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Volume II of II

THE STATE OF SOUTH CAROLINA
DEC 07 2018 In The Supreme Court

S.C. SUPREME COURT
CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

ORIGINAL

Appellate Case No: 2018-001188
Lower Court Case No: 2017-CP-42-2751

CHRISTOPHER MIDDLETON,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA

PETITIONER.

APPENDIX

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT
CASE NO.: 2017-CP-42-2751

CHRISTOPHER MIDDLETON)
vs.) TRANSCRIPT OF RECORD
STATE OF SOUTH CAROLINA)

FEBRUARY 22, 2018
SPARTANBURG, SOUTH CAROLINA

BEFORE THE HONORABLE MICHAEL G. NETTLES

APPEARANCES:

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ATTORNEY FOR THE STATE

SUSANNAH C. ROSS, ESQUIRE
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ATTORNEY FOR THE APPLICANT

SHIRLEY BROOM
16TH Circuit Court Reporter

I-N-D-E-X

WITNESSES:	DIRECT	CROSS	RE-DIRECT	RE-CROSS
Josh Schultz				
By Ms. Giovanoli	19			
By Ms. Ross		20		
By Ms. Giovanoli			21	

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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(NO EXHIBITS)

1 THE COURT - Ms. Giovanoli, you're recognized.

2 MS. GIOVANOLI - This will be Christopher
3 Middleton vs. The State of South Carolina. Docket number
4 is 2017-CP-42-2751. We're before the Court on an
5 application for post-conviction relief filed on August 9th,
6 2017. In March, 2015 applicant was indicted for one count
7 of attempted murder and one count of possession of a weapon
8 during the commission of a violent crime. The charges
9 resulted from an incident on June 20th, 2014 in which
10 applicant attacked and repeatedly stabbed his wife while
11 she was lying in bed, then leaving her there til the next
12 morning. Josh Schultz represented applicant, and on
13 October 12th, 2015 applicant proceeded to trial before The
14 Honorable J. Mark Hayes, II. The jury found applicant
15 guilty as indicted on both counts. Judge Hayes sentenced
16 applicant to imprisonment for thirty years for attempted
17 murder and five years for possession of a weapon during the
18 commission of a violent crime that he serve concurrently.
19 Judge Hayes also executed a permanent Restraining Order.
20 Applicant did file a timely notice of appeal and Appellant
21 Defender David Alexander filed a brief on behalf of
22 applicant pursuant to Anders vs. California. The South
23 Carolina Court of Appeals dismissed his appeal and the
24 remittitur was returned to the Circuit Court on May 5th,
25 2017. Applicant subsequently filed this post-conviction

1 relief application alleging ineffective assistance of
2 counsel, four specific allegations. The State is present
3 and ready to proceed. Applicant is also present and is
4 represented by Ms. Susannah Ross to whom I will hand it
5 over.

6 THE COURT - Ms. Ross, you're recognized.

7 MS. ROSS - Thank you, Your Honor. Mr.
8 Middleton's basic issues are ineffective assistance of
9 counsel. The argument that he briefs quite effectively is
10 that his attorney failed to object to the attempted murder
11 charge which is found on page 414 of the transcript, line
12 11. In State v. King, a case that came out before Mr.
13 Middleton's trial -- I think about four or five months
14 before Mr. Middleton's trial -- that exact jury instruction
15 was found to be objectionable and error to give that
16 instruction. Subsequent ---

17 THE COURT - Harmless error or reversible error?

18 MS. ROSS - It said reversible error and that's
19 where we get into some of the issues. The 2015 State v.
20 King said it was error to give that instruction, and then
21 that was taken up by the Supreme Court and in Opinion
22 published in 2017 the State v. King Supreme Court said on
23 page 14 that this error cannot be deemed harmless, and it
24 goes on to find the error being the instruction which is
25 given on page 414, so it has the exact same jury

1 instruction and says this is error to give this instruction
2 and it cannot be held harmless, so ---

3 THE COURT - Let's see what Ms. -- you might have
4 some more issues, but let's -- that might be the threshold
5 question. Let's hear what Ms. Giovanoli has to say about
6 that.

