STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

RECEIVED

Jan 22 2021

S.C. SUPREME COURT

WILLIE M. WILLIAMS,

RESPONDENT/PETITIONER

V.

STATE OF SOUTH CAROLINA,

PETITIONER/RESPONDENT

APPELLATE CASE NO 2020-000796

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for failing to request a jury instruction on transferred intent as it relates to self-defense when the judge instructed the jury on the law of self-defense and evidence was presented that while Petitioner was acting in self-defense during a struggle over a gun with one person, another person, Petitioner's wife, was fatally shot?

2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to preserve for appellate review the trial judge's failure to instruct the jury with the law of involuntary manslaughter?

3. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object when the judge instructed the jury that a specific intent to kill is not an element of attempted murder?

4. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object when in closing argument the prosecutor told the jury, "On behalf of the people of Greenville County, please find him guilty."?

5. Did the PCR judge err in refusing to find trial counsel ineffective for not objecting to the judge's instruction to the jury that the provocation needed for voluntary manslaughter must come from some act of or related to the victim, precluding a defense theory of transferred intent as to voluntary manslaughter?

STATEMENT

In April of 2013, the Greenville County Grand jury indicted Respondent-Petitioner, Willie M. Williams, for murder, possession of a weapon during the commission of a violent crime, attempted murder and unlawful conduct toward a child, indictments #2013-GS-23-238, 239, 240. (App. pp. 680-685). On May 13, 2013, Williams proceeded to jury trial before the Honorable Deadra L. Jefferson. Richard H. Warder and W. Townes Jones, IV represented Williams at trial. Judith M. Munson prosecuted the case. The jury returned verdicts of guilty on each charge. Judge Jefferson sentenced Williams to life in prison for murder, five (5) years for the weapon charge, thirty (30) years concurrent for attempted murder, and ten (10) years concurrent for unlawful conduct toward a child. A timely notice of intent to appeal was filed and the direct appeal perfected. One of the issues raised on direct appeal was the trial judge's refusal to instruct the jury on the law of involuntary manslaughter. (App. p. 693). The South Carolina Court of Appeals affirmed the convictions and sentences, finding the issue with regard to involuntary manslaughter was not preserved for appellate review. State v. Williams, Op. No. 2016-UP-215 (S.C.Ct.App. filed May 18, 2016). (App. pp. 767-768).

On December 28, 2016, Williams filed an application for post-conviction relief [PCR]. (App. pp. 769-785). The State filed a return and partial motion to dismiss and motion for a more definite statement on September 13, 2017. (App. pp. 786-793). On May 9, 2019, Williams filed an amended application that was assigned a 2019 case number. (App. pp. 794-802). On July 30, 2019, the State moved to merge the two cases and the motion was granted by the Honorable Letitia H. Verdin on September 3, 2019. (App. pp. 803-807). On December 18, 2019, an evidentiary hearing was held before the Honorable Robin B. Stilwell. C. Rauch Wise represented Williams at the PCR hearing. Taylor Z. Smith represented the State. In a written

order signed March 31, 2020, Judge Stilwell granted relief on the one issue involving the trial lawyers failing to object to the trial judge's instruction on mutual combat. (App. pp. 897-921). The State filed a motion to alter or amend on April 17, 2020. (App. pp. 922-931). Judge Stilwell denied the motion on May 7, 2020. (App. p. 932). The State filed a timely notice of intent to appeal on May 21, 2020. Williams filed a timely notice of intent to appeal on May 22, 2020. This petition for writ of certiorari follows.

ARGUMENTS

1. **The PCR judge erred in refusing to find trial counsel ineffective for failing to request a jury instruction on transferred intent as it relates to self-defense when the judge instructed the jury on the law of self-defense and evidence was presented that while Petitioner was acting in self-defense during a struggle over a gun with one person, another person, Petitioner's wife, was fatally shot.**

The jury found Respondent-Petitioner, Willie M. Williams, guilty of the murder of his wife, Natasha Kerns, and the attempted murder of her friend, Anthony Wilson in 2010. At trial, Williams testified that he acted in self-defense when Wilson, armed with a gun, approached him outside of the house where Kearns was living. The two men struggled over the gun and it discharged, killing Kearns.

