supposed to be charged in regards to
22 this intent requirement versus -- for attempted murder. So
23 that would be our argu -- that's one of our arguments, Your
24 Honor. Our other argument is that even if they had been --
25 even if the jury had been charged with specific intent or

1 even if Mr. Bouchette had taken that issue up, Your Honor,
2 he still has to prove that he is prejudiced and there is --
3 the evidence in the case that was presented is clear that
4 there was a specific intent. Um, he -- he was running and
5 he stopped and he turned around and he fired at two
6 different officers, so I think there was evidence, plenty
7 of evidence for the jury to find specific intent in this
8 case. And the same -- I mean the same for the issue of the
9 implied malice. Your Honor, um, the Belcher decision, yes,
10 Belcher itself was a self defense case, and I'm disagreeing
11 with the characterization that it applies in more
12 situations than just self defense. I think that that is
13 true, but I don't think that you can view it as broadly as
14 the applicant is arguing in this situation. I think just
15 because you have a lesser included that is charged in a
16 trial, it does not mean that there cannot be implied
17 malice, and I think if you take her arguments as far as
18 she's -- that's -- that would be the result of her argument
19 if you're -- but -- and that is too far I think. I don't
20 think anyone thinks that Belcher stands for that, and in
21 this case there's no -- there is no mitigation. There's no
22 reason for him to have been firing at officers. They were
23 lawfully effecting an arrest. He knew they were police
24 officers, and he ran from them and he turned and fired at
25 them, so there is no mitigation, and I agree with Mr.

1 Kirincich's assessment that objecting to that on the basis
2 of Belcher was not an appropriate objection to make.

3 And I think that's all. I do have some case cite
4 -- I don't -- I know you've got the memo from Ms. Goldberg.
5 I don't know if you would want a memo from us with our case
6 cites in response or if you would like a proposed order
7 from each side or -- I mean -- or what.

8 MS. GOLDSBERG - And if I -- well, go ahead. I --
9 I just want to briefly respond to her argument, but ---

10 THE COURT - Sure.

11 MS. GOLDBERG - And, Your Honor, just three things
12 I wanted to hit on, one is that, um, you know, I believe
13 the attorney general argued that it's reasonable for Mr.
14 Bouchette to have looked and if there's no case law that
15 supports his opinion, then not to bring it -- well, this is
16 a four year old statute at the time. There's not going to
17 be any case law that supports anybody's opinion either way,
18 so I don't think that argument regarding the reasonableness
19 is fair. As far as prejudice, Ms. McCallister did explain
20 her -- what she believes the facts shows, but, of course,
21 as this Court knows, every juror can believe every witness
22 in whole, in part and some disregard what they want, accept
23 what they want. There was evidence here that does reduce
24 the charge, and I want to cite one case that is in my memo,
25 State v. Shands where there was -- the Court said in

1 talking about Belcher, because there was evidence to reduce
2 Shands' charge, and in that case it was from attempted
3 murder to assault and battery with intent to -- assault and
4 battery of a high and aggravated nature, the Trial Court
5 erred in instructing that malice should be inferred, so
6 that I think is directly on point to what I'm arguing, but
7 it's already in the memo. Your Honor, I think there is a
8 clear preju -- and I think at the end of the day, if this
9 Court is aware of and believes that the jurors were
10 instructed incorrectly as to what elements to decide on,
11 that's prejudice, they reviewed the case incorrectly. They
12 were looking at the wrong things; they were looking for the
13 wrong things and that maybe they could've come out either
14 way, but he was prejudiced because the deliberations were
15 not fair, were biased and were improper looking for the
16 incorrect elements of the charge. I think that's the
17 prejudice.

18 THE COURT - What I'll do is if you want to submit
19 any further memorandum or case law for me to consider, I'm
20 certainly glad to leave the record open, let's say maybe
21 ten days, ---

22 MS. MCCALLISTER - Okay.

23 THE COURT - --- if that's all right with y'all,
24 if there's anything from a legal standpoint that you want
25 to submit within the next ten days.