7 MS. GIOVANOLI - And, yes, I do think that that is
8 the most meritorious issue in this case. In 2015 -- she's
9 correct -- the Court of Appeals did issue a published
10 Opinion finding that this instruction was incorrect, and
11 they kind of -- it was a really -- it's, actually, still
12 on-going. State vs. King, the remittitur hasn't been
13 handed down. It's still up in the Supreme Court pending on
14 a petition for rehearing. So in 2015 the Court of Appeals
15 first heard the direct appeal from King finding that the
16 statute, attempted murder, even though it was based on the
17 common law ABWIK -- the common law charge of ABWIK -- that
18 the statute intended for there to be specific intent to
19 kill in order to prove attempted murder, so the instruction
20 that had been given prior to State vs. King, and had been
21 given for a while, was that specific intent to kill wasn't
22 required. It was just the general intent to commit serious
23 bodily injury, so that has been deemed incorrect. At the
24 time of this trial, it was about six months after the Court
25 of Appeals Opinion, this case was pending Cert in Supreme

1 Court, and we all know that a lot of times the Supreme
2 Court takes Certiorari from the Court of Appeals to change
3 their decision, so the state of the law wasn't -- although
4 the Court of Appeals Opinion was authoritaded, the state of
5 the law wasn't final. It was still being litigated. In
6 this case that -- that same jury charge was ---

7 THE COURT - You're saying that the Court of
8 Appeals Opinion was out when the charge was given.

9 MS. GIOVANOLI - Yes, that's correct. And that --
10 and State vs. King is still pending before the Supreme
11 Court, and -- but they did render an Opinion affirming the
12 Court of Appeals and further elaborating why they thought
13 that specific intent was an element for the crime to be
14 proved -- proven by the State.

15 THE COURT - What do you have to say about their
16 request for post-conviction relief?

17 MS. GIOVANOLI - Well, I think that we need some
18 testimony to -- but my arguments would first be that not
19 objecting to it was it reasonable because the state of the
20 law isn't final. State vs. King isn't a final case, and at
21 the time of the trial it was, actually, pending on
22 Certiorari before the Supreme Court, so that would be
23 deficiency. As far as prejudice, I think that we've got --
24 this record and has a very strong -- if you read the record
25 -- it's about 400 pages -- that even if that one sentence

1 that the Judge read in the instruction, specific intent to
2 kill was not a requirement, absent that error, that the
3 outcome would not have changed. This is one of the best --
4 I don't want to say best -- never mind -- this is a solid
5 attempted murder case, and even had he read the correct
6 instruction, the jury would've found him guilty of
7 attempted murder, not ABHAN, which was the lesser included
8 offense. The difference being attempted murder and ABHAN,
9 the only difference being specific intent to kill.

10 MS. ROSS - And that's a harmless error analysis
11 and that simply can't apply to this. We don't know what
12 the jury would've done. We can't get ---

13 THE COURT - Can I see the Supreme Court decision?

14 MS. ROSS - Yes. Please ignore -- see if that's
15 okay. I put a note -- my note on top.

16 (WHEREUPON, DOCUMENT HANDED UP TO THE COURT.)

17 (WHEREUPON, BRIEF PAUSE)

18 THE COURT - Who wrote the Opinion for The Court
19 of Appeals?

20 MS. GIOVANOLI - I don't have that information
21 right off hand, but I can figure it out.

22 MS. ROSS - For The Court of Appeals?

23 THE COURT - Right.

24 MS. ROSS - Few, Judge Few.

25 MS. GIOVANOLI - Justice Few?

1 MS. ROSS - Justice Few, sorry.

2 THE COURT - Does he recuse himself from reviewing
3 his own decision?

4 MS. ROSS - I don't know whether he did or not.

5 MS. GIOVANOLI - I don't know that either.

6 THE COURT - I was just wondering.

7 MS. ROSS - Beatty, as you can see, wrote the
8 Opinion.

9 (WHEREUPON, PAUSE IN RECORD)

10 THE COURT - This thing's purely like a question
11 of law, but I want to hear from both sides as to whether we
12 need to elicit any testimony. I'll hear from the applicant
13 first.

14 MS. ROSS - Judge, I believe that the question can
15 be answered as a matter of law. If you disagree with that,
16 we can -- be happy to present testimony.

