STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to
Lexington County
Thomas A. Russo, Plea Judge
Walton J. McLeod, IV, PCR Judge

Appellate Case No. 2022-000254

MICHAEL YOUNG,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO AUSTIN PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner's Question

Whether trial counsel rendered ineffective assistance of counsel when he failed to advise his client that he would have been entitled to a voluntary manslaughter jury charge had he proceeded to trial. Counsel's investigation into Petitioner's case was substandard and the PCR court's order of dismissal commits an error of law in finding Petitioner's counsel provided effective assistance of counsel.

Respondent's Counterstatement of Question

Did the PCR court properly find Petitioner failed to prove counsel was ineffective for not advising Petitioner he would be entitled to a voluntary manslaughter charge when counsel's advice was reasonable and based on a proper understanding of the law, and Petitioner failed to submit sufficient evidence to support the charge?

STATEMENT OF THE CASE

Petitioner Michael Young is presently confined in the South Carolina Department of Corrections serving a fifty-year sentence. In October 2007, the Lexington County Grand Jury indicted him for murder and attempted murder. These charges arose after Petitioner shot his estranged wife and her father (Victim) in a mall parking lot, killing Victim. On April 11, 2011, Petitioner pled guilty to murder and attempted murder. John D. Delgado represented Petitioner and Assistant Solicitor Colleen E. Dixon represented the State. In exchange for the plea, the State dismissed a charge for possession of a weapon during a violent crime that stemmed from this incident as well as charges for stealing dogs, stalking, harassment, and forgery. The plea court imposed concurrent sentences of fifty years' imprisonment for murder and twenty years' imprisonment for attempted murder. Petitioner then filed a direct appeal, which was dismissed due to his failure to provide an explanation as required by Rule 203(d)(1)(B)(iv), SCACR.

On November 21, 2012, Petitioner filed an application for post-conviction relief (PCR). On November 9, 2018, the Honorable Walton J. McLeod, IV held an evidentiary hearing. Robert Mills represented Petitioner and Assistant Attorney General Kelly Oppenheimer represented the State. On December 5, 2018, Judge McLeod issued an order denying relief and dismissing the application. Petitioner filed a Motion to Reconsider, which was denied on January 29, 2019.

On January 27, 2020, Petitioner filed a motion in the South Carolina Supreme Court seeking to appeal the dismissal of his PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). In the motion, Petitioner asserted PCR counsel, Mr. Mills, passed away on February 16, 2019, and as a result Petitioner did not timely discover his Motion to Reconsider had been denied. He further contended he did not knowingly and voluntarily waive his right to appeal the order dismissing his PCR application.

On January 29, 2020, the Supreme Court issued an order dismissing his action without prejudice to whatever right he may have to seek relief under Austin by filing an application for PCR in the circuit court. Thereafter, on June 15, 2020, Petitioner filed the current PCR application seeking a belated review of his first PCR application. On January 24, 2022, the Honorable William P. Keesley issued a Consent Order granting Petitioner an Austin Appeal.

Relevant Facts

On May 15, 2007, Petitioner's ex-wife (Ex-Wife)—who had previously separated from him—filed stalking charges against Petitioner after he repeatedly went to the mall where she worked attempting to talk to her. On June 4, 2007, Ex-Wife filed a petition for an Order of Protection. On June 5, 2007, Petitioner again went to the mall where Ex-Wife worked; he was arrested for stalking, and the mall placed him on trespass notice. Petitioner bonded out of jail on June 7, 2007, and continued attempting to contact Ex-Wife at work. As a result, police advised Victim to escort Ex-Wife out of the mall when he picked her up from work. (App. 27-29).

On June 13, 2007, Petitioner again returned to the mall to contact Ex-Wife. Victim arrived shortly thereafter, and the three of them exited the mall together. When they arrived at Victim's car, Ex-Wife got into the passenger seat of the car while Victim and Petitioner remained outside. Ultimately, Petitioner pulled out a handgun and shot Victim three times—once in the neck, once in the right arm, and once in the back.[1] He then ran around the car and shot Ex-Wife twice. Ex-Wife survived but Victim did not. (App. 29-30). Petitioner was subsequently indicted for murder and attempted murder; he pled guilty as indicted and is serving a cumulative fifty-year sentence.

