

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM AIKEN COUNTY S.C. SUPREME COURT
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2018-CP-02-02656

David Glover #364163.....Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

NOTICE OF APPEAL

This is a post-conviction relief case. Appellant appeals from the Order of Dismissal entered in this case on October 5, 2021. Appellant received written notice of the entry of the Order of Dismissal entered on October 5, 2021, by mail on October 18, 2021. A copy of the Order of Dismissal appealed from is attached.

November 17, 2021



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STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

) IN THE COURT OF COMMON PLEAS
) FOR THE SECOND JUDICIAL CIRCUIT
)

David Glover, # 364163,
Applicant,

) Case No. 2018-CP-02-02656
)

v.

) **ORDER OF DISMISSAL**
)

State of South Carolina,
Respondent.

This matter comes before the court by way of an application for post-conviction relief filed by David Glover (Applicant) on November 12, 2018. Respondent made its return, partial motion to dismiss, and motion for a more definite statement on March 6, 2019. Applicant, through counsel, amended his application on May 27, 2021. An evidentiary hearing convened on June 2, 2021, at the Aiken County Courthouse before the Honorable Jennifer B. McCoy.

Applicant was present at the hearing and represented by Art Aiken, Esquire. Applicant proceeded on the three claims in his amended application, alleging his constitutional rights were violated and trial counsel was ineffective for failing to object to the trial court's decision not to give a general-intent charge, as well as the jury charge given concerning implied malice. Assistant Deputy Attorney General Lindsey A. McCallister represented Respondent. Applicant did not call any witnesses at the hearing and instead asked to make a legal argument. Respondent called trial counsel, C. David Hayes, in response to Applicant's argument.

At the close of all evidence and after hearing arguments from both sides, the Court took the matter under advisement. This Court had before it a copy of the Aiken County Clerk of Court's records regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the application and amendment, Respondent's return, the trial transcript, and Applicant's appellate records. After a review of the record and all evidence

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Robert L. White CJP
C.C.P. & G.S.

Charla Gifford Plouffe
Deputy Clerk

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presented, for the reasons set forth below, this Court finds Applicant has failed to meet his requisite burden of proof and denies relief.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted at the September 2014 term of the Aiken County Grand Jury for attempted murder, first-degree burglary, and possession of a firearm during the commission of a violent crime. C. David Hayes and Michael D. Routzong of the Aiken County Public Defender's Office represented Applicant. Assistant Solicitors Jeffrey A. Solcum, Jr., and Cassie W. Hall of the Second Circuit Public Defender's Office prosecuted the case.

On May 13, 2015, Applicant proceeded to a jury trial before the Honorable R. Knox McMahon. The jury convicted Applicant of attempted murder and possession of a firearm during the commission of a violent crime, but acquitted him of first-degree burglary. Judge McMahon sentenced him to twenty-five years' imprisonment for the attempted murder conviction and five years' imprisonment for the possession of a firearm conviction, to be served concurrently.

Applicant filed a timely notice of appeal and an appeal was perfected on his behalf by Appellate Defender Laura R. Baer of the South Carolina Commission on Indigent Defense-Office of Appellate Defense. On appeal, Applicant argued "the trial court erred in failing to recharge the jury on self-defense where the jury was charged on both attempted murder and assault and battery of a high and aggravated nature three times during the course of the trial court's original jury charge and re-charges, such that, under the totality of the circumstances, the jury charge was unbalanced and prejudicial to the defendant." The South Carolina Court of Appeals affirmed in an unpublished opinion. State v. Glover, Op. No. 2017-UP-025 (S.C. Ct. App. filed Jan. 11, 2017). Applicant filed a petition for rehearing, which the Court of Appeals

denied by order dated February 23, 2017. Applicant subsequently filed a petition for a writ of certiorari in the South Carolina Supreme Court, which was denied. The Remittitur was issued on January 4, 2018.