17 THE COURT - Okay. Ms. Giovanoli, you know, the -
18 - I know that you've indicated that you wanted to talk
19 about the merits of the case and whether or not -- or the
20 horrendous facts of the case essentially, but the record --
21 the trial transcript is a part of the record. For
22 appellate purposes, all that can -- do we need to go
23 through all that that? I'm -- and if we do, I want -- and
24 you have a good reason for it I want to hear it. I just
25 want to know.

1 MS. GIOVANOLI - And so our -- just so I can
2 clarify -- there's four issues that were pled in the
3 application, but we're talking about this one issue.

4 THE COURT - Right. Well, I think it's going to
5 be dispositive, and, of course, I -- you can only grant a
6 new trial for one issue, ---

7 MS. GIOVANOLI - Sure.

8 THE COURT - --- but I think probably I do need to
9 address the others if they intend on going forward with
10 them.

11 MR. GIOVANOLI - Well, I think in order for us to
12 make our argument with regard to deficiency, testimony
13 needs to be presented. I don't think that because -- in
14 the King case it was found to be not harmless error, that
15 means that applicant can prove prejudice in his case.
16 Prejudice under Strickland is a different standard. It's
17 absent the error which would be counsel's failure to object
18 to the erroneous jury charge. Is it a reasonable
19 likelihood that the outcome of the trial would've changed,
20 and I think that -- that if you read this transcript, the
21 evidence -- and I can go through all of the evidence
22 against him -- there's no reasonable possibility that
23 absent that one charge, failure to object, the outcome
24 would've been different, and I also think speaking to
25 Strickland there's a strong presumption of reasonable

1 representation. I don't think that applicant can overcome
2 that, and I also don't think that he can overcome that
3 prejudice prong based on the evidence that was presented at
4 trial. But you're right, I mean ---

5 THE COURT - Well, what do you have to say about,
6 if I'm in a position to grant the post-conviction relief
7 with regard to this legal issue -- and I think the statute
8 requires that I address all issues on -- that are presented
9 -- and if you elect to go forward on the other, I imagine
10 we do need to have an evidentiary hearing.

11 MS. ROSS - I wouldn't, Your Honor. The other --
12 this -- the others -- in my review of the transcript, I saw
13 some hearsay that was allowed that wasn't objected to.
14 That's clear from the transcript, and I have an argument --
15 I thought an argument wasn't made that could've been made.
16 Those are very secondary issues. I don't think ---

17 THE COURT - So you're waiving the presentment ---

18 MS. ROSS - I would waive them, yes, sir.

19 THE COURT - All right. Well, -- Ms. Giovanoli,
20 I'm going to allow you to summarize your perception of the
21 facts, and, if necessary, you can call witnesses after
22 that, and I'll allow her an opportunity to comment on that
23 and why that would render it harmless or not, but I'll be
24 glad to hear from you, and after you do that, if you want
25 to elicit testimony, I'll be happy to hear it.

1 MS. GIOVANOLI - Okay. So I will give you a
2 summarization of the facts, and I don't believe this is my
3 perception. This is, actually, in the record, and I'll try
4 to make citations for the record where I've annotated them.

5 So on page 182, the victim, actually, testified.
6 She testified at length and in detail about the incident.
7 She testified numerous times regarding malice, so whenever
8 -- well, first the facts of the case are that he stabbed
9 his wife five times, then he let her bleed out in the bed
10 for 12 hours while he slept next to her. He made
11 statements to her, the B word, I hate you, other statement,
12 you're going to get your divorce, just not by signing
13 papers. Another statement, I'm going to watch you die,
14 watch you take your last breath. Another statement, I'm
15 going to kill you. Another statement, if you're not dead
16 by morning, I'm going to kill you then, I'm going to stab
17 you in your head. And, like I said, he stabbed her five
18 times. He also cut her on her hand. So the physical
19 evidence was consistent with the victim's testimony. She
20 also, after the stabbing he punched her in the jaw which
21 knocked her onto the floor. She testified at -- at that
22 point the stab wound that had entered her stomach caused
23 blood to spill out onto the floor. Physical evidence was
24 consistent with that. There was a big blood stain on her
25 side of the bed where she was laying. She was also kicked.

