STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Certiorari to Spartanburg County

Michael G. Nettles, Circuit Court Judge

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CHRISTOPHER MIDDLETON,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2018-001188

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# BRIEF OF RESPONDENT

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## RESPONDENT'S ISSUE PRESENTED

Whether there was evidence to support the PCR court's finding of prejudice where counsel did not object to the erroneous jury charge that a specific intent to kill was not an element of attempted murder, where intent was the key fact in dispute during trial, where the evidence was not overwhelming, and where the PCR court engaged in a case-specific prejudice analysis where it addressed the "second prong of *Strickland*,"[1] and where it determined the jury instruction error negated the requirement of proof of an essential element of the offense and concluded the "error substantially undermine[d] confidence in the outcome of the trial."

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

## STATEMENT

On March 12, 2015, Respondent was indicted by a Spartanburg County Grand Jury for attempted murder and possession of a weapon during the commission of a violent crime. App. 437 – 438. Respondent was tried before the Honorable J. Mark Hayes, III, and a jury from October 12 – 14, 2015. App. 5. Joshua Schultz represented Respondent and Meghan Gilmer represented the State. App 5. Respondent was convicted and sentenced to imprisonment for concurrent terms of thirty years for attempted murder and five years for possession of a weapon during the commission of a violent crime. App. 491 – 492.

On August 9, 2017, Respondent filed an application for post-conviction relief (PCR), alleging ineffective assistance of counsel. App. 458 – 485. The State made its return on January 10, 2018. App. 493 – 500. The matter proceeded to an evidentiary hearing on February 22, 2018, before the Honorable Michael G. Nettles. App. 501. Respondent was represented by Susannah Ross and the State was represented by Valerie Giovanoli. App. 501. The PCR court issued a written order filed June 8, 2018 in which it granted Respondent relief. App. 527 – 531.

On November 24, 2020, this Court granted certiorari. This brief of respondent follows.

## STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018) (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)). "We review questions of law de novo, with no deference to trial courts." *Id*. (citing *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527; *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

## ARGUMENT

There was evidence to support the PCR court's finding of prejudice where counsel did not object to the erroneous jury charge that a specific intent to kill was not an element of attempted murder, where intent was the key fact in dispute during trial, and where the evidence was not overwhelming. The PCR court engaged in a case-specific prejudice analysis where it addressed the "second prong of *Strickland*,"[2] and where it determined the jury instruction error negated the requirement of proof of an essential element of the offense and concluded the "error substantially undermine[d] confidence in the outcome of the trial."

Counsel failed to object to the court's erroneous instruction that a specific intent to kill was not an element of attempted murder even though counsel said he knew this Court had held specific intent was an element of attempted murder. App. 418, ll. 11-13; App. 520, l. 14 – 521, l. 7. The State concedes this was deficient performance. *See* brief of petitioner at 10. Respondent was prejudiced because whether he intended to kill the complainant was the main factual dispute at trial.

**Relevant facts**

Respondent's trial took place six months after this Court issued its opinion in *State v. King*, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015), which held it was error to charge the jury that attempted murder was a general intent crime since specific intent was an element of attempted murder.

The State alleged that Respondent had been drinking "a lot" when he confronted his wife, the complainant, in their home after finding out she wanted a divorce and he stabbed her. App. 104, ll. 15-22; App. 185, l. 3 – 186, l. 8. According to the complainant, Respondent threatened to

[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

kill her, threatened to kill himself, and repeatedly asked if she loved him. App. 186, l. 15 – 187, l. 12. The State alleged that after Respondent stabbed the complainant, he stayed with her during the night, with the whole event taking about twelve or thirteen hours. App. 214, l. 20 – 215, l. 12. The complainant claimed Respondent told her that if she was "not dead by in the morning," he would kill her. App. 215, ll. 18-21. Respondent eventually fell asleep, and later that morning he opened the door when the complainant's "godsister" came to check on her. App. 189, ll. 9-19. Respondent then ran off "in the woods." App. 97, ll. 19-22; App. 117, ll. 1-11.

The solicitor argued in closing that Respondent intended to kill the complainant. "If that is not an intent to kill, after repeatedly stabbing her and leaving her in the bed for 12 hours to bleed out, I don't know what is." App. 385, ll. 3-5. "[T]hat's specific intent to kill." App. 401, l. 2. The solicitor asserted, "I think the evidence is very clear in this case that he had every intent to kill [the complainant] on that night." App. 399, ll. 3-5. "[H]e had every intent to kill . . ." App. 400, ll. 22-23.