SUMMARY OF FACTS SUPPORTING CONVICTIONS

Applicant was indicted for attempted murder, first-degree burglary, and possession of a firearm during the commission of a violent crime after attacking his former paramour, Vernell Weaver. Tr. p. 11. At trial, Weaver testified that on the day of the incident she spoke with Applicant and asked him to come pick her up from George Mackey's house so she could retrieve some clothes from their home. Tr. p. 109. Applicant agreed and after taking her home, he dropped her back off at Mackey's house. Tr. p. 111. Once inside, Weaver began making herself something to eat when she heard a banging at the door and saw Applicant standing at the door. Tr. p. 115. Before she could speak, Applicant drew a gun and shot her through the neck. Tr. p. 115. Weaver turned, ran into the bedroom, and dialed 911. Tr. p. 115. Although she shut the door, Applicant came through the wall and the two began to tussle on the bed as Weaver attempted to wrestle the gun away from him. Tr. p. 115. However, Applicant took the gun back and attempted to shoot Weaver again in the stomach. Tr. p. 116. Weaver was able to get away from him and ran through the living room, grabbing a hammer that was on the floor as she headed out of the house towards the home of Otis and Almetha Green. Tr. pp. 117-18.

Almetha Green then testified that she was in the kitchen when she heard Weaver yelling about having been shot as she ran towards the house. Tr. p. 145. Weaver eventually reached the porch and sat in a chair, still clutching the hammer. Tr. pp. 148-49. Applicant, who had chased Weaver to the Green's house, tried to pull the hammer from her hand. Tr. p. 149. Almetha got her husband, Otis Green, who told Applicant to leave Weaver alone and threatened to call the

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police. Tr. p. 148. Almetha eventually called the police and Applicant ran away when he heard the sirens. Tr. p. 148. Otis similarly testified that on the day of the incident he was awakened by Almetha, and he went with her to the porch to find Weaver sitting on the porch with Applicant standing over her trying to get the hammer out of her hand. Tr. p. 159.

Dr. Bradford Huffman testified as an expert in oral and maxillofacial trauma and treatment. Tr. p. 278. He described how when Weaver was shot, the bullet entered her right neck, passed through the floor of her mouth and her tongue, and exited through the left side of her lip. Tr. p. 282. He further explained that this type of injury was associated with a high level of mortality. Tr. p. 285.

Applicant testified in his own defense. He testified Weaver called him the morning of the incident about getting something to eat at the church, and they arranged for Applicant to pick her up. Tr. p. 312. He claimed that on the way, Weaver requested they make a stop to pick up some crack before they returned to their shared home, where Weaver smoked the crack she had acquired. Tr. pp. 314-15. After that, Applicant stated he drove Weaver back to Mackey's house and accompanied her inside where she began to smoke the remainder of her crack. Tr. p. 317. Applicant claimed that once Weaver consumed all her crack she asked him for money so she could purchase more to smoke; when he responded he did not have any cash, she began to hit him and they began a physical altercation. Tr. pp. 317-18. Applicant maintained the fight escalated and Weaver eventually grabbed a hammer and began swinging it at him and they began to struggle over the hammer, knocking through a wall and the glass front door. Tr. pp. 319-20. Applicant testified he then withdrew a gun and shot at Weaver twice. Tr. p. 321. He followed her into the bedroom, going through the wall because the door was locked. Tr. p. 322. They continued to fight until Weaver left and ran to the neighbors' home. Tr. p. 326.

The defense then rested and the trial court discussed jury charges. Ultimately, the trial court instructed the jury on burglary, attempted murder, ABHAN, first-degree assault and battery, possession of a firearm during the commission of a violent crime and self-defense. Tr. pp. 373–82. After sending the jury to deliberate, Applicant objected, citing State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), because the trial court had charged the jury it must only find a general intent to commit serious bodily harm as opposed to a specific intent to kill. Tr. p. 386. After reviewing the case, the trial court brought the jury back in and recharged it on attempted murder, this time stating that the “State must prove specific intent to commit murder as an element of attempted murder.” Tr. p. 391. The jury returned to deliberations. Tr. p. 393.