1 After she was knocked to the floor, she was also kicked
2 multiple times and -- let's see -- the friend who,
3 actually, found her -- so, essentially, he had volunteered
4 to take to her surgery the next morning. She had numerous
5 medical conditions. She was -- had received cancer
6 treatment. She also had -- and I can't remember what the
7 disease was called -- it was like asthenia gravis, but it
8 caused her to be extremely weak. She had had a procedure
9 the day before the incident that was an eight-hour
10 procedure. She was receiving blood plasma transfers, so
11 she was extremely weak and she was, basically, in bed. She
12 was scheduled for surgery the next morning. He was
13 supposed to take her to the surgery, however, that night he
14 stabbed her five times. The morning of -- of her surgery,
15 the hospital called her mother to inform her, hey, you
16 know, your daughter was supposed to be here for surgery and
17 she never showed up. So at that point I believe it was a
18 friend who went out to the victim's residence, knocked on
19 the doors, they couldn't get an answer. Eventually, he
20 opened the back door -- the applicant opened the back door
21 covered in blood, he ran off. The -- the friend testified
22 he had something silver in his hand, either a knife or a
23 screwdriver. He ran off through the woods and he fled.
24 They went in and they found the victim with the stab
25 wounds. She was, actually, helivaced to the hospital and

1 immediately entered her in traumatic surgery. Her -- her
2 wounds were extremely -- they were fatal, and she could've
3 died if she was left there any longer.

4 THE COURT - They could have been fatal.

5 MS. GIOVANOLI - What's that? Well, she survived.

6 THE COURT - Yeah.

7 MS. GIOVANOLI - And there was testimony from the
8 doctor that said that this was a fatal wound and that she
9 would have bled out: That's why they helivaced her, and
10 that's why they rushed her into emergency surgery.

11 THE COURT - That's semantics, but I don't it'd be
12 fatal would if you don't die. It could cause fatality.

13 MS. GIOVANOLI - Okay. So she was left 12 hours
14 without any aid while he slept beside her after having
15 stabbed her five times. So the physical evidence was also
16 consistent. There was dried blood on her, as well as the
17 bed, so that shows that she had been there for a while. It
18 wasn't -- it wasn't still wet. It was dried blood. Then
19 also -- he also hid for a number of days before being found
20 with another knife in his possession. The defendant did
21 not testify in this case, and that was absolutely his
22 right, but the jury was left with undisputed testimony, the
23 victim's entire story that she's been stabbed five times --
24 -

1 THE COURT - The problem is that the jury was told
2 they did not have to find that there was intent to kill and
3 they very well could have, but they were instructed that
4 great bodily injury was the standard, and I understand what
5 you're saying, and you're probably saying or taking the
6 position that it wouldn't have made any difference, but I
7 think the Supreme Court said that it can't be harmless
8 error, that it's dispositive that you have to charge a
9 specific intent to kill.

10 MS. GIOVANOLI - I think that the harmless error
11 doesn't equate to prejudice under the Strickland prong.
12 We're addressing ineffective assistance of counsel, so I
13 think that the two standards, while they are very similar,
14 are not the same, and in this case we're addressing
15 ineffective assistance of counsel would the outcome -- was
16 there a reasonable probability that the outcome of the
17 trial would've been different absent the error, and that's
18 the failure to object. So and I -- and I will agree that
19 this was an error. I will concede that it was an error not
20 to challenge the jury instruction, but error is not always
21 equate to deficiency in the preju -- under Strickland
22 either. But I just wanted to make a couple of more notes
23 with regard to the record. The solicitor and the defense
24 attorney both strenuously argued that intent to kill, and
25 the solicitor addressed it three times in three different

1 sections, page 394, 395 and 397. She exactly said, that's
2 that specific intent to kill. Counsel as well made the
3 same statements that he didn't have an intent to kill her,
4 because if he did, he would've done it. He had every
5 opportunity to do so. He was there for 12 years; he had a
6 knife and he could've done it. If he had an intent to
7 kill, he would've killed her. So they were arguing to the
8 jury that he had no intent to kill, and I think that with a
9 four hundred page transcript and that one line that the
10 Judge read that says, the -- I'm sorry -- I want to refer
11 to it -- a specific intent is to kill is not an element of
12 attempted murder but there must be a general intent to
13 commit serious bodily injury. That line taken out of
14 context, yes, well, you can say, well, that's error, that
15 there's -- there's no way we can come back from that, it's
16 -- can't be harmless, but that's not -- that's not the
17 standard for Strickland. Strickland is deficiency,
18 prejudice, and if you look at this entire record, which we
19 are required to do, absent that one error, would it --
20 reasonable possibility it would've affected the outcome of
21 trial, and there's just absolutely no ---

22 THE COURT - Apparently, what you're saying is
23 that was a big debate between the defense counsel and the
24 solicitor as to whether or not he intended to kill her.