Identity was not in dispute. In his closing argument, trial counsel did not deny that Respondent stabbed the complainant, but he disputed that Respondent intended to kill her. "The key thing I want to tell you here today is, if [Respondent] wanted to kill, he had ample opportunity to do it." App. 403, ll. 4-6. But, "He didn't do it. He did not attempt to kill." App. 403, l. 21. "If he wanted to kill her he could of done it. He had the opportunity. He had at least 11 to 12 hours to do it with this knife and he could of done it." App. 403, ll. 14-16.

In its instructions to the jury, the trial court instructed, "If you have any ideas as to what the law is or what the law ought to be, and it does not agree with what I now tell you the law is, you must abandon this idea because you are sworn to accept the law and apply the law exactly as

I state it to you." App. 409, ll. 8-12. The judge had previously told the jury, "The law, as given by the [c]ourt, is the only law that you may consider." App. 42, ll. 14-15.

The trial court did not instruct the jury that specific intent was an element of attempted murder. Instead, the trial court instructed the jury that, "In order to prove this crime, the state must prove that the defendant attempted to kill another person with malice aforethought, either express or implied." App. 413, ll. 4-7. The trial court charged, "A specific intent is—to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury." App. 418, ll. 11-13. "Intent may be shown by acts and conduct of the defendant and other circumstances from which you may reasonably infer intent . . . Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully commits an act the natural tendency of which is to destroy another's life." App. 414, ll. 15-25.

The trial court also instructed the jury on the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN). App. 415, ll. 1-13.

Counsel did not make any objections to the jury charges. App. 422, ll. 18-25. The jury deliberated for over an hour but convicted Respondent of attempted murder and possession of a weapon during the commission of a violent crime. Respondent was sentenced to thirty years for attempted murder and a concurrent term of five years for the weapons charge. App. 420, l. 1 – 421, l. 6; App. 430, l. 21 – 431, l. 4; App. 491 – 492.

In his PCR application, Respondent alleged ineffective assistance of counsel for, *inter alia*, "Failing to object to Trial Judge Honorable J. Mark Hayes, III erroneous jury charge, 'that intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury.'" App. 465.

PCR counsel Ross argued that trial counsel was ineffective for failing to object when the court instructed the jury that the State did not need to prove Respondent had a specific intent to kill to secure a conviction for attempted murder. App. 505, ll. 7-12. PCR counsel correctly observed that in *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), which was published "about four or five months before [Respondent's] trial—that exact jury instruction was found to be objectionable and [it was] error to give that instruction." App. 505, ll. 12-16.

PCR counsel also cited the Supreme Court's subsequent opinion in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), and said that a harmless error analysis "simply can't apply to this. We don't know what the jury would have done." App. 505, l. 18 – 506, l. 2; App. 508, ll. 10-12.

The Assistant Attorney General agreed the jury instruction was erroneous, yet argued trial counsel provided effective representation because at the time of the trial, the *King* case was "pending on Certiorari before the Supreme Court." App. 506, l. 8 – 507, l. 23. In the State's view, "[W]e all know that a lot of times the Supreme Court takes Certiorari from the Court of Appeals to change their decisions, so the state of the law wasn't—although the Court of Appeals opinion was authoritati[ve], the state of the law wasn't final." App. 507, ll. 1-5.

Respondent's trial counsel then testified that he was aware of the *King* decision at the time of trial, but he did not object to the erroneous charge. App. 520, ll. 14-16. This was not a strategic decision. Trial counsel maintained he was not aware that a published opinion of this Court is good law unless it has been overruled. When asked why he did not object, trial counsel said, "[T]he decision was on Cert, and so I wasn't sure or not that I should introduce that when arguing for a—arguing for the instructions on my side." App. 520, ll. 19-21.

Q. Why didn't you object to the jury instruction?

A. Because it was on Cert. I wasn't sure if that was proper or not.

App. 521, ll. 5-7.

