RECEIVED

Nov 30 2020

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO KERSHAW COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis, Post-Conviction Relief Judge
The Honorable James R. Barber, III, Trial Judge

Appellate Case No. 2019-002056

Earnest Maurice Allen, #310134,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Deputy Attorney General
SC Bar #79054

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

[1] State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017).

PETITIONER'S ISSUES PRESENTED

1. Did the PCR judge err in refusing to find appellate counsel ineffective for not raising the preserved issue of whether trial judge erred in instructing the jury that the offense of attempted does not require a specific intent to kill?

2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the trial judge's jury instruction to the jury on attempted murder that malice could be inferred from the use of a deadly weapon when there was evidence presented that would reduce the charge and the judge charged the jury with the lesser-included offense of assault and battery of a high and aggravated nature?

COUNTERSTATEMENT OF ISSUES PRESENTED

1. The PCR court correctly found Appellate Counsel was not constitutionally ineffective for failing to raise on appeal the issue of the trial court's general-intent jury charge on attempted murder where the trial took place before the Court of Appeals and this Court issued their decisions in King v. State,[2] finding attempted murder is a specific-intent crime, and Appellate Counsel is not required to be clairvoyant. Additionally, Petitioner was not prejudiced because the State presented significant evidence of specific intent at trial.

2. The PCR court correctly found trial counsel was not constitutionally ineffective for failing to object to the trial court's implied-malice jury charge on attempted murder where trial counsel is not required to be clairvoyant and existing precedent did not require him to object.

[2] State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017).

STATEMENT OF THE CASE

Earnest Maurice Allen (Petitioner) is presently confined in the South Carolina Department of Corrections.[3] In July of 2013 the Kershaw County Grand Jury indicted Petitioner 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).

On January 13-16, 2014, Petitioner proceeded to trial before a jury and the Honorable James R. Barber. Jason D. Kirincich, Esquire (Trial Counsel), represented Petitioner, and Assistant Solicitor Brett Perry represented the State. The jury found Petitioner guilty of two counts of attempted murder,[4] 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. 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.

Petitioner filed a timely notice of appeal. Thomas Jarrett Bouchette, Esquire (Appellate Counsel),[5] perfected the appeal. The South Carolina Court of Appeals affirmed Petitioner's

---

[3] SCDC lists Petitioner's name as Earnest Maurice Pickett. Petitioner explained at the evidentiary hearing that he used Pickett as his surname as a child because that is the name listed on his social security card. However, he recently learned Allen is the legal name listed on his birth certificate, and, at the time he filed this application, he used the surname Allen. App. pp. 562-63.

[4] The trial court directed a verdict on the fourth attempted murder charge. App. pp. 216-22.

[5] 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, Bouchette selected the issues for appeal and wrote all briefs and motions submitted in the course of the appeal. App. pp. 554-55.

conviction on April 6, 2016. State v. Allen, Op. No. 2016-UP-135 (S.C. Ct. App. filed October April 6, 2016). Petitioner filed a *pro se* petition for rehearing while still represented by Appellate Counsel on April 20, 2016, and the State objected to the petition as an improper *pro se* filing. On May 3, 2016, the Court of Appeals notified Petitioner it would not take action on his *pro se* petition because 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, Petitioner 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.

Petitioner moved for the remittitur to be recalled on August 23, 2016, and the Court of Appeals granted his motion on September 9, 2016. Thereafter, on October 21, 2016, the Court of Appeals denied Petitioner's *pro se* petition for rehearing. Petitioner then filed a petition for writ of certiorari with the South Carolina Supreme Court on November 18, 2016. The South Carolina Supreme Court denied Petitioner's petition in an order dated August 25, 2017. The remittitur issued on September 22, 2017.

Petitioner then timely filed an application for post-conviction relief (PCR) filed on October 13, 2017, and amended the application on June 1, 2018, and August 24, 2018. An evidentiary hearing into the matter convened on February 20, 2019, at the Richland County Courthouse before the Honorable Kristi F. Curtis. Kristy Grafton Goldberg, Esquire, represented Petitioner. Petitioner 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 PCR court indicated it would take this matter under advisement in order to give Respondent time to respond to Petitioner's arguments. By written order filed September 9, 2019, the PCR court granted relief as to Petitioner's allegation his trial counsel was ineffective for

requesting a charge on count of assault and battery of a high and aggravated nature (ABHAN), as this was not an appropriate charge based on the evidence presented at trial. Respondent conceded relief was appropriate on this ground, 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). However, the PCR court denied relief as to Petitioner's other allegations regarding his attempted murder and possession of a weapon charges.