1 Thank you. I will certainly read everything and
2 take it under advisement.

3 MS. MCCALLISTER - Thank you, Your Honor.

4 THE COURT - Thank you.

5 (END OF TRANSCRIPT)

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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**FILED FOR RECORD
2019 SEP -9 PM 3:14
JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

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 jury charge on assault and battery of a high and aggravated

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Court**
Janet C. Hasty
Clerk of Court, Kershaw County

nature (ABHAN), as this was not an appropriate charge based on the evidence presented at trial. The State conceded relief is appropriate on this ground. However, the Court denies relief as to all other allegations, finding Applicant has failed to meet his burden of proof.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. In July of 2013 the Kershaw County Grand Jury indicted Applicant for four counts of attempted murder (2013-GS-28-0681; -0682; -0683; -0684); one count of resisting arrest with a deadly weapon (2013-GS-28-0811); and one count of possession of a firearm during the commission of a violent crime (2013-GS-28-0685). The charges stem from an incident in December of 2012, in which the Applicant was apprehended and arrested after he fled from and fired upon law enforcement officers attempting to arrest him on outstanding bench warrants. Trial Tr. pp. 80-85, 102, 108-09, 138-39, 153, 161-62.

On January 13-16, 2014, Applicant proceeded to trial before a jury and the Honorable James R. Barber. Jason D. Kirincich, Esquire (Trial Counsel), represented Applicant, and Assistant Solicitor Brett Perry represented the State. The jury found Applicant guilty of two counts of attempted murder,¹ one count of ABHAN, one count of resisting arrest with a deadly weapon, and one count of possession of a firearm during the commission of a violent crime. Trial Tr. 281-82. Judge Barber sentenced him to twenty years' imprisonment for the two attempted murder charges and the ABHAN charge, all to run concurrently; two years' imprisonment for the resisting arrest with a deadly weapon charge, to run concurrently; and four years' imprisonment on the possession of a firearm during the commission of a violent crime charge, to run consecutive to the others. Sent. Tr. 10.

¹ The trial court directed a verdict on the fourth attempted murder charge. Trial Tr. p. 220.

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 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, 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.

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:

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.

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 malice may be inferred from the use of a deadly weapon;
4. Trial counsel was ineffective for failing to explain the elements and the nature of the charges to 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 was deprived of the opportunity to present his own testimony regarding his intent at the time of the incident.

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 jury charge on implied malice because he did not believe the circumstances of Applicant’s case fell under the court’s holding in Belcher. See 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. He met with Mr. Dudek, the Chief Appellate Defender, for guidance, but 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, he explained he could not find any cases directly supporting Trial Counsel's argument that attempted murder was a specific intent crime at the time he prepared the appellate brief. Because of the lack of case law supporting Trial Counsel's position, Appellate Counsel stated he felt the specific-intent issue was not the most appropriate issue for appeal. The Court of Appeal's decision in King was issued while Applicant's appeal was still pending. When the decision was published, Appellate Counsel petitioned the Court of Appeals to amend his brief to include the specific intent issue. His motion was denied by the court. 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.

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 conclusions 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 second, 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 general intent 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....”

The Court of Appeals’ decision was delivered in June 2015 after the Applicant’s Initial Brief had already been filed with the Court. The Supreme Court’s decision in King was filed in October 2017, years after Applicant’s 2014 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.

Case law prior to the 2010 amendment to the statute supported the general intent charge. See 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 general intent). Moreover, at the time of

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

Applicant's trial and appeal in 2014 and 2015, respectively, South Carolina law was unclear as to the level of intent required for attempted murder, especially given the conflicting language of the statute. In King, the Supreme Court acknowledged the conflicting language in the attempted murder statute. "While we are convinced that this is the correct interpretation, we also acknowledge the ambiguity created by the language in section 16-3-29 as aptly noted by the author of the concurring opinion." 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 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. 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. Accordingly, this Court finds Appellate Counsel was not deficient for choosing not to raise the issue. 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 judgement, 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 implied-malice 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 have an opportunity to testify at trial regarding his intent at the time of the shooting. 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.

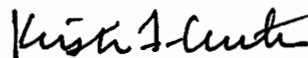
The Court notes Applicant and/or the State must file and serve a notice of appeal within thirty days from post-conviction relief counsel’s receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 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 30th day of August, 2019.