The jury subsequently submitted the question: “What is the difference between guilty of attempted murder and guilty of [ABHAN].” Tr. p. 393. The trial court proposed recharging attempted murder and ABHAN, and neither party objected. Tr. p. 393. After the court delivered its recharge and the jury exited, Applicant requested “the Court to consider re – instructing self-defense as well.” Tr. p. 398. The State objected and the court ultimately declined to recharge the jury, citing State v. Anderson, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996), for the proposition that a trial court need only answer the questions asked. Tr. p. 399.

The jury then submitted another question: “Can you give an example of guilty of [ABHAN] without reading the law.” Tr. pp. 399–400. After bringing the jury back, the trial court clarified it could not provide examples for fear that could be interpreted as a comment on the facts. Tr. pp. 400–01. Instead, the trial court reiterated the language of the statute and reminded the jury it must determine the facts and compare them to the law. Tr. p. 401. Finally, the trial court reminded the jury the State must prove the elements beyond a reasonable doubt. Tr. p. 401. The jury then returned to deliberations and neither party noted any objections. Tr. p. 402.

Ultimately, the jury found Applicant guilty of attempted murder and possession of a firearm during the commission of a violent crime, and not guilty of burglary. Tr. p. 403. The trial court sentenced him to twenty-five years' imprisonment on the attempted murder charge and five years' imprisonment on the possession charge, to be served concurrently. Tr. p. 414.

ALLEGATIONS

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully based on allegations of:

1. Ineffective Assistance of Counsel
 - a. "failure to prepare mitigation"
 - b. "cumulative error"
2. Illegal Enhancement

In his amended application, Applicant alleges:

1. "Glovers' trial counsel's performance was deficient because he failed to preserve for appellate review the reversible error of the trial court's failure to give a general [intent] charge on the attempted murder charge, and Glover was prejudiced by that deficient performance."
2. "Glovers' trial counsel's performance was deficient because he failed to object to the Court's instructions on implied malice, and Glover was prejudiced by that deficient performance."
3. "In the jury instructions in this case, the trial court instructed the jury extensively on the law that implied malice can support a guilty verdict on an attempted murder charge. In 2017, the South Carolina Supreme Court changed the substantive law of attempted murder and held that implied malice evidence is no longer sufficient to show the specific intent to kill necessary for a finding of guilt on an attempted murder charge. State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). This law is applicable under the authority of Aiken v. Byars, 410 S.C. 534, 765 S.E.d 572 (2014)."

At the call of the case, Applicant clarified he was proceeding only on the allegations of ineffective assistance of counsel listed in his amended application. Therefore, all other allegations are waived and dismissed with prejudice.

SUMMARY OF TESTIMONY

Trial counsel, C. David Hayes (Counsel), testified this incident arose out of a domestic dispute between Applicant and the victim, who was his ex-girlfriend. Counsel explained the fact that Applicant shot the victim was not in dispute, and the only issue was whether he did so in self-defense. Counsel testified Applicant's version of the facts was that the victim was smoking crack and attacked him with a hammer, knocking him to the floor. Applicant then shot her, and she retreated to the bedroom. According to Applicant, he forced his way into the room through the wall in order to check on her. The victim, however, testified Applicant showed up at her new boyfriend's home uninvited, shot her, and then chased her into the bedroom and continued to try to fire the gun, but it jammed. The victim called 911 from the bedroom, then fled to a neighbor's home, where the neighbors called 911 again.

Counsel testified the jury was instructed on attempted murder, ABHAN, and assault and battery in the first-degree. Counsel further testified the trial judge ultimately charged specific intent based on King, but included language that malice may be express or implied, to which he did not object. Counsel explained he did not object to this language because he had no case law or precedent on which to base an objection, otherwise, he would have objected. Counsel testified the jury clearly deliberated between attempted murder and ABHAN and asked to be recharged on those issues. Counsel acknowledged the jury did not have to find malice in order to convict Applicant of ABHAN.