In 2007, Williams and Kerns became romantically involved and they had a daughter that same year. (App. p. 484, line 6 – p. 485, lines 1-23). The couple married in 2009, when Williams was home from Iraq where he was working. (App. p. 492, lines 12-15). In February of 2010, Williams resigned from his job in Iraq because of the stress of the working environment and he moved in with Kerns and their daughter and her son. (App. p. 494, line 1 – p. 495, lines 1-13). At the time of the fatal shooting in July of 2010, however, Williams and Kerns had separated. (App. p. 510, lines 2-4). Kerns was living with the children in the home she had shared with Williams in Greenville County. Williams was living in his home in Gray Court.

On the night of the shooting Williams went to some clubs in Greenville. (App. pp. 520-525). Williams testified that he left the last club between 4:15 and 4:30 AM. (App. p. 526, lines 6-8). Williams was supposed to pick up his daughter in a few hours. (App. p. 524, lines 2-6). Williams testified that he called Kerns' cell phone and the house phone but she did not answer. (App. p. 526, lines 10-14). Williams testified at trial, "So, instead of driving 50 miles

back to Gray Court, I had my key to the place. So I said I was going to ride over there." (App. p. 526, lines 15-17).

When Williams got to Kerns' house he saw an unfamiliar SUV with North Carolina plates. (App. p. 526, lines 21 – 25). He did not see Kerns' car. (App. p. 526, lines 21 – 25). He parked behind the SUV and went to the front door. (App. p. 527, line 25 – p. 530, lines 1- 2). The storm door was locked and he was unable to use his key. (App. p. 529, lines 13-17). He knocked on the door for three to five minutes. (App. p. 529, lines 20-21). As Williams turned to leave, he heard a noise and then saw a man approaching him with a weapon. (App. p.530, lines 12-14). Williams testified that the man pointed a gun at Williams, the two men struggled over the gun and the gun went off. (App. p. 535, line 21 – p. 536, lines 1-25). As they continued to wrestle over the gun, both men fell through the front window and the struggle continued inside the house. (App. p. 537, lines 1-25). Williams described another struggle over the gun and said "that's when the gun went off, pow, pow, pow." (App. p. 539, lines 4 – 16). The man he was struggling with went to the floor and did not move. (App. p. 539, lines 15 – 20). Williams then saw Kerns on the floor and "blood everywhere." (App. p. 540, lines 6 – 13). Williams rushed over to Kerns and checked for a pulse but found none. (App. p. 540, lines 6-10). Williams began crying, panicked and left the scene. (App. p. 540, lines 6 – 25).

The man who Williams struggled with, Anthony Wilson, testified at trial. Wilson testified that on the night of the shooting he was asleep in bed with Kerns and her daughter when he was awakened by dogs barking and banging. (App. p. 288, line 12 – p. 289, 290, lines 1-15). According to Wilson, when he awakened Kerns she immediately hopped up, grabbed her weapon and ran toward the front. (App. p. 290, lines 11 – 19). Wilson testified that he took the daughter to the son's room. (App. p. 291, lines 1 – 3). Wilson testified he heard Kerns talking and heard her "say

something about get away from my property, get away from my house." (App. p. 291, lines 18 – 25). Wilson then testified that he saw the "silhouette of a human being come down the hallway" that he knew was not Kerns. (App. p. 292, lines 11 – 22). According to Wilson he heard gunshots and believed the first shot hit him and knocked him unconscious. (App. p. 295, lines 2 – 11). The EMT who testified at trial said that Wilson "had a superficial laceration noted to the right side of his head." (App. p. 174, lines 15 – 20). Wilson testified that he never left the house but regained consciousness and checked on Kerns when the police arrived. (App. p. 296, lines 6 – p. 297, lines 1-15). In a stipulation by the parties however, Wilson's bloody handprint was found on the trunk of a car parked outside behind Kern's house. (State's Exhibit #59). The trial judge instructed the jury on the law of self-defense and accident. (App. pp. 644, line 1 - 648, lines 1-8).

In the amended PCR application Williams alleged that, "Trial counsel failed to request a charge as to transferred intent as it relates to self defense." (App. p. 796). The amended application goes on to state, "The defense in this case was self-defense. Trial counsel should have requested a charge that if Mr. Williams was justified in shooting at Mr. Wilson, and the bullet accidently killed the deceased, then Mr. Williams would be not guilty as the intent of Mr. Williams would have been to defend himself. The accidental shooting of a third party under these circumstances would not be murder or manslaughter." (App. p. 797).