However, the PCR judge observed that trial courts must "abide by the Court of Appeals rulings" unless they have been reversed. App. 522, l. 24 – 523, l. 2. The PCR court also noted that there was a "big debate" at trial "between the defense counsel and the solicitor as to whether or not he intended to kill her." App. 516, ll. 22-24. The PCR court explained that this "makes it very important that they [the jurors] understand what the law is . . ." App. 517, ll. 1-2. The court stated, "[T]he more you argue about it from a defense standpoint and say, well, he didn't really mean to kill her and you argue and argue and argue about it and then the Judge tells them, well, you don't really have to do that [prove intent to kill]. I think that might've made a difference perhaps." App. 517, ll. 9-13. The court then asked PCR counsel to address prejudice. "Well, you know, she's [the Assistant Attorney General] saying that it would not have made a difference in the outcome of the case. **What do you have to say about that and the second prong of *Strickland*?**" App. 518, ll. 7-10 (emphasis added).

PCR counsel observed that specific intent was disputed in trial, responding that during the twelve-hour time period in which Respondent was "sleeping next to a woman after stabbing her, if he—if there was an intent to kill, she would be killed . . ." App. 518, ll. 14-17.

At the conclusion of the hearing, the PCR court ruled that Respondent was entitled to post-conviction relief. App. 525, ll. 8-11. In its order granting PCR, the court stated, "The transcript of [Respondent's] trial clearly shows the trial judge gave an erroneous jury charge on attempted murder." App. 530. "Although he claimed to have been fully aware of the *King* opinion that found a specific intent to kill was an element of attempted murder, trial counsel failed to submit a compliant proposed instruction. He further failed to object or take exception after the improper jury charge was given." App. 530. "I find this was error and amounted to

ineffective assistance of counsel. I further find no strategic basis for allowing the improper jury charge which was clearly prejudicial to his client." App. 530.

The court reasoned that, "The jury charge in this case negated the requirement of any proof of an essential element of the charge against [Respondent]. This error substantially undermines confidence in the outcome of the trial." App. 530. "If the error had been properly preserved for appeal, the appellate court would likely have reversed as evidenced by the *King* opinions." App. 530. "Furthermore, to underscore the prejudicial nature of the improper charge, the Supreme Court held that the error cannot be harmless." App. 530.

**Discussion**

***Rule 243, SCACR***

As an initial matter, Petitioner impermissibly recast the issue in this case under Rule 243, SCACR. Petitioner sought certiorari on the question presented:

> Did the PCR court err in granting relief, when it ruled that an improper jury instruction for attempted murder could not be deemed harmless error?

*See* State's petition for certiorari at ii. However, once certiorari was granted, Petitioner changed the question presented to:

> Did the PCR court, by failing to engage in a case-specific prejudice analysis, erred [sic] as a matter of law in granting relief on the basis of trial counsel's failure to object to an erroneous jury instruction charging only general intent in an attempted-murder case, because no prejudice existed where the erroneous instruction did not contribute to the jury's verdict, due to overwhelming evidence of a specific intent to kill when Middleton repeatedly told the victim he would kill her and only failed to do so because the attack was interrupted when the victim's friend arrived at the house unexpectedly?

*See* State's brief of petitioner at 1. Rule 243(j), SCACR provides, in relevant part, "Upon the concurrence of any two justices, the petition may be granted on any question presented." Petitioner did not brief the question presented upon which this Court granted certiorari.

As the issue was cast in the State's petition for certiorari, it appeared that the PCR judge had committed an error of law by applying a legal principle relevant to direct appeal—whether there was harmless error, instead of the principle relevant to a PCR case—whether there was prejudice. It also incorrectly appeared from the question presented in the petition for certiorari that the PCR judge had ruled that an erroneous jury instruction on intent always entitled a PCR applicant to relief. In fact, the PCR judge here correctly recognized that the applicable legal inquiry was *Strickland* prejudice on the facts of the case. As seen, the record reflects that the PCR judge asked Respondent's PCR counsel, "What do you have to say about . . . the second prong of *Strickland?*" App. 518, ll. 7-10.

PCR Judge Nettles stated that he believed the erroneous instruction here could have affected the case outcome, where there was a "big debate" about specific intent between the parties but then the trial judge instructed the jury the State did not have to prove specific intent. App. 516, l. 22 – 517, l. 13.