KRISTI F. CURTIS
Presiding Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA) FILED FOR RECORD
COUNTY OF KERSHAW) 2018 SEP 11 AM 10:03
Earnest Maurice Allen,) JANET C. HASTY
S.C.D.C. No. 310134,) CLERK OF COURT
KERSHAW COUNTY, S.C.) C.A. No. 2017-CP-28-0904
Applicant,)
v.) **APPLICANT'S MEMORANDUM**
) **IN SUPPORT OF**
State of South Carolina,) **POST-CONVICTION RELIEF**
Respondent.)
_____)

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 13, 2017 and amended June 1, 2018 and amended further on August 24, 2018. Respondent made its return on or about February 15, 2018.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. Applicant was indicted at the July 2013 term of the Kershaw County Grand Jury for four counts of attempted murder (2013-GS-28-0681; -0682; -0683; -0684) resisting arrest with a deadly weapon (2013-GS-28-0811) and possession of a firearm during the commission of a violent crime (2013-GS-28-0685). Attorney Jason Kirinchich represented the Applicant at trial which began January 13, 2014 before the Honorable James R. Barber and a jury. On January 16, 2014 the Applicant was convicted and sentenced as follows:

Att. Murder (-0681)	Guilty	20 years concurrent to other sentences
Att. Murder (-0682)	Guilty	20 years concurrent to other sentences
Att. Murder (-0683)	Guilty of ABHAN	20 years concurrent to other sentences
Att. Murder (-0684)	Dismissed by directed verdict	

R.A. with a deadly weapon (-0811)	Guilty	2 years concurrent
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Poss. Firearm during violent crime (-0685)	Guilty	4 years consecutive to -0681
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A timely Notice of Appeal was filed on January 27, 2014. The Office of Appellate Defense handled appeal and J. Jarrett Bouchette, Esquire was tasked with the case under the supervision of Robert M. Dudek, Esquire. The Applicant's initial brief was filed January 6, 2015 and final briefs were filed in July of 2015. Oral arguments were conducted on February 2, 2016.

On February 23, 2016 Attorney Bouchette filed a "Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law." This Motion attempted to raise an issue related to the attempted murder jury instruction which, while preserved for review, had not been previously raised in the initial or final briefs or in oral argument. The Court denied the Appellant's motion to supplement on March 23, 2016. The South Carolina Court of Appeals thereafter affirmed Applicant's conviction on April 6, 2016. State v. Allen, Op. No. 2016-UP-135 (S.C. Ct. App. Filed April 6, 2016).

Applicant filed a Petition for Rehearing on April 22, 2016 and again on May 16, 2016 and was eventually allowed to proceed pro se with this matter. A remittitur was issued without a decision on the Petition for Rehearing on July 18, 2016. The Applicant objected and the Remittitur was recalled August 25, 2016. The Court finally ruled on the Applicant's Petition for a Rehearing on October 21, 2016. The Applicant thereafter filed a Petition for Writ of Certiorari which was ultimately denied on August 25, 2017.

The Remittitur was issued September 22, 2017. The Applicant filed his timely Application for post-conviction relief on October 13, 2017.

The Attempted Murder Convictions Must be Overturned

1. Ineffective Assistance of Appellate Counsel

The Applicant's trial transcript reflects that the Court instructed the jury 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." T.T. 268, lines 12-14. At the conclusion of the jury instructions the following exchange took place:

Mr. Krincich: As I indicated previously, I do object to the charge of attempted murder with regards to specific intent. Your Honor did read from what you told us you would. I would disagree that specific intent is not an element of attempted murder. I'd ask you to correct that but I understand the Court's position on that. I just make my objection noted.

The Court: All right. It is. Thank you very much.

T.T. 278, lines 3-12.

The Applicant would argue that the instruction regarding specific intent was properly objected to by trial counsel and preserved for appellate review¹. Counsel's objection was based on the statutory language defining Attempted Murder as occurring with "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied." South Carolina Code of Laws, §16-3-29 (*emphasis added*). This statute is relatively new as it went into effect on June 2, 2010 and had been in effect less than four years prior to this 2014 trial.