In the order of dismissal the PCR judge wrote:

> This Court finds Applicant has failed to establish his attorneys' performance was deficient according to the prevailing professional norms because he has not shown that they should have requested a jury instruction on transferred self-defense. When asked to recognize the theory in Porter, the Supreme Court declined to decide whether the theory is viable in the courts of South Carolina. Id. Our appellate courts have not recognized the theory since. Jones and Warder were acting reasonably under the prevailing professional norms when they did not request a jury instruction, the viability of which the Supreme Court declined to address almost four decades before Applicant's trial. Furthermore, the Supreme Court has explained that it "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of trial." Thornes at 309-10, 426 S.E.2d at 765-66 (citing Robinson, 308 S.C. 74, 417

> S.E.2d 88 (1992)(holding that counsel was not constitutionally ineffective in failing to make use of a defense that would not receive acceptance for years afterwards). It is not a requirement of constitutional effectiveness that a defense attorney be the trailblazer in the courts' acceptance of a new legal theory, and Jones and Warder were not ineffective for not raising the issue with the trial court.

(App. p. 920). The PCR judge also found that Williams suffered no prejudice because the evidence did not support Williams' version of events. (App. p. 920). The PCR judge erred. Trial counsel was ineffective in failing to request a jury instruction on transferred intent as it applies to self-defense. Williams was prejudiced by the deficient performance.

In State v. Porter, 269 S.C. 618, 622, 239 S.E.2d 641, 643 (1977), the case referenced in the order of dismissal, the South Carolina Supreme Court wrote:

> Appellant next asserts error on the part of the trial judge in refusing to charge the law on "transferred self-defense." This legal theory is recognized in some jurisdictions to absolve a defendant who injures an innocent third party while attempting to defend himself from bodily harm. See 55 A.L.R.2d 623. In appropriate cases the failure to charge such a theory has been held to be reversible error. State v. Clifton, 290 N.E.2d 921 (Ohio 1972); State v. Fielder, 50 S.W.2d 1031 (Mo.1932); Johnson v. State, 288 S.W. 223 (Texas 1926). We need not now pass on the viability of this theory in South Carolina since we believe appellant received a more favorable charge than he was entitled to under the law of self-defense in this State.

In Porter there was a dispute about some missing pigs. The Court wrote, "In our opinion, the law in this State with respect to mutual combat obviated a plea of self-defense." Porter, 269 S.C. at 622–23, 239 S.E.2d at 643. The Court in Porter noted that the Appellant returned to the injured party's property with a gun at least twice despite threats and gunshots. The present case is factually distinct from the Porter case as there was no evidence of mutual combat in the present case.[1]

[1] The PCR judge found that there was no evidence of mutual combat, trial counsel was ineffective in failing to object to the mutual combat instruction and found that, as a result of the

Additionally, the legal theory of "transferred self-defense" is easily distinguished from the "complex psychological phenomenon of battered women's syndrome" discussed in the Robinson case cited in the order of dismissal. The Court in Robinson noted that battered women's syndrome had not been recognized by the Court and had only recently been identified by the scientific community. Unlike a new scientific theory to be recognized by the Court and often requiring expert testimony, the theory of transferred intent is a legal theory that has long been recognized by the Court. To apply transferred intent to self-defense does not require counsel to anticipate a change in the law. Instead, counsel was simply required to apply the existing law of transferred intent to the facts of this case involving self-defense. Counsel should have been aware of the theory of transferred intent with regard to self-defense based on the Porter case which included cases from other jurisdictions. Counsel was ineffective in failing to request an instruction on transferred intent with regard to self-defense.

Williams was prejudiced by the deficient performance. Transferred intent cases generally deal with an intent to kill one person but resulting in the unintended killing of another. It has been said that "malice follows the bullet." State v. Fennell, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000). In the present case the intent was to kill Wilson, in self-defense, resulting in the unintended killing of Kerns. If Williams was justified in shooting Wilson or causing Wilson to shoot while Williams was acting in self-defense, then there was no malice to follow the bullet and the unfortunate and unintended death of Kerns is not murder. See *Unintentional Killing of or Injury to Third Person During Attempted Self-defense* 55 A.L.R.2d 623. The jury should have been instructed on transferred intent as it applies to self-defense.

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mutual combat instruction, the jury was unable to fairly consider the self-defense claim warranting relief. (App. pp. 912-913).