As seen, the order of dismissal stated, "The jury charge in this case negated the requirement of any proof of an essential element of the charge against [Respondent]. This error substantially undermines confidence in the outcome of the trial." App. 530. "If the error had been properly preserved for appeal, the appellate court would likely have reversed as evidenced by the *King* opinions." App. 530. The PCR court did consider *Strickland* prejudice as applied to the facts of this case. Respondent respectfully requests that this Court dismiss certiorari as improvidently granted based on the State's failure to comply with Rule 243(j), SCACR. In the

alternative, Respondent requests this Court affirm the PCR court for the reasons discussed below.

***Deficiency***

Trial counsel knew the jury instruction at issue here was erroneous, yet he did not object. This was not a strategic decision. Counsel did not know that a published opinion of this Court constituted precedent. *See* App. 520, ll. 5-21. This Court issued its decision in *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), six months prior to Respondent's trial and held that "specific intent to commit murder [is] an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime." *See also State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) ("Attempted murder would require the specific intent to kill and conduct towards that end"). Counsel said he was aware of the holding in *King*.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. at 686. "In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687).

The Due Process Clauses of the Fifth and Fourteenth Amendments "protect an accused against conviction unless the State supplies proof beyond a reasonable doubt of each element necessary to constitute the crime with which the accused is charged." *Lowry v. State*, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008); U.S. CONST. amend. V; U.S. CONST. amend. XIV. Specific intent to kill is an element of attempted murder. 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 . . ." The South Carolina Supreme Court affirmed as modified this Court's decision in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), and agreed that specific intent to kill is an element of attempted murder. *Id*. at 55, 810 S.E.2d at 22.

"A trial court is required to charge the current and correct law in South Carolina." *State v. Cottrell*, 421 S.C. 622, 643, 809 S.E.2d 423, 435 (2017). The failure to object to an erroneous jury instruction is deficient performance. *Gibson v. State*, 416 S.C. 260, 265, 786 S.E.2d 121, 124 (2016). The State concedes that counsel's failure to object to the jury instruction error was deficient performance. *See* Brief of Petitioner at 10.

The PCR court correctly found deficiency under *Strickland* since counsel's conduct fell below reasonable professional norms. *Strickland*, 466 U.S. at 687. "The appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings." *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (citing *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984)). The PCR court's finding of deficiency was supported by the evidence.

***Prejudice***

Respondent was alleged to have stabbed his wife multiple times, threatened that he would kill her if she was alive in the morning, then fallen asleep. The complainant was still alive when Respondent awoke in the morning, and the State claimed Respondent fled rather than kill her. The jury was instructed on attempted murder and the lesser-included offense of ABHAN. Had the trial court properly instructed the jury on intent, the jury would have had to determine on these facts whether the prosecution proved the specific intent to kill necessary to sustain a

conviction for attempted murder, or whether it had merely proven ABHAN. The erroneous instruction did not explain that attempted murder and ABHAN differed in levels of intent.

*State v. King* was a direct appeal which involved the armed robbery and shooting of a taxicab driver. 422 S.C. at 51, 810 S.E.2d at 20. In this Court's opinion in *King*, 412 S.C. at 416, 772 S.E.2d at 196, this Court concluded that the jury instruction error was not harmless beyond a reasonable doubt because "[o]ne of the key issues at trial was whether King continued to shoot at Brown [the complainant] after they exited the cab." In its opinion in *King*, 422 S.C. at 63-64, 810 S.E.2d at 27, the Supreme Court stated, "[W]e agree with the Court of Appeals that the trial judge erred in charging the jury that a specific intent to kill is not an element of attempted murder. Further we agree that this error cannot be deemed harmless." This Court had concluded the jury instruction error was not harmless because, "one of the key issues at trial was whether King continued to shoot at Brown after they exited the cab." *King*, 412 S.C. at 416-17, 772 S.E.2d at 196. It is clear the Supreme Court was agreeing with this Court's discussion in *King* that on those facts, the error was not harmless.

In *State v. Shands*, 424 S.C. 106, 115, 817 S.E.2d 524, 529 (Ct. App. 2018), another direct appeal, this Court addressed comparable factual and legal issues to the case at hand. That case involved a "domestic incident" in which Shands was alleged to have argued with Sharon Shands and "prevented her from leaving by pulling her back into the house by her hair; he then stabbed her multiple times with a barbecue fork." *Id*. Sharon Shands "was able to escape to the neighbor's house, but Shands followed her and broke into the neighbor's house. The assault ended when police arrived." *Id*.