[1] According to Victim's autopsy report, the gunshots were "distant." At the PCR hearing, the parties stipulated that the forensic pathologist would have testified that "distant" meant 18 to 24 inches or greater. (App. 81).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found Petitioner did not prove counsel was ineffective for not advising Petitioner he would be entitled to a voluntary manslaughter charge when counsel's advice was reasonable and based on a proper understanding of the law, and Petitioner failed to submit sufficient evidence at the PCR hearing to support the charge.

Petitioner asserts plea counsel was ineffective for not advising him he would be entitled to a voluntary manslaughter charge if he proceeded to trial. He further asserts plea counsel's investigation was substandard, and counsel would have discovered facts to support this charge had he conducted a proper investigation.[2] Petitioner contends the following evidence supports a voluntary manslaughter charge: Petitioner was emotionally vulnerable due to his tumultuous relationship with Ex-Wife; Petitioner was psychologically stressed and just wanted to have a conversation with Ex-Wife, but her protective father "got involved and a scuffle" ensued; Petitioner became enraged and did not have a sufficient cooling off period; and the autopsy report showed Victim had cocaine in his system.[3] (Pet. 10). He asserts he would have proceeded to trial if plea counsel had advised him he could receive the voluntary manslaughter charge.

However, plea counsel's advice to Petitioner was reasonable under prevailing professional norms and based on a proper understanding of voluntary manslaughter law. Further, Petitioner did not submit evidence at the PCR hearing to support a voluntary manslaughter charge, making it not reasonably likely he would have proceeded to trial rather than plead guilty. Thus, the PCR

[2] The petition, however, does not indicate what information counsel would have discovered upon a further investigation.

[3] Petitioner also avers his intoxication supported a voluntary manslaughter charge, but the appendix does not support a finding that he was intoxicated at the time of the shooting. (Pet. 10). Petitioner's reference to being "intoxicated from that morning and the night before" was in response to a question about his state of mind when he spoke to law enforcement on June 14, 2007—the day *after* the shooting. (App. 83-84). No testimony in the appendix supports a finding that Petitioner was intoxicated *at the time of* the shooting.

court properly denied relief.

"There is a strong presumption trial counsel provided adequate assistance." Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687 (1984). In other words, "the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different." Green, 351 S.C. at 192, 569 S.E.2d at 322. "A reasonable probability is one sufficient to undermine confidence in the trial's outcome." Id.

At the PCR hearing, Petitioner acknowledged receiving discovery, including the autopsy report. (App. 86). However, he asserted plea counsel did not explain that "distant" in the autopsy report meant 18 to 24 inches or greater. (App. 89). Petitioner testified he told counsel he was arguing with Victim at the time of the shooting. (App. 106). He also testified Victim had a gun. (App. 117). However, when asked whether he told counsel that Victim had a gun, he replied, "I don't recall. I'm not sure." (App. 119). When asked whether Victim pulled a weapon on him, he replied, "I believe he was trying to scare me. But he did have a weapon and, I believe, he was going for it." (App. 117). Petitioner agreed police did not find a gun on Victim. (App. 117).

Petitioner recalled discussing voluntary manslaughter, including that it required "sufficient legal provocation" and "killing with sudden heat of passion." (App. 88). However, he stated that "because [Victim] was shot in the back one of the times, [plea counsel] didn't believe a jury or judge would give [him] a manslaughter charge." (App. 101). Petitioner contended he would not have pled guilty if he had known he could receive a voluntary manslaughter charge. (App. 90).

Plea counsel testified he met with Petitioner 25-30 times and they discussed voluntary

manslaughter. (App. 122-23, 126). However, he was unsure if the judge would charge it here. (App. 121). When asked why, he explained,

> [Petitioner] was in a state of mind where [Ex-Wife] was the source of all his discontent. And [Victim] added to that because, according to [Petitioner], he was interfering in their marriage.
>
> . . . . [M]y review of [discovery] with [Petitioner] was [Petitioner] was probably at the rear of [Victim's] car. [Victim] was in the position of standing with his back to an open door.
>
> As [Petitioner] said in his statement to the City of Columbia police officers, they asked him, why did he shoot him? And [Petitioner] said nothing to do with self-defense, nothing to do with words that [Victim] used to him.
>
> [Petitioner] said that he had either disrespected him or that he had—well, let me just—the police officer asked him: What reason did you shoot him? Answer: Because he hurt me emotionally. That isn't going to make it for a voluntary manslaughter plea, if that came out.
>
> There was no indication of sufficient leave of provocation. [Petitioner] was present with that gun, very probably improperly and unlawfully.