The judge instructed the jury with the standard self-defense instruction with no mention of transferred intent. (App. pp. 644-647). When instructing on the law of accident the judge told the jury, "The Defendant has, also, raised the defense of accident. An act may be excluded on the ground of accident if it was shown that the act was unintentional, that the Defendant was acting lawfully and that reasonable care was used by the Defendant in the handling of the weapon. For example, if a person is lawfully armed in self-defense and the gun accidentally discharges, the defense of accident would apply." (App. p. 647, line 21 – p. 648, lines 1-3). The jury, however, was not instructed that if Williams was acting in self-defense against Wilson and the firearm discharged killing Kerns, the jury must find Williams not guilty of murder. In Brown v. State, 84 Fla. 660, 661, 94 So. 874, 874 (1922), the Florida Supreme Court wrote, "If the killing of the party intended to be killed would, under all the circumstances, have been excusable or justifiable homicide upon the theory of self-defense, then the unintended killing of a bystander, by a random shot fired in the proper and prudent exercise of such self-defense, is also excusable of justifiable." In People v. Jackson, 390 Mich. 621, 624, 212 N.W.2d 918, 919 (1973), the Michigan Supreme Court wrote:

> The unintended killing of an innocent bystander is not murder if justifiably committed in proper self-defense. It may, however, be manslaughter. 'If A in proper self-defense aims at his adversary B but misses B and unintentionally strikes innocent bystander C, he is not liable for C's injury or death unless his conduct, under all of the circumstances (including the need to defend himself) was reckless with regard to C. In such a case he would be liable for battery if he merely injuries, involuntary manslaughter if he kills, C.' LaFave and Scott, Criminal Law, p. 396.

The failure to instruct the jury on the law of transferred intent as it applies to self-defense becomes more prejudicial when viewed with the confusing voluntary manslaughter charge discussed in issue five below. While instructing the jury on the law of voluntary manslaughter the judge said, "The provocation needed for voluntary manslaughter must come from some act of or related to the victim." (App. p. 657, lines 17-18). Based on the lack of an instruction on

transferred intent as it applies to self-defense and the instruction on voluntary manslaughter that the provocation must come from the victim, the jury reasonably could have concluded that in order to find that Williams was justified in acting in self-defense the jury must find that he believed he was in danger of death or serious bodily injury at the hands of the victim Kerns rather than Wilson. Williams was prejudiced by trial counsel's failure to request an instruction on transferred intent as it applies to self-defense.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to request an instruction on transferred intent as it applies to self-defense. There is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. This Court should grant relief on this issue in

addition to the mutual combat issue upon which the PCR judge granted relief.

2. The PCR judge erred in refusing to find trial counsel ineffective for failing to preserve for appellate review the trial judge's failure to instruct the jury with the law of involuntary manslaughter.

In the amended PCR application Williams alleged that, "Trial counsel was ineffective in failing to preserve for appellate review the failure to charge involuntary manslaughter." (App. p. 796). The amended application goes on to state, "In affirming the conviction of the Applicant, the South Carolina Court of Appeals found that the issued [sic]to be 'unpreserved when [trial counsel] acquiesced in the circuit court's decision not to give the charge and never subsequently objected to the court's refusal to give the charge.'" (App. p. 796).

At trial Williams requested an involuntary manslaughter charge "based on Willie Williams' testimony." (App. p. 581, lines 19 – 22). The trial judge took the matter under advisement overnight. (App. p. 582, lines. 2 – 4). The next day the judge ruled, "I'm not instructing, however, involuntary manslaughter as the record is void of any evidence supporting that instruction." (App. p. 600, line 24 – p. 601, line 1). After the charge, which did not include an instruction on involuntary manslaughter, the judge asked, "Okay. Anything further from the Defense that was not already stated?" (App. p. 651, lines 16-17). Defense counsel answered, "No, Your Honor." (App. p. 652, line 18).

On direct appeal Williams raised the issue of, "Did the trial court err by failing to charge involuntary manslaughter because appellant testified that the gun went off during a struggle with one of the alleged victims?" (App. p. 693). The Court of Appeals affirmed writing, "As to the circuit court's refusal to charge the jury with involuntary manslaughter: State v. Rios, 388 S.C. 335, 340–41, 696 S.E.2d 608, 611–12 (Ct.App.2010) (finding defendant's request for an

involuntary manslaughter charge unpreserved when he acquiesced in the circuit court's decision not to give the charge and never subsequently objected to the court's refusal to give the charge)." State v. Williams, No. 2013-001152, 2016 WL 2944076, at *1 (S.C. Ct. App. May 18, 2016) (App. p. 768).