Petitioner filed a timely notice of appeal of the partial denial of relief,[6] and petitioned this Court for a writ of certiorari on July 16, 2020.

[6] Respondent conceded relief was appropriate as to the ABHAN charge and therefore did not file a cross-appeal.

STATEMENT OF THE FACTS

In December 2012, Petitioner had nine outstanding Kershaw County bench warrants for failure to appear in court. App. p. 98. Sergeant Michael Sellers with the Kershaw County Sheriff's Office had searched for Petitioner at some local apartment complexes and left his number with other residents there. App p. 95. On December 20, 2012, Sellers received a text message from a tipster notifying him Petitioner was in a beige van leaving the Wateree Villa apartment complex in Camden. App. pp. 95-96. The tipster also advised Sellers that Petitioner was armed with a firearm. App. p. 97. Based on this information, Sellers did not want to approach Petitioner by himself, so he called his captain and a description of the van and its general direction to other deputies who responded to the area. App. p. 97. Sellers then parked on the side of the road with his lights off and awaited the van. App. p. 97. Captain Edward Corey joined him and the van approached shortly thereafter. App. p. 97. The officers began following, and as the van got close to a trailer park, Sellers decided to make a felony traffic stop.[7] App. pp. 98-99.

Sellers activated his blue lights, the van stopped, and Petitioner immediately bailed out of the passenger side and began running across the brightly lit yard of a home. App. p. 99. Sellers recognized Petitioner as the fleeing suspect because he knew Petitioner from past experience. App. pp. 99- 100. Additional officers were on the scene by this time, and Deputy Justin Scott ran after Petitioner and was able to gain on him quickly. App p. 100. Sellers then saw something silver and a flash in his direction, and he heard a loud noise and began looking for somewhere to take cover. App. pp. 100-01. He yelled to Deputy Scott that Petitioner had a gun because Scott was

[7] A felony traffic stop, or felony car stop, is one that is carried out with consideration for the safety of the public and the officers. App. p. 136. Rather than a typical traffic stop where the officer approaches the driver, in a felony stop the officer does not walk up to the car, but rather calls the suspect out of the car to him. App. pp. 99, 135-36.

closing in on Petitioner. App. pp. 101-02. Sellers saw Petitioner turn to face Scott about fifteen to twenty yards apart and saw the muzzle flash of numerous shots fired. App. p. 102. Deputy Scott returned fire but did not hit Petitioner. App. pp. 153-55.

The officers then decided to retreat to their cars rather than follow an armed suspect into a dark, wooded area.[8] App. p. 103. Petitioner was not apprehended that night but was arrested the next day and charged with four counts of attempted murder, one count of resisting arrest with a deadly weapon, and one count of possession of a firearm during the commission of a violent crime. App. p. 104.

[8] A third officer, Rick Bailey, also gave chase and was in the yard trailing behind Sellers and Deputy Scott when the shots were fired. App. pp. 125-26. He testified he arrived on scene as the other officers initiated the traffic stop and saw someone flee out the passenger side of the van. He gave chase, following behind Deputy Scott, who is his stepson. Bailey testified he was approximately ten yards behind Scott when he heard the first shots fired and "bullets hitting things within close proximity," although he could not see Petitioner as his view was blocked by some azalea bushes and by Scott in front of him. App. pp. 125-26, 130-31. The fourth officer, Captain Corey, remained on the road near the police cars during the foot chase. App. p. 138. The trial court ultimately directed a verdict as to the count of attempted murder for which he was the victim, as he was out of range of Petitioner's shots. App. pp. 216-22.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR court correctly found Appellate Counsel was not constitutionally ineffective for failing to raise on appeal the issue of the trial court's general-intent jury charge on attempted murder where the trial took place before the Court of Appeals and this Court issued their decisions in King v. State,[9] finding attempted murder is a specific-intent crime, and Appellate Counsel is not required to be clairvoyant. Additionally, Petitioner was not prejudiced because the State presented significant evidence of specific intent at trial.