(App. 123-24). Plea counsel explained Starnes[4] was published while he represented Petitioner, and he advised Petitioner it could be interpreted in a way that the trial court may decide not to charge voluntary manslaughter. (App. 139-40).

Plea counsel acknowledged that Petitioner "at one time[] tried to say . . . how the two of them had grappled over the gun." (App. 135). However, he stated Petitioner initially did not mention any scuffling, and the person who drove Petitioner to the mall "didn't see any scuffling" or close physical contact. (App. 137-38, 143). Likewise, he stated the police notes indicated,

[4] State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010) (finding "fear resulting from an attack can constitute a basis for voluntary manslaughter," but "the fear must be the result of sufficient legal provocation **and** cause the defendant to lose control and create and uncontrollable impulse to do violence").

"[Petitioner] said he was standing with [Victim and Ex-Wife] outside their car. He said he was never attacked or struck by [Victim]." (App. 149). Plea counsel explained,

> Sometimes in my practice, clients' testimony changes. And . . . while that may have been said at one time, I would have said to him, Michael, while you're saying you were grappling over the gun, nobody sees that; you immediately, in your statement to police the next day or that same day, don't say anything about grappling over a gun. I think that's something that could go against us.

(App. 138-39). He stated they discussed the meaning of "distant" in the autopsy report, and he was certain he told Petitioner that distant could mean anywhere from 18 to 24 inches to five feet or more. (App. 133, 141, 143).

Plea counsel also explained the State had a recording of a 911 call placed by Ex-Wife during the shooting that likely would have caused a jury to convict Petitioner of murder. (App. 124-26). He testified he played the call for Petitioner, and Petitioner stated, "I see what you mean now." (App. 126).

Additionally, plea counsel stated Petitioner had a history of assaultive behavior toward Ex-Wife, and the State had evidence that Petitioner had offered a friend "up to $15,000 if he would kick [Ex-Wife's] a** in an attempt to keep her with him and to keep her in a marital relationship with him." (App. 131, 135). Finally, plea counsel stated the solicitor had mentioned trying it as a capital case. (App. 126). He explained capital cases are frequent in Lexington County, and the solicitor "was nationally known as not just an advocate of the death penalty, but as a prosecutor who was able to obtain death penalty verdicts." (App. 126, 130). Plea counsel averred that "under all those circumstances, a plea was better than life in prison without parole." (App. 135). He also averred that, "under the circumstances of a possibility of a capital prosecution," proceeding to trial on the hopes of a voluntary manslaughter charge was not a good decision. (App. 140).

A. Trial counsel was not deficient because his advice was reasonable under prevailing professional norms and based on a proper understanding of voluntary manslaughter law.

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." Starnes, 388 S.C. at 596, 698 S.E.2d at 608. "[B]oth heat of passion and sufficient legal provocation must be present at the time of the killing." Id.

In Starnes, our Supreme Court examined whether Starnes was entitled to a voluntary manslaughter charge in his trial for the murders of "Bill" and "Jared." Id. at 593, 698 S.E.2d at 606. At trial, Starnes testified Bill had attacked him earlier that evening while at a bar. Id. at 594-95, 698 S.E.2d at 607. According to Starnes, he was at his house with Bill, Jared, and Starnes's friend "Jody" later that night when Jared pulled a gun on Jody. Id. at 595, 698 S.E.2d at 607. Starnes "ran into the bedroom and retrieved his gun"; when he returned, Bill "was pointing a gun at him." Id. Starnes testified "he felt threatened and was in fear"; as a result, "he shot Bill, then he turned and shot Jared." Id. at 595, 698 S.E.2d at 607-608.

On appeal, the Court found the trial court properly denied Starnes's request to charge voluntary manslaughter. Id. at 600, 698 S.E.2d at 609. It first acknowledged that, depending on the facts, "an unprovoked attack with a deadly weapon or an overt threatening act can constitute sufficient legal provocation." Id. at 598, 698 S.E.2d at 608. Likewise, it noted "that fear resulting from an attack can constitute a basis for voluntary manslaughter." Id. at 598, 698 S.E.2d at 609. However, it cautioned that "the presence of fear does not end the inquiry." Id. Rather, "the fear must be the result of sufficient legal provocation **and** cause the defendant to lose control and create an uncontrollable impulse to do violence." Id.