25 MS. GIOVANOLI - Exactly.

1 THE COURT - And -- which makes it very important
2 that they understand what the law is, because they've got
3 to apply the law -- the facts to the law.

4 MS. GIOVANOLI - Absolutely.

5 THE COURT - And in this case if that was a major
6 contention in the trial, it would be harmless error not to
7 say that not only do you have to prove that he meant to
8 hurt her but he meant to kill her. But -- and that was a
9 big -- and the more you argue you about it from a defense
10 standpoint and say, well, he didn't really mean to kill her
11 and you argue and argue and argue about it and then the
12 Judge tells them, well, you don't really have to do that.
13 I think that might've made a difference perhaps.

14 What do you have to say about that, Ms. Ross?

15 MS. ROSS - Judge, I think that harmless error
16 analysis is the same. That's why the Court goes through
17 it, and I think that the Supreme Court -- the Justice has
18 spoken in State v. King and said that this is an error that
19 cannot be deemed harmless, and I certainly agree that as a
20 defense counsel when you get up and make an argument saying
21 if he had intended to kill he would've, you have to have
22 specific intent, and then the Judge stands up and gives the
23 jury an instruction that says the opposite ---

24 THE COURT - Which is contrary to the law?

1 MS. ROSS - Exactly. It certainly makes your
2 entire argument look ridiculous and is highly prejudicial,
3 so we would argue again that this is a case where there is
4 substantial prejudice, and I would agree that even if there
5 wasn't, that's not the analysis here, because it can't be
6 harmless error and that's what ---

7 THE COURT - Well, you know, she's saying that it
8 would not have made a difference in the outcome of the
9 case. What do you have to say about that and the second
10 prong of Strickland?

11 MS. ROSS - I believe it well could have, because
12 a correct charge under State vs. King would not -- would
13 have required a specific intent to kill and there would be
14 a strong argument that with the 12 hours, you know, given
15 the facts of this case in sleeping next to a woman after
16 stabbing her, if he -- if there was an intent to kill, she
17 would be killed, and then the testimony is full of her
18 talking back and, you know, she would've been killed if
19 there was a specific intent to kill, and that would've been
20 a strong argument for the jury if it had been supported by
21 the Judge's charge which it was not.

22 THE COURT - All right. Well, Ms. Giovanoli, if
23 you would like to proffer any testimony, be glad to hear
24 it.

1 MS. GIOVANOLI - Yes, absolutely. We would call
2 Mr. Josh Schultz to the stand.

3 THE COURT - Yes, sir, if you could please come
4 forward and place your left hand on the Bible and raise
5 your right hand as the clerk administers the oath.

6 Let me -- first of all, did you want to offer any
7 testimony?

8 MS. ROSS - No, Your Honor.

9 MR. MIDDLETON - No, sir.

10 MS. ROSS - No.

11 THE COURT - Okay. Very good.

12 JOSHUA SCHULTZ, AFTER BEING FIRST DULY SWORN,
13 TESTIFIES AS FOLLOWS -

14 THE COURT - Very good. Have a seat.

15 MR. SCHULTZ - Thank you.

16 THE COURT - I'm going to ask you if you could to
17 state your full name for the record and spell your last.

18 MR. SCHULTZ - Yes, sir. My name is Attorney
19 Joshua Schultz. Schultz, S-c-h-u-l-t-z.

20 DIRECT EXAMINATION

21 BY MS. GIOVANOLI -

22 Q Thank you. I'm going to cut straight to the point.
23 You represented -- I'm sorry -- Mr. Middleton during his
24 attempted murder trial.

25 A I did.

1 Q Okay. And since the only real issue for debate here
2 is this jury charge, at the time of the trial were you
3 aware of the Court of Appeals decision in State vs. -- I am
4 escaping my words -- King?