In its Order denying relief as to this issue, the PCR court correctly found Appellate Counsel was not constitutionally ineffective for failing to raise the issue of the trial court's general-intent instruction on appeal because "the law was ambiguous as to the required intent at the time of [Petitioner's] trial and appeal" and therefore, "Appellate Counsel was not on notice he needed to raise the issue." App. p. 595. Additionally, as the PCR court again correctly found, even if Appellate Counsel was deficient, Petitioner was not prejudiced because the State presented significant evidence of specific intent, at least as to the officers who were the victims in the two counts of attempted murder for which Petitioner was actually convicted.

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

[9] State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017).

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 reviewing 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 if so, whether Petitioner 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).

As an initial matter, the State agrees the trial court's instruction 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" is no longer valid after this Court's decision in 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) ("We agree with the Court of Appeals that 'the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime.'") (citations omitted). However, the Court of Appeals' decision was delivered in June 2015 and this Court's decision in October 2017; this case was tried in January 2014, and Appellate Counsel filed his initial brief on January 6, 2015, before either court's King decision was issued. Id.

Therefore, the PCR court's decision denying Petitioner relief on this ground should be affirmed, and this Court should deny certiorari.

A. Appellate Counsel was not constitutionally ineffective because he was not deficient where the ruling establishing the specific-intent standard for attempted murder was not issued until months after the trial took place and Appellate Counsel filed his initial brief, and Appellate Counsel is not required to be clairvoyant.

The reasonableness of Appellate Counsel's decision not to raise the challenged general-intent instruction on appeal is informed by the legislative history of attempted murder in South Carolina. Until 2010, the offense of attempted murder did not exist in South Carolina; instead, South Carolina recognized the offense of assault and battery with intent to kill (ABWIK). In 2010, however, the General Assembly "abolished all common law assault and battery offenses and all prior statutory assault and battery offenses," and in their place codified attempted murder. S.C. Code Ann. §§ 16-3-29, 16-3-600; State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). It was well-settled that the old crime of ABWIK required only a general intent to kill. 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). However, the statutory definition of someone who commits attempted murder, as codified in 2010, now reads: "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. Unfortunately, this definition created ambiguity as to the level of intent – general or specific – required for the crime to be committed, and it was not until 2017 that this Court decided King and found "the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder...." 422 S.C. at 56-57, 810 S.E.2d at 23.

At the time of Petitioner's appeal in early 2015, however, the law in South Carolina was

not clear as to the required level of intent for attempted murder. As noted by both the majority opinion and by Justice Kittredge's concurrence in this Court's King decision, existing authority supported the general-intent instruction given at Petitioner's trial. 422 S.C. at 74-75, 810 S.E.2d at 32 (Kittredge, J., concurring in result only) (concluding 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.'"); 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"); Foust, 325 S.C. at 14-15, 479 S.E.2d at 5 (explaining, for ABWIK, the required finding of "malice aforethought, either express or implied" encompassed a requirement of general intent). As Justice Kittredge noted, "[T]he 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." King, 422 S.C. at 72, 810 S.E.2d at 31; see also 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?").

Importantly, the relevant lens for analysis is "counsel's perspective at the time" of the 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...."). Additionally, attorneys are not required "to anticipate or discover changes in the law, or facts which did not exist, at the time" of the alleged ineffectiveness. Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765. In this case, Appellate Counsel testified the lack of any direct support in existing case law for trial counsel's position was why he chose not to raise this issue. App. pp. 558-59, 561. Given the ambiguous language of the statute and the lack of direct support for trial

counsel's objection, it was not unreasonable for Appellate Counsel to decline to raise this issue he identified other meritorious issues to raise instead. 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).