Counsel testified, however, the problem at trial was that Applicant broke through the wall separating the hallway from the bedroom where the victim was on the phone with 911. Counsel testified if the jury was going to find malice, in his opinion, it would have to be from Applicant's conduct in breaking into the bedroom after he shot the victim, and the jury would have to decide

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if he did so to continue an attack or try to help her. Counsel explained the victim testified at trial that Applicant broke the wall, she held the gun to her stomach and tried to fire, but it did not fire and only made a clicking sound. Counsel acknowledged that, if believed, this testimony would provide the jury with a basis to find express malice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has heard the testimony and evidence presented at the evidentiary hearing, observed the witnesses and evaluated their credibility, considered the arguments of counsel, and weighed these factors accordingly in its discussion below. Further, this Court has reviewed the Clerk of Court records regarding the subject conviction, the appellate records, and Applicant's original and amended applications, as well as the trial transcript. This Court finds the combined record from the criminal case and the testimony and evidence presented at the evidentiary hearing establishes Applicant received effective assistance of counsel, and relief should be denied and this application dismissed with prejudice. Set forth below are the relevant findings of fact and conclusion of law as required by section 17-27-80 of the South Carolina Code of Laws:

Standard of Review

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made

all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688 (1984)). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. An applicant who pleads guilty with the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994); Hill v. Lockhart, 474 U.S. 52 (1985)). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Lockhart, 474 U.S. at 56.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an

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ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Allegations of Ineffective Assistance of Counsel for Failing to Object to Trial Court's Decision not to Give a General Intent Charge and Failing to Object to Charge on Implied Malice

Applicant argues his plea counsel was constitutionally ineffective for failing to object to the trial court's decision not to give a general-intent charge and to affirmatively charge implied malice. In support of this argument, Applicant cites to King and State v. Shands, 424 S.C. 106, 817 S.E.2d 574 (Ct. App. 2018). Applicant argues these cases created new substantive law which is applicable on collateral review pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). Specifically, Applicant quotes the King decision which states, "one cannot attempt to kill another by implied malice because there is not attempted to achieve an unwanted goal." 422 S.C. at 57, 810 S.E.2d at 23. Additionally, Applicant points to the Court of Appeals' statement from Shands that "the State needed to prove Shands acted with express malice *and* the specific intent to kill in order to be found guilty of attempted murder." 424 S.C. at 131, 817 S.E.2d at 537 (emphasis in original).

As an initial matter, the Court notes both cases cited by Applicant were not decided until well after Applicant's trial. "For an ineffective assistance claim, the PCR court must 'determine whether counsel was ineffective *at the time of the alleged error.*' Thus, the court must consider the law as it existed at the time of trial and 'not as it has evolved today. . . .' Accordingly, trial counsel will not be found deficient for failing "to be clairvoyant or anticipate changes in the law. . . ." Chappell v. State, 429 S.C. 68, 79, 837 S.E.2d 496, 501-02 (Ct. App. 2019) (internal citations omitted) (emphasis in original). Counsel is not required to be clairvoyant, and therefore, this Court finds he was not deficient.