As explained above in the procedural history, the Applicant appealed his convictions and was appointed counsel to assist him in perfecting his appeal. However, counsel failed to raise this issue regarding "specific intent" in his initial brief, final brief or oral argument. On February 29, 2016, 27 days after oral arguments, appellate counsel filed a "Motion to Supplement Final Brief

¹ The Attorney General's office seems to agree that the issue was properly preserved for appellate review in footnote 1 of their filed "Return to Appellant's Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law."

of Appellant Based on Recently Decided Case Law.” This Motion asked the Court leave to raise a new legal issue based upon the decision in State v. King, 412 S.C. 403 (Ct. App. 2015) which was decided April 22, 2015. Notably, this case would have been decided after the Applicant’s initial appellate brief was filed (January, 2015) and before the Applicant’s final appellate brief was filed (July, 2015). While appellate counsel clearly made a valiant effort to correct his omission, it was too late as the appellate court rules do not allow for new issues to be raised on appeal at such a late stage. As a result the Appellate Court denied counsel’s motion and the merits of the Applicant’s issue as to specific intent was not reviewed at the appellate level.

The Applicant alleges that appellate counsel was ineffective for failing to raise the preserved meritorious issue regarding whether “specific intent” is an element of attempted murder, as it would have entitled the defendant to reversal on appeal. *See, Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991), *overruled on other grounds by State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009). The State v. King case originally cited by appellate counsel has since been reviewed by our Supreme Court. 422 S.C. 47, 810 S.E.2d 18 (2017). In King, the Supreme Court affirmed the Appellate Court’s determination that a “specific intent to kill” is an element of attempted murder and a jury instruction stating that “a specific intent to kill is not an element of attempted murder” is error. Id. At 64, 27. The Supreme Court further stated this error cannot be deemed harmless. Id.

While it is true that the King opinions were released subsequent to the convictions and the initial appellate briefing, this Court does not have to hold appellate counsel to a clairvoyant standard to find deficiency. Trial counsel originally raised the objection based on the plain unambiguous black letter law of the attempted murder statute at the time of the trial and not a potential future appellate “change” in the law. Further, the issue in King had already been raised

in the Courts and argued by competent counsel in November of 2014 prior initial briefs being filed in the Applicant's case.

"A defendant is constitutionally entitled to the effective assistance of appellate counsel. In deciding a claim of ineffective assistance of counsel, the focus is on the 'fundamental fairness of the proceeding whose result is being challenged.' First, the burden of proof is upon petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. Second, the petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Southerland v. State, 337 S.C. 610, 615-616, 524 S.E.2d 833, 836 (1999).

Appellate counsel was deficient in that he failed to raise a meritorious issue on behalf of the Applicant. Given the Supreme Court's analysis in King, there is a reasonable likelihood that the Applicant would have prevailed on appeal had appellate counsel not been deficient, given the clear error by the trial court instructing the jury that a "specific intent to kill is not an element of attempted murder." In this circumstance, the appropriate remedy is for this Court to order a new trial rather than a belated appeal. Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001).

2. Ineffective Assistance of Trial Counsel

The Applicant also challenges the attempted murder convictions based upon the trial counsel's failure to object when the Court instructed the jury that "[i]nferred malice may ... arise when the deed is done with a deadly weapon." T.T. 268, lines 10-12. A review of the record shows no objection from trial counsel either at the time the instruction was given or after the

instruction when the Court gave counsel the opportunity to comment or object further. *See*, T.T. 268-280.

In State v. Belcher 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). Belcher also recognized that erroneous jury instructions are subject to a harmless error analysis. Id. At 611, 809.