Here, plea counsel's advice to Petitioner that the trial court may not charge voluntary manslaughter was reasonable under prevailing professional norms. (App. 139-40). Specifically,

as discussed more thoroughly in the following section, no evidence showed Victim made an overt, threatening act toward Petitioner. See State v. Holland, 385 S.C. 159, 166, 682 S.E.2d 898, 902 (Ct. App. 2009) ("[M]erely displaying a willingness to fight, unaccompanied by any overt threatening act toward a defendant, does not constitute sufficient legal provocation."); State v. Rogers, 320 S.C. 520, 525, 466 S.E.2d 360, 362 (1996) ("[M]ere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon."). Further, although Petitioner avers he was emotional over his break-up with Ex-Wife, there is no evidence he *suddenly* went into an uncontrollable rage while arguing with Victim. See Starnes, 388 S.C. at 598, 698 S.E.2d at 609 (rejecting defendant's claim that he was entitled to voluntary manslaughter charge when "he felt threatened and was in fear" after victim pointed gun at him; clarifying fear can support voluntary manslaughter only if it is "the result of sufficient legal provocation **and** cause[s] the defendant to lose control and create an uncontrollable impulse to do violence"). Rather, the evidence shows Petitioner was in a sustained emotional state. (Pet. 10). Thus, it was reasonable for counsel to advise Petitioner the trial court may not charge voluntary manslaughter.

Further, it was reasonable for counsel to consider the evidence as a whole and evaluate whether the jury would believe Petitioner acted in a sudden heat of passion upon sufficient legal provocation. Counsel relayed the following facts he considered when determining the viability of a voluntary manslaughter claim: (1) the evidence showed Petitioner "was probably at the rear of [Victim's] car" and Victim was "standing with his back to an open door," (2) in his statement to police, Petitioner "said nothing to do with self-defense, nothing to do with words that [Victim] used to him," but rather said Victim had hurt him emotionally; (3) Petitioner initially did not mention any scuffling to police, (4) the police notes indicted Petitioner "said he was never attacked

or struck by [Victim], and (5) the person who drove Petitioner to the mall "didn't see any scuffling" or close physical contact. (App. 137-38, 143). Based on this, it was reasonable for counsel to advise Petitioner that a jury may not believe he was acting under a sudden heat of passion based upon sufficient legal provocation.

Finally, based on the fact the solicitor had mentioned seeking capital punishment, the damaging 911 call, and counsel's reasonable assessment that the court may not give a voluntary manslaughter charge and the jury was unlikely to believe such a claim, counsel's advice to plead guilty was reasonable. Because counsel's advice was reasonable and based on a proper understanding of voluntary manslaughter law, Petitioner did not prove counsel was deficient.

B. The PCR court properly found Petitioner did not submit evidence to support a voluntary manslaughter charge; thus, Petitioner has not shown prejudice.

Viewed in the light most favorable to Petitioner, the evidence does not support a finding that Petitioner was acting in a sudden heat of passion upon sufficient legal provocation. Specifically, no evidence supports a finding of an overt, threatening act by Victim. Further, even if Petitioner and Victim were grappling over a gun or Victim reached for the gun to scare him, Victim would have been exercising a legal right in doing so. Finally, no evidence showed Petitioner was acting in a *sudden* heat of passion. Thus, Petitioner failed to show he would have been entitled to a voluntary manslaughter charge—and thus failed to establish prejudice.

Initially, Petitioner did not present any evidence at the PCR hearing of what counsel may have found (other than evidence counsel discussed with Petitioner) upon a further investigation. Thus, Petitioner failed to prove prejudice from counsel's failure to further investigate. See Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998) (reversing PCR when applicant failed to "present any evidence of what counsel could have discovered or what other defenses he would

have requested had counsel more fully prepared for the trial").

Regarding the evidence presented, it is important to note what Petitioner did *not* tell police or testify to at the PCR hearing.[5] In his statement to police, Petitioner did not mention a physical altercation or grappling over a gun; rather, he told police that "he was never attacked or struck by Victim." (App. 139, 149). During his PCR testimony, Petitioner never testified Victim pulled a gun on him.[6] (App. 117). Petitioner never described a physical fight with Victim or an overt, physical action from Victim. Likewise, he never indicated he was afraid of Victim.[7] Overall, nothing in Petitioner's testimony supports a finding that Victim made an overt, threatening act. See State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001) ("Provocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation.").