In the order of dismissal the PCR judge wrote, "Like the defendant in Scott, Applicant was not entitled to an instruction on involuntary manslaughter because his defensive move caused the weapon's bearer to use it to cause harm; in this case, according to Applicant's testimony, his move caused Wilson to fire the fatal shot at the victim." (App. p. 907). The PCR judge went on to write, "This Court finds, even if the jury instruction on involuntary manslaughter were somehow warranted at trial, Applicant has not shown his conviction would have been reversed on appeal because any purported error was harmless." (App. p. 908). The PCR judge erred.

Williams' testimony about the struggle over the weapon required the trial judge to charge involuntary manslaughter. A defendant's testimony that he struggled over the weapon supports a charge of involuntary manslaughter. State v. Battle, 408 S.C. 109, 116, 757 S.E.2d 737, 740 (Ct. App. 2014); Tisdale v. State, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008); Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991).

The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Reversible error is committed if the trial court fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). When determining whether the evidence requires a charge on a lesser included offense, the court views the facts in the light most favorable to the defendant. See Knoten, 347 S.C. at 302, 555 S.E.2d at 394 (requiring the trial court to view facts

in the light most favorable to a defendant when determining whether to charge involuntary manslaughter).

"Importantly, our courts have long emphasized that to warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 486 (Ct. App. 2010); see also State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000); State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999). A request to charge a lesser-included offense is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense. Casey, 305 S.C. at 447, 409 S.E.2d at 392.

Involuntary manslaughter is the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Crosby, 355 S.C. 47, 51-2, 584 S.E.2d 110, 112 (2003); Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999).

In State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) the defendant gave inconsistent versions of the victim's death, but repeatedly maintained that the gun unintentionally discharged after a struggle. Despite expert testimony contradicting the defendant's story, the Supreme Court ruled that defendant's testimony, by itself, was sufficient to require an involuntary manslaughter charge. Id. at 648-49, 664 S.E.2d at 469. The Court stated, "[T]he fact petitioner and [the victim] were struggling over the weapon is sufficient evidence to support an involuntary manslaughter charge to the jury. Id.

Burriss is similar to the facts of this case. As an attacker advanced on the defendant, the defendant reached for his gun and "it went off," killing another man who had earlier participated in

the attack. Burriss at 258-59, 513 S.E.2d at 105-06. Also similar is Battle, in which the defendant and the decedent struggled over a gun and it fired. Williams testified that "the gun went off" during his struggle with Wilson. (App. p. 536, lines 13 – 25; p. 539, lines 5 – 14). Viewing the evidence in the light most favorable to Williams, the judge erred in refusing to charge involuntary manslaughter.

The present case can be distinguished from State v. Scott, 414 S.C. 482, 779 S.E.2d 529 (2015), and State v. Sams, 410 S.C. 303, 764 S.E.2d 511(2014), cited by the PCR judge in the order of dismissal. Unlike in Scott and Sams, in the present case there is evidence to support both a self-defense charge and an involuntary manslaughter charge. Trial counsel was ineffective in failing to preserve the issue for appellate review.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694,

104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to preserve the involuntary manslaughter issue for appellate review. There is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. This Court should grant relief on this issue in addition to the mutual combat issue upon which the PCR judge granted relief.

3. The PCR judge erred in refusing to find trial counsel ineffective for failing to object when the judge instructed the jury that a specific intent to kill is not an element of attempted murder.

In the amended PCR application Williams alleged that, "Trial counsel was ineffective when he failed to object to the charge specific intent is not required in an attempted murder case." (App. p. 796). The amended application goes on to state, "The trial judge charged the jury 'I instruct you that a specific intent to kill is not an element of attempted murder.' Tr. at 642, ll16-17. The South Carolina Supreme Court recognized in S*tate v. King*, 422 S.C. 47, 810 S.E.2d 18 92017), reh'g denied (Mar. 9, 2018) that a specific intent is required in an attempted murder case and noted such a position was consistent with prior decisions in our state." (App. p. 797).