Indeed, the very fact this 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. If the statute at issue was so clear as to the required level of intent, this Court would not have needed to issue such a detailed a decision interpreting what the Legislature meant by its wording of that statute. Appellate Counsel, therefore, cannot be deficient because King was not the law at the time of Petitioner's trial and appeal, and given the ambiguous and confusing wording of the attempted murder statute, Appellate Counsel was not clearly on notice this was a meritorious issue he should raise. Id. at 62, 810 S.E.2d at 25-26 ("While we are convinced this is the correct interpretation, we also acknowledge the ambiguity created by the language in section 16-3-29. . . ."); see also 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).

In sum, the PCR correctly applied the Strickland standard and denied relief. 466 U.S. at 687; id. at 688 ("The proper measure of attorney performance remains reasonableness under prevailing professional norms."). This Court has repeatedly made clear that attorneys are not

required "to anticipate or discover changes in the law, or facts which did not exist, at the time of" the alleged ineffectiveness. Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765; Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (explaining an attorney is not required to "be clairvoyant or anticipate changes in the law which were not in existence at the time of trial."). Similarly, there exists ample authority interpreting Strickland from other jurisdictions, including the Fourth Circuit, which recognizes attorneys are "not required to forecast changes in the existing law." Mayo v. Henderson, 13 F.3d 528, 533 (2nd Cir. 1994). See also Kornahrens v. Evatt, 66 F.3d 1350, 1360 (4th Cir. 1995) ("Skipper was on appeal to the Supreme Court at the time of Kornahrens's trial, and [counsel] testified that he was aware of that fact. Nevertheless, the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law."); United States v. McNamara, 74 F.3d 514, 515-17 (4th Cir.1996) (finding counsel cannot be considered ineffective for failing to anticipate changes in law).

Even the justices of this Court could not unanimously agree on which level of intent the Legislature intended to assign to attempted murder, and the majority was notably unable to fully reconcile its holding with the wording of the statute. See King, 422 S.C. at 64 n. 5, 810 S.E.2d at 27 n. 5 ("[W]e would respectfully suggest to the General Assembly to 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*.") (emphasis added). It would be contrary to the dictates of Strickland to find Appellate Counsel constitutionally ineffective because he failed to divine the interpretation this Court ultimately settled on, given the belief the statute encapsulated only general intent was a reasonable interpretation of the ambiguous language. See Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.").

Because the PCR correctly denied relief on this issue, this Court should likewise deny certiorari and affirm the decision of the PCR court.

B. Petitioner was not prejudiced by the general-intent instruction because the State presented significant evidence of his specific intent to kill the officers who were the victims named in the two counts for which Petitioner was convicted.

Moreover, notwithstanding the lack of any deficiency on Appellate Counsel's part, the PCR court also correctly found Petitioner had not met his burden of establishing prejudice due to substantial and compelling evidence of malice and specific intent as to the two officers who were the victims of the two counts of attempted murder for which Petitioner was actually convicted.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the PCR court applies the Strickland test just as it would to a claim of ineffective assistance of trial counsel, asking first whether appellate counsel's performance was deficient, and then whether Petitioner was prejudiced by the 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 his 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). In Petitioner's case, however, any error in the jury instruction was harmless, so Petitioner was not prejudiced by Appellate Counsel's decision not to raise the issue on appeal. "Harmless error review looks to the basis on which the jury actually rested its verdict." Lowry v. State, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008) (citing Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)). "From this perspective, in order to conclude that the error did not contribute to the verdict, the Court must 'find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" Id. (citing Yates v. Evatt, 500 U.S. 391, 403 (1991).

The facts established at trial show Petitioner acted with malice and a specific intent to kill

towards Sellers and Scott, the two named victims in the attempted murder charges which actually resulted in a conviction. The evidence presented at trial clearly showed Petitioner fled from officers attempting a valid traffic stop and fired multiple shots at the officers closest to him. Sellers testified he was within range of the shots such that he felt the need to take cover and stop his pursuit to avoid being hit. App. p. xxx. Moreover, Sellers and Captain Corey both testified they saw Petitioner stop his flight, turn to face the officers, and fire multiple shots. App. pp. 102, 138-39. Scott testified he saw Petitioner stop and turn around to fire at him from less than fifteen yards away, and Petitioner fired over his shoulder in Sellers' direction as Petitioner was running towards the woods. App. pp. 154, 161-62. Sellers testified he could see the muzzle flash and could tell the gun was pointed level at the officers, not up in the air. App. pp. 103, 111. Sellers and Bailey testified to hearing bullets around them and striking objects in the vicinity. App. pp. 101, 126. At the evidentiary hearing, Petitioner himself admitted he had to stop and turn to face the two officers in order to fire at them. App. pp. 568, 72. It is also undisputed that the officers did not fire at Petitioner until he first fired at them. App. pp. 128, 153. Petitioner's "belief" that he should have only been convicted of first-degree assault and battery does not negate the ample evidence of specific intent presented by the State through the consistent testimony of the officers. App. pp. 569.