Recently the Court of Appeals analyzed this court instruction and how it specifically relates to the charge of attempted murder. The Court reflected that, in light of the Supreme Court instruction in King, the State is required to prove that a defendant charged with attempted murder acted with express malice and the specific intent to kill. State v. Shands, Op. No. 5569 (S.C. Ct. of Appeals filed June 13, 2018), 2018 WL 2944992, 10 (*emphasis added*). The Court added, “[t]herefore, we question whether an implied malice instruction is proper in any attempted murder trial.” Id. The Court went on to explain that even if an implied malice instruction could be appropriate in an attempted murder case, it was not appropriate in the Shands case because the evidence justified an instruction on a lesser included offense. Id. The Court recognized that, if the jury did not believe the defendant “had the specific intent to kill, he would have been guilty of the lesser included offense of ABHAN.” Id. Using the law as pronounced in the Belcher, case, the Court found that, “because there was evidence to reduce Shand’s charge, the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon.” State v. Shands, Op. No. 5569 (S.C. Ct. of Appeals filed June 13, 2018), 2018 WL 2944992, 10.

Again, this court would not have to hold trial counsel to the standard of clairvoyance to find him ineffective in filing to object to this jury instruction. The Shands decision is reached by

directly applying the law in State v. Belcher from 2009 to the facts of a case where evidence existed to justify an instruction on a lesser included offense.

As discussed above, the attempted murder statute clearly requires the state to prove specific intent AND the existence of malice. Given the fact that the jury was incorrectly instructed regarding the requirement of specific intent, the improper instruction allowing the jury to infer malice is extremely harmful. If the jury found only a general intent to cause serious injury, and also 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. This scenario is entirely possible given the jury instructions provided in the Applicant's case. For that reason, this Court should find that the jury instructions were fundamentally unfair that the "trial cannot be relied on 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.

The Assault and Battery of a High and Aggravated Nature (ABHAN) Conviction Must be Overturned

The transcript reflects that trial counsel requested a lesser included offense charge on Assault and Battery of a High and Aggravated Nature (hereinafter "ABHAN"). T.T. 213, lines 16-25. The State did not object to that request. Id. The Court's instruction to the jury defined ABHAN as occurring when a person "injures another person and great bodily injury to another results or the act is accomplished by a means likely to produce great death or great bodily injury." T.T. 269, lines 11-14. The Judge further instructed the jury that it is "not necessary that the attempted injury or harm actually take place" and provided the common law definitions of assault and battery. T.T. 269, lines 21-25 through 270, lines 1- 9. After the jury left the courtroom, the following exchange occurred:

Mr. Krinchich: Your Honor, I do have one other issue. I don't know the true solution to it. I just wanted to express this. I believe your Honor did everything you could to properly charge assault and battery of a high and aggravated nature. I understand the law and I've got it here in front of me. There's and/or in there. There's a battery or there could be an assault. I'm just not sure that's clear enough for the jury. They don't have to find an actual battery to find the assault and battery of a high and aggravated nature. Before we had common law ABHAN, AHAN. Now, it's all under one.

Mr. Perry: Your Honor, I would join Mr. Krinchich in that. It would just simply clarify for the jury that they don't have to find a battery.

The Court: You want me to bring the jury and just tell them that.

Mr. Perry: Because it does say assault and battery, I think it would be proper to instruct them that they don't have to find the battery to find him guilty of—

Mr. Krinchich: You surely said or in there in explaining the assault.

Mr. Perry: Right. They could have easily have missed it in all that.

The Court: All right. We'll bring the jury back in.

T.T. 278, line 13, through 279, line 15.

At which point the Court instructed the jury as follows:

All right. Ladies and Gentlemen, the lawyers have asked me to clarify one thing on the charge. On the charge of Assault and Battery of a High an Aggravated Nature, uh, the offense says that there has to be great bodily injury to another, that which would be the assault and the battery or the act is accomplished by means likely to produce a death or great bodily injury. So there doesn't actually have to be the battery in an assault and battery, you know, the unlawful touching, or, uh, striking in some way. There either has to be — there is a battery or the act is accomplished by means likely to produce death or great bodily injury. So with that said,

I'm going to let you step back to the jury room. I think that's all we're going to do. I'll have everything brought to you in just a moment and you can begin your deliberations.

T.T. 279 line 19 through 280 line 11.

No objections were raised by counsel.