5 A Yes, I believe that it was on Cert at that -- at that
6 time.

7 Q Okay, were ---

8 THE COURT - Say that again, now. What did you
9 say?

10 A I believe it was on Cert, Your Honor.

11 THE COURT - Okay.

12 Q At the time of trial.

13 A Yes.

14 Q Okay. And so you were aware of the Court of Appeals
15 decision in 2015?

16 A Yes, at the time of the trial, yes.

17 Q Okay. So what was your view of the state of the law
18 at that time?

19 A Well, like I said, the decision was on Cert, and so I
20 wasn't sure or not that I should introduce that when
21 arguing for a -- arguing for the instructions on my side.

22 Q Okay. And you had objected to this jury instruction
23 and the proper instruction had been given pursuant to the
24 Court of Appeals Opinion. What, in your experience,
25 would've happened if the Supreme Court had reversed the

1 Court of Appeals and then you were back to the general
2 charge that had been given?

3 A I'm not sure -- I'm not -- I don't think I could tell
4 the future ---

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

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

8 MS. GIOVANOLI - Okay, well, I have no further
9 questions.

10 THE COURT - Any cross examination?

11 CROSS EXAMINATION

12 BY MS. ROSS -

13 Q Well, it was a published Opinion, wasn't it?

14 A It was.

15 Q By the Court of Appeals. Correct?

16 A Yes, ma'am.

17 Q So nothing on it said this can't be used as precedent
18 in the law and be a basis for an objection?

19 A Absolutely not.

20 Q All right. And you're saying you just chose not to
21 make that objection.

22 A Correct.

23 Q And that was because you knew it would be in error not
24 to make the objection?

1 A No, I -- it was on Cert and I felt that -- like I said
2 to Ms. Giovanoli, it could've been improper.

3 THE COURT - What you're saying is you don't have
4 much faith in what Justice Few had to say on the Court of
5 Appeals?

6 MR. SCHULTZ - No, Your Honor, I -- I have the
7 utmost faith in Justice Few's ---

8 THE COURT - Oh, I was just picking at you.

9 MR. SCHULTZ - Yes, sir.

10 MS. ROSS - Okay, I have no further questions.

11 MS. GIOVANOLI - I just have one last question.

12 THE COURT - Yes.

13 RE-DIRECT EXAMINATION

14 BY MS. GIOVANOLI -

15 Q In your experience, does the Supreme Court grant
16 Certiorari in Court of Appeals cases often times to flip
17 them?

18 A Yes.

19 Q We don't know what the Supreme Court's was going to
20 decide ---

21 A I'm not a mind-reader, yes.

22 MS. GIOVANOLI - Okay. No further questions.

23 THE COURT - Let me ask this. Everybody seems to
24 be -- I thought as a general rule the Circuit Court Judge

1 and lawyers are supposed to abide by the Court of Appeals
2 rulings until they're reversed. Is that right?

3 MS. GIOVANOLI - I think ---

4 THE COURT - That's what I've always done.

5 MS. GIOVANOLI - When I -- the Court of Appeals
6 Opinion was absolutely authoritative on this case, and in
7 the abundance of caution Mr. Schultz should've object, but
8 because the standard of deficiency is reasonableness in
9 light of the ---

10 THE COURT - I understand all that. The question
11 you asked I didn't really get the point of. You said that
12 if he would've charged the specific intent to kill and they
13 had changed the Opinion, it would've been -- it would've
14 made no difference because the defendant would have already
15 been tried and acquitted or convicted and it would've been
16 to his favor.

17 MS. GIOVANOLI - Okay, if that ---

18 THE COURT - And it would be -- first of all, if
19 he was acquitted, it would be double jeopardy for trying it
20 again and -- and if they reversed the Court of Appeals it
21 would make no difference, it would be of no consequence.

22 MS. GIOVANOLI - Right, except that incorrect
23 instruction would've been read in his trial. He would have
24 been convicted based on the Court of Appeals held that the

1 instruction should be -- had the Supreme Court flipped it,
2 that instruction would've been erroneous.

3 THE COURT - You think they would've been retried
4 him if he'd been acquitted with an improper law or would
5 that be double jeopardy? That's my question.

6 MS. GIOVANOLI - No. No. I think it would (sic)
7 only affected if he was convicted of attempted murder. And
8 had Judge Schultz objected and then they read the Court of
9 Appeals -- what they had held to be the proper instruction
10 and then it went up to the Supreme Court -- see the state
11 of the law wasn't final. The King's case hadn't -- even
12 the remittitur hadn't been issued.