At trial the judge instructed the jury, "I instruct you 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. Intent means intending the result which, actually, occurs, not accidentally or involuntarily." (App. p. 642, lines 16-20). In the order of dismissal the PCR judge wrote, "This Court finds that, due to the ambiguity of the language in the attempted murder statute, Applicant's defense attorneys were not acting outside the reasonable bounds of prevailing professional norms by not objecting to the jury instruction." (App. p. 914). The PCR judge additionally wrote, "This Court finds Applicant has failed to show there is a reasonable likelihood the jury's verdict as to Applicant's attempted

murder of Wilson would have been different had Jones or Warder objected to the trial court's instruction regarding specific intent." (App. p. 915). The PCR judge erred.

In 2015, after Williams' trial, the South Carolina Court of Appeals decided 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), and overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). In King the Court of Appeals wrote, "We find 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." State v. King, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017), and overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). The South Carolina Supreme Court affirmed, as modified, the finding by the Court of Appeals writing, "Considering the legislative history as a whole, we conclude that section 16-3-29 is not a codification of the offense of ABWIK. We find the General Assembly expressly repealed the offense of ABWIK and purposefully created the new offense of attempted murder, which includes a "specific intent to kill" as an element." State v. King, 422 S.C. 47, 63–64, 810 S.E.2d 18, 26–27 (2017) (n. 5 omitted).

Williams' trial took place in May of 2013, prior to the decision by the South Carolina Supreme Court in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). The offense of attempted murder was codified, however, in the Omnibus Crime Reduction and Sentencing Reform Act of 2010. "Through the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses. In place of these offenses, the Act codifies attempted murder in section 16–3–29 and four degrees of assault and battery

in section 16–3–600. *See* S.C.Code Ann. §§ 16–3–29 & 16–3–600 (Supp.2012)." State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014).

S.C. Code Ann. § 16-3-29 provides that, "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder. A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years. A sentence imposed pursuant to this section may not be suspended nor may probation be granted." The South Carolina Supreme Court in King acknowledged the ambiguity within the statute and wrote:

> Additionally, it is necessary to address both parts of section 16-3-29 as it demonstrates that the General Assembly created the offense of attempted murder by purposefully adding the language "with intent to kill" to "malice aforethought, either express or implied" to require a higher level of *mens rea* for attempted murder than that of murder. Moreover, the addition of the "with intent to kill" language effectively negates the State's claim that the General Assembly merely codified ABWIK. Because our case law, particularly *Foust*, establishes "malice aforethought" as the required mental state for ABWIK, the additional language of "with intent to kill" clearly elevates the required mental state above a general-intent crime.

King, 422 S.C. at 61, 810 S.E.2d at 25.

Regardless of any ambiguity in the statute prior to the King decision, in 2000, prior to Williams' trial, in State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000), the South Carolina Supreme Court wrote:

> In general, "[a]ttempt is a specific intent crime." 21 Am.Jur.2d Criminal Law § 176 (1998). "The act constituting the attempt must be done with the intent to commit that particular crime." *Id. See also* Wharton's Criminal Law Attempt §§ 694-695 (1996)("To constitute an attempt, there must be an intent to commit a particular crime ... Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill.")[5] In the context of an "attempt" crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose. United States v. Calloway, 116 F.3d 1129 (6th Cir.1997). Attempted murder would require the specific intent to kill and conduct towards that end. ABIK requires an unlawful act of violence to the person of another with malice. Clearly, each offense has an element the other does not. However,

> simply because convictions for both offenses would not violate double jeopardy, we are not constrained to recognize the offense of attempted murder.

Based on the Sutton case and well established laws of statutory construction, as well as case law from other jurisdictions (*See What Constitutes attempted Murder*,54 A.L.R.3d 612, 622 (1973)), all decided prior to Williams' trial, trial counsel was ineffective in failing to object to the judge's instruction that specific intent is not an element of attempted murder. Under the facts of this case where the judge instructed the jury on self-defense and voluntary manslaughter, the error was prejudicial and requires reversal.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective was ineffective in failing to object to the judge's instruction that specific intent is not an element of attempted murder. There is a reasonable probability that,

but for counsel's error, the result of the proceeding would have been different. This Court should grant relief on this issue in addition to the mutual combat issue upon which the PCR judge granted relief.

4. The PCR judge erred in refusing to find trial counsel ineffective for failing to object when in closing argument the prosecutor told the jury, "On behalf of the people of Greenville County, please find him guilty."