As an initial matter, the Applicant argues that the Court misstated the law to the jury. The trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.#.2d 462 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. Id. While the Court initially correctly defined ABHAN as written in South Carolina Code §16-3-600(B)(1), the charge as a whole does not contain the correct definition of the law. As stated above, Court went on to instruct the jury that an injury was not required to find the defendant guilty of ABHAN. T.T. 269, lines 21-25, T.T. 280, lines 1-7. This is incorrect as the statute clearly requires that the accused “unlawfully injures another person.” South Carolina Code §16-3-600(B)(1). Trial counsel never objected to the Court’s misstatement of the law.

As an additional related matter, the Applicant argues that the jury should not have received an instruction on ABHAN as a lesser included offense. “The law to be charged must be determined from the evidence presented at trial.” State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). As stated above, an ABHAN conviction would require evidence that the accused “unlawfully injures another person.” A review of the trial transcript clearly shows that no evidence was presented that the Applicant injured any of the victims. Instructions on lesser included offenses are appropriate “where there is evidence from which the jury could infer that the defendant committed a lesser offense.” State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157,

159 (2010). However, in this instance there was no evidence of an injury presented, and therefore the charge was inappropriate and likely to confuse and mislead the jury.

The fact that the jury actually found the Applicant guilty of ABHAN on one indictment even though an injury did not occur makes the prejudice apparent. As a result, the Applicant stands convicted of an offense for which there was no evidentiary basis. In addition, since the jury did not find that the State met their burden to prove attempted murder on that indictment, it is possible that the jury could have found the defendant not guilty on the indictment if they understood that an ABHAN requires injury.

The appropriate lesser included offense would have been assault and battery in the first degree, as it does not require an injury but can be satisfied by an offer or attempt to injure another person with certain aggravating circumstances. South Carolina Code of Laws §16-3-600(C). *See, State v. Middleton*, 407 S.C. 312, 755 S.E.2d 432 (2014) (First-degree assault and battery based on an attempt to injure another person in a manner likely to produce death or great bodily injury was a lesser included offense of attempted murder with respect to one of two victims who suffered no injury.) Assault and Battery in the First Degree carries a maximum penalty of ten years.

Trial counsel was deficient in requesting an improper lesser included charge and additionally failing to object when the Court misstated the law. As a result, the Applicant is serving a twenty year sentence on an ABHAN conviction. The prejudice is apparent and the ABHAN conviction should be overturned.

The Possession of a Firearm During the Commission of a Violent Crime Conviction Must be Overturned

In conjunction with the Attempted Murder charges, the Applicant was indicted and tried for the offense of possession of firearm during commission of violent crime. The statute for this charge states as follows:

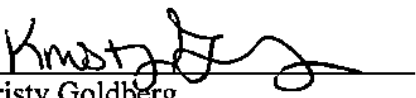
If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime **and is convicted of** committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime.

South Carolina Code of Laws § 16-23-490(A)(*emphasis added*).

It is without doubt that the statute requires that a person be convicted of committing or attempting to commit a crime classified as violent. Accordingly, if this Court grants Post-Conviction Relief and overturns the Applicant's convictions for Attempted Murder and ABHAN², this Court must also overturn his conviction for possession of a firearm during the commission of a violent crime and remand the matter back to General Sessions Court. *See, State v. Smith*, 363 S.C. 111, 116, 609 S.E.2d 528, 531 (App. Ct. 2005).

CONCLUSION

Based on the foregoing legal argument, the Applicant respectfully asks that this Court grant the Applicant's Post-Conviction Relief application.


Kristy Goldberg
Attorney for the Applicant

Columbia, South Carolina
September 5, 2018

² Attempted Murder and Assault and Battery of a High and Aggravated Nature are both defined as violent crimes under South Carolina Code §16-1-60.

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

**STATE'S MEMORANDUM IN
OPPOSITION TO PCR**JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

2019 MAR 26 PM 12:51

FILED FOR RECORD

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 Jarett Bouachette, Applicant's appellate counsel. Applicant submitted a 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. This Memorandum follows.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. In July of 2013 the Kershaw County Grand Jury indicted Applicant for four counts of attempted murder (2013-GS-28-0681; -0682; -0683; -0684); one count of resisting arrest with a deadly weapon (2013-GS-28-0811); and one count of possession of a firearm during the commission of a violent crime (2013-GS-28-0685). The charges stem from an incident in December of 2012, in which the Applicant was apprehended and arrested after he fled from law enforcement officers attempting to lawfully arrest him on outstanding bench warrants and fired upon them. Tr. 80-85.