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Moreover, this Court finds the jury charge ultimately given by the trial court as to attempted murder was correct at the time of. The charge quoted directly from the statute, instructing, “[T]he State must prove the defendant attempted to kill another person with malice aforethought, either express or implied...” Tr. p. 390. While King and Shands hint at the issue of whether implied malice can be used to show specific intent, this Court finds Applicant’s assertion that it can never be used is an overstatement of both King and Shands. See King, 422 S.C. at 64 n. 5, 810 S.E.2d at 27 n. 5 (“[W]e would respectfully suggest to the General Assembly to re-evaluate the language following “malice aforethought” as the inclusion of the word ‘implied’ in section 16-3-29 is arguably inconsistent with a specific-intent crime.”) (emphasis added); Shands, 424 S.C. 106, 131, 817 S.E.2d 524, 537 (“[W]e question whether an implied malice instruction is proper in any attempted murder trial. However, *even if an implied malice instruction was appropriate in an attempted murder case*, we do not believe it was appropriate in Shands’s case.”) (emphasis added). Notably, the General Assembly has yet to revise the attempted murder statute, and thus, the issue of the interplay between specific intent and implied malice remains an unsettled question in South Carolina. Even if Shands supports Applicant’s position,¹ the Court finds Counsel credibly testified he had no basis to object to the charge as given, and he is not required to be clairvoyant. This Court therefore finds he was not deficient.

¹ Applicant argues King and Shands should be applied retroactively to Applicant’s case on collateral review and cites Aiken v. Byars to support this argument. Aiken found the United States Supreme Court’s decision in Miller v. Alabama should be applied retroactively because it announced a new substantive rule of constitutional law. Aiken, however, was not a PCR action, and it was instead brought in the Supreme Court’s original jurisdiction. Moreover, there are many examples of cases in which a new rule has been applied retroactively to cases pending on direct review, but not on post-conviction relief. See, e.g., State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (“[T]oday’s ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved.... Our ruling, however, will not apply to convictions challenged on post-conviction relief.”), overruled by State v.

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Further, the Court finds, in any event, Applicant was not prejudiced by the trial court's instruction because the only evidence of malice in the case was evidence of express malice. Therefore, because the jury returned a verdict of attempted murder, and ABHAN does not require malice, the jury must have found express malice.

As Counsel explained, the issue of malice essentially came down to whose story the jury believed – the victim's testimony that Applicant showed up unannounced, shot her, and then broke down the wall to hold the gun to her stomach and fired again – or, Applicant's testimony that he shot the victim only after she initiated an unprovoked attack on him with a hammer and he was afraid for his life. As Counsel explained, even if the jury believed part of Applicant's testimony, that the victim initiated the attack, it was undisputed that she retreated to the bedroom to call 911, and Applicant followed her by breaking through the wall. The victim testified he then held the gun to her stomach and pulled the trigger multiple times, but the gun did not fire. Moreover, as the Supreme Court explained in State v. Smith,

[i]n claiming self-defense, *Smith* admitted he had an express intent to kill, but argued his intent to kill was legally justified due to an imminent threat to his life from the rival group. Thus, there was no need for the jury to infer his malice from the circumstances surrounding the shooting. Rather, the jury was faced with the choice of either believing *Smith's* story and finding he acted in self-defense, or believing *Smith* had a self-admitted intent to kill that was *not* legally justified—the very definition of express malice.

430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020) (emphasis in original).

Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) (“Our ruling today is effective in this case and in those cases which are pending on direct review or are not yet final, so long as the issue is preserved. . . . However, today's ruling will not apply to convictions challenged on post-conviction relief.”). Indeed, the fact that Applicant argues King and Shands are new rules supports this Court's finding that Counsel would have had to be clairvoyant in order to apply them, and thus, he was not ineffective.

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"[J]urors are presumed to have followed the law as instructed to them." State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999). Here, the trial court correctly instructed attempted murder, as discussed above, as well as ABHAN. See Tr. pp. 378-79 ("A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person and (A) great bodily injury to another person results or (B) the act was accomplished by means likely to produce death or great bodily injury."). The jury is presumed to have followed these instructions, and therefore, because the jury had to find malice in order to convict Applicant of attempted murder. The only evidence of malice presented was that of express malice. Thus, the Court finds Applicant was not prejudiced, even the trial court's instruction was erroneous.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by her representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Further, Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and

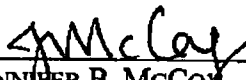
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file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED:

1. the Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.



JENNIFER B. MCCOY
Presiding Judge
Second Judicial Circuit

Sept. 30, 2021

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