In the amended application for post-conviction relief Williams alleged that, "Trial counsel failed to object to an improper closing argument given by the State." (App. p. 796). The amended application goes on to state, "During her closing argument, the assistant solicitor argued 'On behalf of the people of Greenville County, please find him guilty.' This charge encouraged the jury to convict on an improper basis and lessened the burden on the State." (App. p. 797). During the prosecutor's closing argument she told the jury, "On behalf of the people of Greenville County, please find him guilty." (App. p. 630, lines 13-14). Counsel did not object.

In the order of dismissal the PCR judge wrote, "This Court finds Applicant has failed to demonstrate his attorneys were constitutionally ineffective for failing to object to the State's reference to the people of Greenville during closing argument because he has failed to show any deficiency in his attorney's performance and resulting prejudice." (App. p. 918). The State did not simply reference the people of Greenville. Instead, the prosecutor argued that the jury should find Williams guilty on behalf of the people of Greenville County. The argument was improper. The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the improper closing argument.

In State v. Liberte, 336 S.C. 648, 654, 521 S.E.2d 744, 747 (Ct. App. 1999), the South Carolina Court of Appeals wrote:

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.
>
> United States v. Monaghan, 741 F.2d 1434, 1441 (D.C.Cir.1984), cert. denied, 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985); see also United States v. Hawkins, 595 F.2d 751, 754 (D.C.Cir.1978) (Prosecutors are not "at liberty to substitute emotion for evidence by equating, directly or by innuendo, a verdict of guilty to a blow against the drug problem."), cert. denied, 441 U.S. 910, 99 S.Ct. 2005, 60 L.Ed.2d 380 (1979); United States v. Barker, 553 F.2d 1013, 1025 (6th Cir.1977) ("[I]t is beyond the bounds of propriety for a prosecutor to suggest that unless this defendant is convicted it will be impossible to maintain 'law and order' in the jurors' community."); *cf.* State v. Smart, 278 S.C. 515, 526, 299 S.E.2d 686, 692-93 (1982) (finding solicitor's closing argument urging that "law officers who risked their lives in [the defendant's] recapture would be aggrieved by a sentence less than death" and implying that "other citizens of Lexington County including himself would strongly disapprove of a life sentence," to be improper, noting that "*[j]urors are simply not to consider the opinions of neighbors, officials or even other juries* ") (emphasis added), *cert. denied,* 460 U.S. 1088, 103 S.Ct. 1784, 76 L.Ed.2d 353 (1983), *overruled in part on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); United States v. Radka, 904 F.2d 357, 361 (6th Cir.1990) ("Despite the devastation wrought by drug trafficking in communities nationwide, we cannot suspend the precious rights guaranteed by the Constitution in an effort to fight the 'War on Drugs.' ").

Consistent with South Carolina case law, 23A C.J.S. Criminal Procedure and Rights of Accused § 1770 provides:

> The prosecutor may argue for the necessity of law enforcement or fearless or strenuous administration of the law, and impress upon the jury its responsibility in that regard, and denounce crime in strong terms. However, any statement which suggests to the jury that its mission is to solve the crime problem or do anything other than to determine the innocence or guilt of the accused is disapproved. A call for justice by the prosecutor during closing argument may be acceptable when it is directed to the jurors' duty to do justice in a general sense, but an appeal to the jurors to do justice on behalf of the victim or the local community is generally viewed as unprofessional and improper. Accordingly, the prosecutor may not urge the jury to convict the accused in order to protect community values, preserve civil order, or deter future lawbreaking. It is generally improper for the prosecutor to urge the jury to protect society with its verdict, and a prosecutor's summation should not employ language designed to stoke a jury's fear for the future of its community or make an inflammatory argument akin to a "call to arms." (footnotes omitted).

The prosecutor's argument to the jury that they should find Williams guilty on behalf of the people of Greenville County is, as stated above, unprofessional and improper. The argument urges jurors to reach a verdict based on something other than the guilt or innocence of Williams and dilutes the State's burden of proof beyond a reasonable doubt. Trial counsel was ineffective in failing to object to the improper closing argument.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective trial counsel was ineffective in failing to object to the improper closing argument. There is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. This Court should grant relief on this issue in addition to the mutual combat issue upon which the PCR judge granted relief.