13 THE COURT - Well, I think it was final until they
14 change it.

15 MS. GIOVANOLI - Okay. Well, the remittitur
16 hadn't been sent back down and that's when it's final. The
17 Court of Appeals decision was final, absolutely, but
18 because the Supreme -- my argument here is that because the
19 Supreme Court accepted Cert on this issue and it was a very
20 hot issue, that it was reasonable for a trial attorney at
21 that time to not object. Now, it was not error, but it was
22 a reasonable error, because error doesn't necessarily
23 equate to deficiency and we can read Strickland over and
24 over and gather that the standard to find something
25 deficient would have to have been -- it was unreasonable,

1 and so in light of the, I guess, the lack of finality in
2 the case law in this case, I would argue that not objecting
3 was not deficient, may have been error. Standard isn't
4 perfection. In the abundance of caution he should've
5 objected to preserve that issue, but I don't think it was
6 unreasonable in light of the state of the case law.

7 THE COURT - Very good.

8 Well, I'm going to ask that Ms. Ross prepare an
9 Order to that effect granting the post-conviction relief on
10 the issue of the fact that the -- the jury charge was
11 improperly given and not objected to.

12 MS. ROSS - Thank you, Your Honor.

13 THE COURT - Thank you very much. You may step
14 down.

15 MR. SCHULTZ - Thank you, Your Honor.

16 THE COURT - Anything from the State ---

17 MS. GIOVANOLI - No, and I think that ---

18 THE COURT - -- on this case or anything else?

19 MS. GIOVANOLI - Not in this case, and I think
20 that concludes all the hearings.

21 THE COURT - I'm looking forward to reading some
22 riveting Orders on this case and others.

23 MS. GIOVANOLI - Thank you.

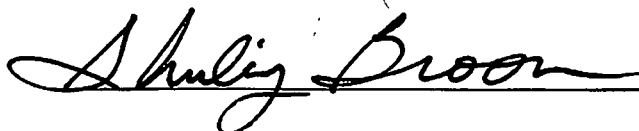
24 (END OF TRANSCRIPT)

25

C E R T I F I C A T E

I, Shirley Broom, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing 25 pages is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the proceedings of Christopher Middleton vs. State of South Carolina, as taken by me in Court of Common Pleas for the Sixteenth Judicial Circuit on February 22, 2018, and provided by me this the 6th day of July, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party herein.

A handwritten signature in cursive script, reading "Shirley Broom", written in dark ink. The signature is fluid and stylized, with the first and last names being clearly legible despite the cursive style.

Shirley Broom, CVR-M
Official Court Reporter,
Certified Verbatim Reporter, In and
for the State of South Carolina

STATE OF SOUTH CAROLINA	/	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG		)	IN THE SEVENTH JUDICIAL CIRCUIT
		)	
CHRISTOPHER MIDDLETON		)	
APPLICANT,		)	
		)	
VS.		)	ORDER GRANTING
		)	POST-CONVICTION RELIEF
THE STATE OF SOUTH CAROLINA		)	
		)	
RESPONDENT.		)	CASE NO: 2017-CP-42-2751

This matter comes before the Court by way of Mr. Middleton's application for post conviction relief filed August 9, 2017, alleging ineffective assistance of counsel for failing to object to trial counsel's erroneous jury charge on attempted murder, failing to make proper objections to preserve his motions for a self-defense charge to the jury, failing to properly motion the trial court for a directed verdict of acquittal, and failing to object to the trial judge's unconstitutional charge that malice may be inferred by conduct showing a total disregard for human life. A evidentiary hearing was held at the Spartanburg County Courthouse on February 22, 2018. The Applicant was present represented by Susannah Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented State.

At the hearing, the Applicant waived his right to testify and all allegations of ineffective assistance of counsel for failing to object to trial counsel's erroneous jury charge on attempted murder. E. Joshua Schultz, Esquire, testified on behalf of the State. The court had before it a copy of the Spartanburg County Clerk of Court Records, Applicant's records from South Carolina Department of Corrections, the trial transcript, the Respondent's Application, the State's Return, and the Applicant's appellate records.