This Court held the trial court erred when it instructed the jury that malice could be inferred from the use of a deadly weapon because the attempted murder charge could have been

reduced or mitigated by the lesser-included offense of ABHAN or by Shands' defense that he lacked criminal intent. *Id*. at 128-132, 817 S.E.2d at 535-37. This Court observed that for a conviction for attempted murder to lie, the State was required to prove Shands possessed both malice and a specific intent to kill. *Id*. at 131, 817 S.E.2d at 537. Of particular relevance to the case at hand, this Court explained that, "Despite the number of times Shands stabbed [the complainant] and the nature of the attack, a jury could have found Shands only had a general intent . . . instead of the higher *mens rea* of specific intent to kill." *Id*. "This error requires reversal of Shands's conviction for attempted murder." *Id*. at 132, 817 S.E.2d at 538.

As the PCR court recognized, had counsel properly objected to the jury instruction error here, this case would have been reversed on direct appeal, because, on direct appeal, the error here would not have been harmless. *King*, 422 S.C. at 63-64, 810 S.E.2d at 27; *Shands*, 424 S.C. at 132, 817 S.E.2d at 538. Similar to the reversible error in *Shands*, the jury could have found that, despite the number of times he stabbed the complainant and the nature of the attack, Respondent lacked the specific intent to kill.

Under the second prong of *Strickland*, a PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

In determining whether a PCR applicant was prejudiced by trial counsel's deficient performance, the appellate court must decide whether an erroneous jury instruction "contributed to the verdict based on all the evidence presented to the jury." *Gibson v. State*, 416 S.C. at 265, 786 S.E.2d at 124, *overruled on other grounds by State v. Burdette*, 427 S.C 490, 832 S.E.2d 575

(2019). In *Pauling v. State*, 350 S.C. at 285, 565 S.E.2d at 772, the Supreme Court held that counsels' failure to object to an erroneous jury charge entitled the petitioner to post-conviction relief since there was "a reasonable probability that, but for counsels' failures to object to the trial judge's improper instruction, the outcome of petitioner's trial would have been different." Similarly, in *Taylor v. State*, 312 S.C. 179, 183, 439 S.E.2d 820, 822 (1993), the Supreme Court held that an applicant was entitled to post-conviction relief where counsel was ineffective for failing to object to an erroneous jury instruction which improperly shifted the burden of proof since there was "a reasonable possibility that the error contributed to the verdict."

As seen, the PCR court found Petitioner was prejudiced. The court specifically referenced the "second prong of *Strickland*," and reasoned, "[T]he more you argue about it from a defense standpoint and say, well, he didn't really mean to kill her and you argue and argue and argue about it and then the Judge tells them, well, you don't really have to do that. I think that might've made a difference . . ." App. 518, ll. 7-10; App. 517, ll. 9-13. After hearing what was argued at trial, the PCR judge stated, "[W]hat you're saying is that was a big debate between the defense counsel and the solicitor as to whether or not he intended to kill her." App. 516, ll. 23-24. Both the State and the defense addressed intent repeatedly during closing arguments. Trial counsel framed this as the "key" issue in the case when he argued before the jury. App. 399, ll. 4-6. The PCR court recognized that specific intent was "major contention" in the trial. App. 517, ll. 5-8. The PCR court said, "[W]hich makes it very important that [the jury] understand what the law is . . ." as to that issue. App. 517, ll. 1-2.

In its order of dismissal, the PCR court explained that the "improper jury charge" "was clearly prejudicial." App. 530. The order stated, "The jury charge in this case negated the

requirement of any proof of an essential element of the charge against [Respondent]. This error substantially undermines confidence in the outcome of the trial." App. 530.

In *High v. State*, 300 S.C. 88, 89, 386 S.E.2d 463, 464 (1989), the Supreme Court concluded that where the "critical dispute at trial" was whether the petitioner "had the requisite intent to kill someone when he pulled the gun from his pocket in order to convict him of voluntary rather than involuntary manslaughter," the "petitioner was prejudiced by counsel's failure to object to the defective charge on intent." In *Tate v. State*, 351 S.C. 418, 427, 570 S.E.2d 522, 527 (2002), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), the Supreme Court reversed the applicant's conviction for assault and battery with intent to kill where counsel failed to object to erroneous jury instructions and there was "a reasonable likelihood that the erroneous charges did affect the jury's consideration . . ."