The facts of Holland, 385 S.C. at 159, 683 S.E.2d at 898, best illustrate why the evidence here does not support a finding of an overt threat by Victim. In Holland, the defendant Lemond Holland got into an argument with Brandt Koehler inside a bar. Id. at 163-64, 682 S.E.2d at 899. After Koehler left the bar, Holland went to his vehicle, "reached inside, and then locked the door." Id. Holland then approached the passenger door of the vehicle where Koehler was sitting and began banging on the window. Id. After two individuals unsuccessfully tried to pull Holland away, the passenger door opened, although it was unclear if Holland or Koehler opened the door.

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[5] Petitioner—not the State—has the burden of proof at a PCR hearing. See Glover v. State, 318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995) ("To establish a claim of ineffective assistance of trial counsel, *a PCR applicant has the burden* of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different." (emphasis added)).

[6] Petitioner merely testified he *believed* Victim was reaching for a gun to scare him. (App. 117). Notably, Petitioner could not recall if he ever told plea counsel that Victim had a gun. (App. 119).

[7] Although he averred Victim was reaching for a gun to scare him, Petitioner's testimony does not indicate Petitioner was actually afraid of Victim.

Id. at 164, 682 S.E.2d at 899. Holland and Koehler "then grabbed each other and locked arms, moving about fifteen to twenty feet away from [the] car." Id. The bar's manager testified Koehler had his head down and "it appeared that Holland was hitting Koehler over the head. Then, three shots were fired." Id. Koehler died from a gunshot wound. Id.

On appeal, Holland argued the trial court erred in denying his request to charge voluntary manslaughter. Id. at 162, 682 S.E.2d at 899. The Court of Appeals disagreed, finding a lack of "evidence, nor any reasonable inferences from the evidence, that at the exact moment Holland killed Koehler, Holland's rage was justified by *legal* provocation." Id. at 167, 682 S.E.2d at 902. The Court recounted testimony that "Holland banged on the car's passenger side window, pointed a gun at Koehler, and repeatedly yanked on the passenger door to get to Koehler." Id. The Court found,

> Even if Koehler opened the door, that act could not be considered sufficient legal provocation because it was obvious that Holland wanted to get Koehler out of the vehicle; Holland, who was already furious and was armed, was on a mission to inflict harm. Further, **the witness' vague characterizations of the physical contact between Holland and Koehler as "tussling" and "wrestling" does not permit an inference that Koehler threw any punches or otherwise posed a genuine threat to Holland through any specific, identifiable hostile act. There was absolutely no evidence that Koehler did anything to pose a genuine threat to the armed and determined Holland**.

Id. at 167-68, 682 S.E.2d at 902 (emphasis added).

Here, testimony that (1) Petitioner and Victim were grappling over the gun and (2) Petitioner believed Victim was reaching for the gun to scare him does not permit an inference that Victim "posed a genuine threat to [Petitioner] through any specific, identifiable hostile act." See id. As noted, Petitioner *never* contended Victim pointed a weapon at him or otherwise approached him in a physical manner. Rather, the evidence shows Petitioner relentlessly pursued Ex-Wife and

argued with Victim when he tried to protect his daughter. Thus, the evidence does not support a finding of a "specific, identifiable hostile act" from Victim.

In the absence of an overt, threatening act by Victim, the argument between the two men—including any words Victim may have said—cannot constitute sufficient legal provocation to support a voluntary manslaughter charge. See Holland, 385 S.C. at 166, 682 S.E.2d at 902 ("[M]erely displaying a willingness to fight, unaccompanied by any overt threatening act toward a defendant, does not constitute sufficient legal provocation."); Rogers, 320 S.C. at 525, 466 S.E.2d at 362 ("[M]ere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon.").