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PROCEDURAL HISTORY

Applicant is serving a thirty year sentence in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In March 2015, the Spartanburg County Grand Jury indicted Applicant for one count of attempted murder and one count of possession of a weapon during the commission of a violent crime (2015-GS-42-1128). The allegation was that Applicant stabbed his wife a number of times on or between June 19 and 20, 2014.

On October 12, 2015, Applicant proceeded to trial before the Honorable J. Mark Hayes. He was represented by E. Joshua Schultz, Esquire, and Assistant Solicitor Meghan Gilmer prosecuted the case. The jury convicted Mr. Middleton on both counts and Judge Hayes sentenced him to thirty years for attempted murder and five years for possession of a weapon during the commission of a violent crime, to be served concurrently.

Mr. Middleton filed a timely Notice of Appeal. Appellate Defender David Alexander filed an Anders brief in the matter, The South Carolina Court of Appeals dismissed Applicant's appeal and granted counsel's motion to be relieved. State v. Middleton, Op. No. 2017-UP-178 (S.C. Ct. App. filed April 19, 2017). The remittur was returned to the circuit court on May 5, 2017.

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SUMMARY OF PCR HEARING

Mr. Middleton waived his right to testify and waived all allegations except ineffective assistance of counsel for failing to object or voice exceptions to trial counsel's jury charge on attempted murder which is found on page four-hundred and fourteen (414), line eleven (11), of the trial transcript. It reads, "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." Mr. Middleton's counsel submitted *State v. King* decided six months prior to his trial, where the Court of Appeals found that the exact same charge was erroneous because attempted murder requires proof a specific intent to kill. *State v. King*, 412 S.C. 403, 408, 772 S.E.2d 189, 192 (Ct. App. 2015), S.C. Code Ann. § 16-3-29 (Supp.2014). She further referenced the Supreme Court opinion which Affirmed as Modified the Court of Appeals' opinion and further ruled that the error of charging the jury that a specific intent to kill is not an element of attempted murder cannot be held harmless. *State v. King*, App. Case No. 2015-001278, Opinion No. 27744 (2017).

Joshua Schultz, Esquire, was called to the stand on behalf of the State. His testimony pertaining to his failure to object to the jury charge was that he was aware of the *King* opinion but did not object because he believed it was not necessary because Supreme Court had taken certiorari.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard and weighed the testimony at the post-conviction relief hearing. In accordance with S.C. Code Ann. § 27-80 (2003) this Court's finding of fact and conclusions of law are set forth below.

The burden of proof is on the applicant in post-conviction proceedings to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). 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. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show counsel was

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deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms. *Strickland*, 466 U.S. at 688; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Strickland*, 466 U.S. at 694; *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Johnson*, 325 S.C. at 186, 480 S.E.2d at 735.

The transcript of Mr. Middleton's trial clearly shows the trial judge gave an erroneous jury charge on attempted murder. (Trial p. 414, l.11) 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 object or take exception after the improper jury charge was given. (Trial p. 418) *State v King*, 412 S.C. at 411, 772 S.E.2d at 194. I find this was error and amounted to ineffective assistance of trial counsel. I further find no strategic basis for allowing the improper jury charge which was clearly prejudicial to his client.

The jury charge in this case negated the requirement of any proof of an essential element of the charge against the Applicant. This error substantially undermines confidence in the outcome of trial. If the error had been properly preserved for appeal, the appellate court would likely have reversed as evidenced by the *King* opinions. Furthermore, to underscore the prejudicial nature of the improper charge, the Supreme Court held that the error cannot be harmless. *State v King*, App. Case No. 2015-001278, Opinion No. 27744, Page14 (2017)

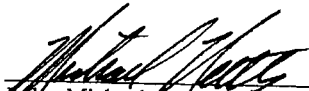
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CONCLUSION

Based on the above, this Court grants the Applicant post-conviction relief in this matter.

IT IS THEREFORE THE ORDER OF THIS COURT that the Applicant's conviction and sentence be vacated and this case remanded to General Sessions. If the State chooses to appeal this Order, I retain jurisdiction to address the appeal bond.

AND IT IS SO ORDERED this 29 day of May, 2018.


Judge Michael G. Nettles
Presiding Judge
Seventh Judicial Circuit

 Florence, South Carolina.

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