On January 13-16, 2014, Applicant proceeded to trial before a jury and the Honorable James R. Barber. Jason D. Kirincich, Esquire, represented Applicant, and Assistant Solicitor Brett Perry represented the State. The jury found Applicant guilty of two counts of attempted murder,¹ one count of assault and battery of a high and aggravated nature (ABHAN),² one count of resisting arrest with a deadly weapon, and one count of possession of a firearm during the commission of a violent crime. Tr. 281-82. Judge Barber sentenced him to twenty years' imprisonment for the two attempted murder charges and the ABHAN charge, all to run concurrently; two years' imprisonment for the resisting arrest with a deadly weapon charge, to run concurrently; and four years' imprisonment on the possession of a firearm during the commission of a violent crime charge, to run consecutive to the others. Sent. Tr. 10.

¹ The trial court directed a verdict on the fourth attempted murder charge. Tr. 220, lines 20-21.

² The State conceded at the evidentiary ABHAN is 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.

Applicant filed a timely notice of appeal. Thomas Jarrett Bouchette, Esquire,³ 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 finally issued on September 22, 2017.

II. 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:

³ 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.

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.

III. Standard of Review

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. See Southerland, 337 S.C. at 616, 524 S.E.2d at 836 (1999). 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).

IV. Argument

In 2010, the General Assembly replaced the offense of assault and battery with intent to kill (ABWIK)⁴ 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[.]" Id. at § 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 case was tried. At the time of Applicant's trial and appeal in 2014 and 2015, which is the relevant time frame for analysis of counsel's actions under Strickland, the law in South Carolina was not clear as to the required level of intent. Applicant has relied 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 raised the issue on appeal, but in fact, as evidenced by both the majority opinion and by Justice Kittredge's concurring opinion in King, existing authority supported the attempted murder instruction given at Applicant's trial. 422 S.C. at 74-74, 810 S.E.2d at 32 (Kittredge, J.,

⁴ Formerly S.C. Code Ann. §16-3-620. See legislative history of S.C. Code Ann. § 16-3-29.

concurring in result only); 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 general intent). Indeed, 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.”). 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, 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 in its analysis in King, which “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 to interpret the elements of attempted murder as requiring only general intent. Id. at 73, 810 S.E.2d at 32 (“I

therefore conclude that a specific intent to kill is not an element of the offense of attempted murder found in section 16-3-29, notwithstanding... the phrase ‘with intent to kill...’). “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?” Id. 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.

Appellate counsel, therefore, cannot be deficient based on King, because the law was ambiguous as to the required intent at the time of Applicant’s trial and appeal, so 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 dissent, 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 the initial briefs, he would have raised that issue. Thus, appellate counsel’s decision not to raise the issue was not based on neglect, but rather was a considered choice based on his professional judgement, made

after researching the law *as it existed at the time*. Therefore, appellate counsel was not ineffective because his performance was not deficient.

For the same reasons, trial counsel was not ineffective when he did not 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, counsel could not reasonably have known to object at the time of Applicant's trial in 2014.

Even King itself does not directly address the issue and 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. 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, trial counsel was not ineffective in failing to object to this instruction.⁵

⁵ Applicant also argues State v. 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

CONCLUSION

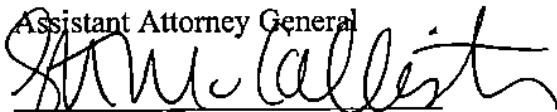
Based upon the foregoing analysis, Respondent submits Applicant's claims of trial and appellate counsel's ineffectiveness are wholly meritless. The State respectfully asks the Court to deny and dismiss the application for post-conviction relief.

Respectfully submitted,

LINDSEY A. MCCALLISTER

Assistant Attorney General

BY:



ATTORNEY FOR RESPONDENT

Office of the Attorney General

Post Office Box 11549

Columbia, SC 29211

(803) 734-3737

3/28

, 2019.

homicide). However, counsel testified he felt Belcher was not applicable to Applicant's case as there was no evidence of self-defense or other mitigating factors.