Even if testimony that (1) Petitioner and Victim were grappling over the gun and/or (2) Petitioner believed Victim was reaching for his gun to scare him could constitute sufficient legal provocation (which the State disputes), Petitioner cannot show sufficient legal provocation because Victim would have been exercising a legal right in grappling over a gun and/or reaching for a gun to scare Petitioner.[8] It is important to consider the context in which this argument arose. Prior to this incident, Ex-Wife had separated from Petitioner due to his assaultive behavior toward her. Petitioner was arrested for stalking Ex-Wife, and Ex-Wife had obtained an Order of Protection. Additionally, the mall had placed Petitioner on trespass notice. (App. 27-29, 131, 135). Notwithstanding this, Petitioner *still* persisted in contacting Ex-Wife at the mall. Due to Petitioner's relentless pattern of behavior, law enforcement advised Victim to escort Ex-Wife out of the mall when he picked her up from work. On the day of this incident, Victim was escorting Ex-Wife out of the mall—to protect her from Petitioner—when Petitioner walked with them to

[8] The only evidence showing Victim reached for a gun was Petitioner's self-serving testimony. The evidence as a whole did *not* show Victim had a gun.

Victim's car. To the extent Victim grappled with Petitioner over a gun and/or reached for a gun to scare Petitioner, Victim was acting within his legal right to protect both himself and his daughter. See State v. Tucker, 324 S.C. 155, 171, 478 S.E.2d 260, 269 (1996) ("Here, there is no sufficient legal provocation. If Victim did try to grab the gun, she was only trying to defend herself."); Schuler, 344 S.C. at 632, 545 S.E.2d at 819 ("A victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter."); State v. Norris, 253 S.C. 31, 38, 168 S.E.2d 564, 567 (1969) ("[A] father has the right to defend his daughter from death or receiving serious bodily harm at the hands of a person who makes a malicious and unprovoked assault upon her. The right of the father to defend his daughter is coextensive with the right of the daughter to defend herself."); id. (finding insufficient evidence of legal provocation based on defendant's testimony that the victim "grabbed him by the shoulder" when the victim was "exercising his legal right in protecting his endangered daughter").

Finally, no evidence showed Petitioner acted in a *sudden* heat of passion. Although Petitioner averred Victim was reaching for a gun to scare him, Petitioner never contended he was afraid. Even at the time of his PCR hearing, Petitioner did not assert he was acting out of fear or an uncontrollable impulse to do violence. Thus, assuming *arguendo* Victim *was* reaching for a gun, this factor would not support voluntary manslaughter because Petitioner *never* contended Victim's act of reaching for a gun caused him to act out of control due to fear or an uncontrollable impulse to do violence. See Starnes, 388 S.C. at 598, 698 S.E.2d at 609 (finding defendant's testimony that he felt threatened and afraid after the victim pulled a gun on him did not support voluntary manslaughter charge when no evidence showed defendant was out of control because of fear or was acting under an uncontrollable impulse to do violence). Further, although Petitioner contends he was "emotionally vulnerable" and "psychologically distressed" because "he just

wanted to have a conversation with his ex-wife," these factors do not support a finding that Petitioner was acting under a *sudden* heat of passion. Rather, considered in context with Petitioner's repeated harassment of Ex-Wife—which led to his arrest for stalking—the evidence shows Petitioner was unable to accept the fact that Ex-Wife no longer wanted a relationship. In context, there was nothing sudden about Petitioner's anger; rather, the evidence showed Petitioner had been emotional for weeks, leading him to violate an Order of Protection even after he was arrested for stalking. Cf. Holland, 385 S.C. at 167, 682 S.E.2d at 902 ("Holland's fury never subsided as he relentlessly pursued a retreating Koehler."). Petitioner's flagrant disregard for the Order of Protection and the trespassing notice at the mall cannot now be construed as a sudden heat of passion. Petitioner chose to violate these orders and show up at the mall with a gun. There is nothing sudden about these decisions.[9]

Viewed in the light most favorable to Petitioner, the evidence does not support a finding that Petitioner acted upon sufficient legal provocation in a sudden heat of passion. In the absence of evidence to support a voluntary manslaughter charge, it was not reasonably likely Petitioner would have proceeded to trial in the hopes of being convicted of voluntary manslaughter rather than murder—especially when the solicitor had indicated he would seek the death penalty. Thus, the PCR court properly found Petitioner failed to prove prejudice.

[9] Petitioner's argument that he did not have a sufficient cooling-off period is inapposite when nothing shows he acted in a sudden heat of passion.

CONCLUSION

Based on the foregoing, the PCR court properly found Petitioner failed to prove plea counsel was ineffective for not advising him he would be entitled to a voluntary manslaughter charge or further investigating to discover facts to support this charge. Thus, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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ATTORNEYS FOR THE RESPONDENT

This 14th day of July, 2022