Here, there was a reasonable probability that, but for counsel's failure to object to the defective instruction on the critical issue of intent, the result of the trial would have been different. As seen, intent was the only element of the crime disputed at trial. The PCR court recognized that *King* underscored the prejudicial nature of this erroneous charge and made a finding which was supported by probative evidence that counsel's deficient performance prejudiced Respondent since there was a "major contention" and a "big debate" at trial whether Respondent specifically intended to kill the complainant. App. 516, l. 22 – 517, l. 8.

The State's argument that the evidence against Respondent was overwhelming is unavailing. "In rare cases, using 'overwhelming evidence' as a categorical bar to preclude a finding of prejudice is not error." *Smalls v. State*, 422 S.C. 174, 190, 810 S.E.2d 836, 844 (2018). However, for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA

evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." *Id*. at 191, 810 S.E.2d at 845. While it was undisputed that Respondent stabbed the complainant, whether he possessed a specific intent to kill when he did so was hotly disputed. As seen, the solicitor argued in closing, "If that is not an intent to kill, after repeatedly stabbing her and leaving her in the bed for 12 hours to bleed out, I don't know what is." App. 385, ll. 3-5. "[T]hat's specific intent to kill." App. 401, l. 2. The solicitor argued, "I think the evidence is very clear in this case that he had every intent to kill [the complainant] on that night." App. 399, ll. 3-5. "[H]e had every intent to kill . . ." App. 400, ll. 22-23.

Trial counsel argued in closing, "The key thing I want to tell you here today is, if [Respondent] wanted to kill, he had ample opportunity to do it." App. 403, ll. 4-6. But, "He didn't do it. He did not attempt to kill." App. 403, l. 21. "If he wanted to kill her he could of done it. He had the opportunity. He had at least 11 to 12 hours to do it with this knife and he could of done it." App. 403, ll. 14-16.

If Appellant intended to kill the complainant, he had twelve hours in which to do so and he did not. Despite the jury instruction error that specific intent was not an element of attempted murder, the jury still deliberated for over an hour. On this record, the jury may well have found Respondent guilty of only the lesser-included offense of ABHAN, if it believed that he did not specifically intend to kill the complainant but instead only committed an act likely to cause death or serious bodily injury in an effort to convince her not to divorce him. *See* S.C. Code Ann. § 16-3-600(B)(1)(b): "A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and . . . the act is accomplished by means

likely to produce death or great bodily injury." Overwhelming evidence is not a bar to relief here since there was no conclusive evidence of a specific intent to kill. *Smalls v. State*, 422 S.C. at 191, 810 S.E.2d at 845.

Lastly, the State's argument that Respondent was not prejudiced by the jury instruction error because the jury was "made aware" that specific intent was an element of attempted murder due to the parties' closing arguments is unavailing. The trial court instructed the jury here, "If you have any ideas as to what the law is or what the law ought to be, and it does not agree with what I now tell you the law is, you must abandon this idea because you are sworn to accept the law and apply the law exactly as I state it to you." App. 409, ll. 8-12 "The law, as given by the [c]ourt, is the only law that you may consider." App. 42, ll. 14-15. "[A]rguments of counsel cannot substitute for instructions by the court." *Taylor v. Kentucky*, 436 U.S. 478, 488–89 (1978) (citing *United States v. Nelson*, 498 F.2d 1247 (5th Cir. 1974)).

The PCR court correctly concluded that the "jury charge in this case negated the requirement of any proof of an essential element of the charge against [Respondent]. This error substantially undermines confidence in the outcome of the trial." App. 530. Thus, the court correctly found Respondent demonstrated prejudice under *Strickland*. Respondent showed "that there [wa]s a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "Any evidence" of probative value is sufficient to uphold the PCR judge's findings. *Cherry*, 300 S.C. 115, 386 S.E.2d 624; *Webb*, 281 S.C. 237, 314 S.E.2d 839. The PCR court's finding of prejudice was supported by the evidence here.

## CONCLUSION

Based on the foregoing argument, this Court should dismiss certiorari as improvidently granted or affirm the PCR court.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR RESPONDENT

This 1st day of March, 2021.