STATE OF SOUTH CAROLINA)

COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

2017-CP-28-0904

EARNEST ALLEN, #310134,)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

AFFIDAVIT OF SERVICE BY MAIL

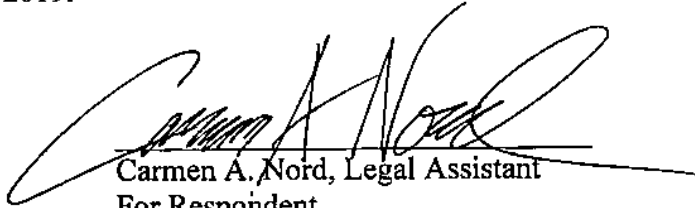
JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

2019 MAR 26 PM 12:51

FILED FOR RECORD

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **State's Memorandum in Opposition to PCR** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mrs. Kristy Grafton Goldberg
Law Office of Kristy Goldberg, LLC
1720 Main Street, Suite 303
Columbia, South Carolina 29201

DATED this the 25th day of March, 2019.


Carmen A. Nord, Legal Assistant
For Respondent

FILED FOR RECORD
2019 APR -4 AM 9:36

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW) FOR THE FIFTH JUDICIAL CIRCUIT

Earnest Maurice Allen,)
S.C.D.C. No. 310134,)
JANET C. HASTY)
CLERK OF COURT)
KERSHAW COUNTY, S.C.) C.A. No. 2017-CP-28-0904

v.)
Applicant,)
) **APPLICANT'S RESPONSE**
) **TO THE STATE'S MEMORANDUM**
) **IN OPPOSITION TO**
) **POST-CONVICTION RELIEF**

State of South Carolina,)
)
Respondent.)
_____)

The Applicant briefly responds to the State's Memorandum in Opposition to Post Conviction Relief as follows:

1. Appellate counsel was ineffective because he failed to raise a legitimate, non-frivolous legal argument previously raised and preserved by trial counsel. The State's assertion in their Memorandum that the law at the time "was not clear as to the required level of intent" is precisely the reason that Appellate counsel should be expected to raise such a legal argument. The King case shows that the argument would have been meritorious.
2. Trial counsel was ineffective for failing to object to the implied malice instruction based on State v Belcher, a case decided approximately five years prior to the Applicant's trial. 385 S.C. 597m 608 (2009). State v. Shands simply an application of Belcher to the facts in the Shands case which, while helpful and illustrative in the Applicant's matter, is substantively based on the holding in Belcher.

CONCLUSION

Based on the foregoing legal argument, the Applicant respectfully asks that this Court grant the Applicant's Post-Conviction Relief application.



Kristy Goldberg
Attorney for the Applicant

Columbia, South Carolina
April 2, 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

**MOTION TO ALTER/AMEND
JUDGMENT**JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

2019 SEP 30 AM 9:25

FILED FOR RECORD

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

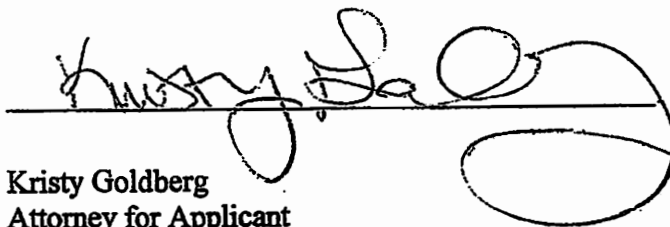
previously reached and overturns the convictions in their entirety remanding this matter for a new trial, the conviction for Possession of a Firearm During the Commission of a Violent Crime must be overturned as well pursuant to South Carolina Code of Laws § 16-23-490(A).

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.



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Columbia, South Carolina

This ____th day of September, 2019

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

FILED FOR RECORD
2019 DEC -2 PM 12:10
JANET C. HASLEY
CLERK OF COURT
KERSHAW COUNTY, S.C.

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 F. Curtis
KRISTI F. CURTIS
Presiding Judge
Fifth Judicial Circuit