5. **The PCR judge erred in refusing to find trial counsel ineffective for not objecting to the judge's instruction to the jury that the provocation needed for voluntary manslaughter must come from some act of or related to the victim, precluding a defense theory of transferred intent as to voluntary manslaughter.**

In the amended PCR application Williams alleged that, "Trial counsel was ineffective in failing to object to the jury charge concerning the provocation for voluntary manslaughter must come from the victim." (App. p. 796). The application goes on to state, "In the charge as to manslaughter, the trial judge charged 'The provocation needed for voluntary manslaughter must come from some act of or related to the victim.' Tr. at 639, ll24-25. This charge was not proper as the provocation may legally come from Anthony Bernard Wilson who was shot at by the Applicant when he accidentally hit his former wife." (App. pp. 796-797).

The judge instructed the jury, "The provocation needed for voluntary manslaughter must come from some act of or related to the victim." (App. p. 639, lines 24-25). Trial counsel did not object to the charge. In the order of dismissal the PCR judge wrote:

> This Court finds neither Jones nor Warder exhibited deficient performance by failing to object to the trial court's jury instruction that provocation must come from the victim or in requesting that the court instruct the jury on the doctrine of transferred intent in the context of voluntary manslaughter. Our appellate courts have not answered the question of whether the doctrine is recognized in South Carolina, and there is therefore no legal authority in this State regarding the doctrine. In recognizing the uncertainty surrounding a legal issue that was unsettled at the time of Applicant's trial and is unsettled now, this Court finds the attorneys were not ineffective.

(App. p. 910). The PCR judge erred.

In his closing statement to the PCR judge PCR counsel argued:

> I would point out the idea of Wharton saying that transferred intent is unsettled. When this Court advises the bench and bar years before this trial that a certain issue is unsettled, I think competent counsel has an obligation to bring forth issues to settle that case, if they're going to adequately represent their client. It is not a case of being clairvoyant because our court has ling before this trial, this is unsettled. We need to settle it. It's like inviting the defense counsel to bring up the issue of transferred intent.

(App. p. 893, lines 2-13).

In State v. Wharton, 381 S.C. 209, 215, 672 S.E.2d 786, 788–89 (2009), the South Carolina Supreme Court wrote:

> The State argues that the court of appeals erred in holding that the doctrine of transferred intent was inapplicable to voluntary manslaughter. We decline to address this issue.
>
> In State v. Childers, 373 S.C. 367, 645 S.E.2d 233 (2007), the plurality of this Court held that the doctrine of transferred intent was not applicable to voluntary manslaughter cases because the overt act that produces the sudden heat of passion must come from the victim. However, the dissent would have held that if a defendant kills an unintentional victim upon sufficient legal provocation committed by a third party, the doctrine of transferred intent applies, entitling the defendant to a voluntary manslaughter charge.
>
> In this case, the court of appeals held that the trial court erred in charging the jury on voluntary manslaughter because there was no evidence of sufficient legal provocation and because transferred intent does not apply to voluntary manslaughter. We find, however, that Childers was not a majority opinion, and the applicability of the doctrine of transferred intent to voluntary manslaughter cases where the defendant kills an unintended victim upon sufficient legal provocation committed by a third party remains an unsettled question in South Carolina. However, because we find no evidence of sufficient legal provocation by a third party in this case, we need not address this issue. We therefore vacate the portion of the court of appeals' opinion addressing this issue.

The Wharton case placed trial counsel on notice that the concept of whether transferred intent applied to a voluntary manslaughter charge was unsettled and an issue that needed to be litigated, especially under the facts of the present case where the provocation came from Wilson but Kerns was fatally shot. Trial counsel was ineffective in failing to object to the charge as given and failing to request an instruction on transferred intent as it applies to voluntary manslaughter. Williams was prejudiced by the deficient performance. The charge, as given, prevented the jury from considering voluntary manslaughter. The record reflects that the jury asked for additional instruction as to the difference between murder and voluntary manslaughter. (App. p. 655, lines 4-6). The judge again instructed the jury that, "The provocation needed for

voluntary manslaughter must come from some act of or related to the victim." (App. p. 657, lines 17-18).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to object to the instruction that the provocation for voluntary manslaughter must come from the victim. There is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. This Court should grant relief on this issue in addition to the mutual combat issue upon which the PCR judge granted relief.

CONCLUSION

Based on the arguments made above, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

s/ Kathrine H. Hudgins
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR
RESPONDENT/PETITIONER

This 22nd day of January, 2021.