Thus, there is no other reasonable interpretation of Petitioner's actions other than a specific intent to kill, at least towards Sellers and Scott, at whom Petitioner deliberately aimed and fired multiple times. Petitioner was therefore not prejudiced by the jury instruction on general intent because the evidence of intent actually presented to the jury was evidence of malice and specific

intent, at least as to these two victims.[10] Cf. State v. Price, 400 S.C. 110, 114-15, 732 S.E.2d 652 (Ct. App. 2012) (finding no error in the trial court's jury charge where "it is not possible to interpret the evidence to support any conclusion other than that the person who shot [Victim] committed ABWIK."). Therefore, because the general-intent instruction was harmless as to the two attempted murder convictions, Petitioner was not prejudiced by Appellate Counsel's decision not to raise it because it was not reasonably likely to have changed the outcome on appeal.

This Court should therefore deny certiorari and affirm the PCR court's grant of relief on this ground.

II. The PCR court correctly found trial counsel was not constitutionally ineffective for failing to object to the trial court's jury charge malice could be inferred from the use of a deadly weapon because other significant evidence of malice existed such that Petitioner was not prejudiced by the instruction.

Petitioner alleges Trial Counsel was constitutionally ineffective for failing to object when the trial court charged the jury on malice implied by the use of a deadly weapon. Petitioner argues Belcher required counsel to object because there was evidence presented which would have supported the lesser-included offense of assault and battery in the first degree. 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); PWC p. 16. However, Trial Counsel testified he felt Belcher was not applicable to Petitioner's case as there was no evidence of self-defense or other mitigating factors. App. pp. 549-51. The PCR court agreed, at least as far as the two attempted murder convictions,

[10] Petitioner was not convicted of attempted murder as to the third officer, Bailey, but rather of ABHAN, and the State conceded relief was appropriate for that conviction on other grounds.

and correctly denied relief because Petitioner failed to meet his burden as to prejudice. App. p. 597.

To prove prejudice, an applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 694). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. As discussed above, the evidence presented at trial showed Petitioner fled from officers attempting a valid traffic stop and fired multiple shots at the officers closest to him. Sellers and Captain Corey both testified they saw Petitioner stop his flight, turn to face the officers, and fire multiple shots. App. p. 102, 138-39. Scott testified he saw Petitioner stop and turn around to fire at him from less than fifteen yards away. App. pp. 154, 161-62. At the evidentiary hearing, Petitioner acknowledged he had to stop and turn to face the two officers in order to fire at them. App. pp. 568, 572. It is also undisputed the officers did not fire at Petitioner until he first fired at them. App. pp. 128, 153.

Thus, the malice in this case was not proven solely or necessarily from the use of a deadly weapon – rather, malice is implied from the fact Petitioner stopped his flight and turned to face the officers in order to shoot multiple times at relatively close range, as this conduct clearly demonstrates a "wanton or reckless disregard for human life." See State v. Wilds, 355 S.C. 269, 276-77, 584 S.E.2d 138 (Ct. App. 2003) ("Implied malice is when circumstances demonstrate a 'wanton or reckless disregard for human life' or 'a reasonably prudent man would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act.'") (internal citations omitted). Therefore, even if the deadly weapon instruction was objectionable, there is no reasonable probability that instruction affected the result

of the proceeding. The PCR court correctly denied relief as to this issue, and this Court should deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari and affirm the PCR court's denial of relief. Should this Court grant certiorari, Petitioner requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Deputy Attorney General

BY: s/Lindsey A. McCallister
Lindsey A. McCallister

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

November 30, 2020

ATTORNEYS FOR RESPONDENT