THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Edgar W. Dickson, Circuit Court Judge

Case No.: 2018-CP-10-1658

Kadrin Singleton, 335449, Petitioner,

vs.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Kadrin Singleton, Petitioner, appeals the Order of Dismissal issued by the Honorable Edgar W. Dickson on January 7, 2022, which was filed on January 10, 2022. Petitioner, through counsel timely filed a Rule 59, SCRCP, Motion. Thereafter, the Court issued an Order Denying Applicant's Motion to Reconsider Pursuant to Rule 59(e), SCRCP, on June 30, 2022, which was filed on July 5, 2022. Petitioner, through counsel, received notice of the entry of the Order on July 18, 2022.

Respectfully submitted,

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August 15, 2022

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Kadrin Singleton, #335449, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2018-CP-10-1658 **ORDER DENYING APPLICANT'S MOTION TO RECONSIDER PURSUANT TO RULE 59(E), SCRCP**

This matter comes before this Court by way of Applicant Kadrin Singleton's "Motion Pursuant to Rule 59(a) & (e)" filed by his counsel, Tricia Blanchette, on January 28, 2022. Applicant asked this Court to alter, amend or reconsider its Order of Dismissal. This Court makes the ruling as follows:

I. PROCEDURAL HISTORY

Kadrin Singleton (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. On March 4, 2013, the Charleston County grand jury indicted Applicant for murder, possession of a stolen motor vehicle, failure to stop for a blue light, and trafficking in cocaine (2013-GS-10-1153, 2602, 2603, & 1457). (Tr. Vol. 1, p. 11, ll. 5-24; p. 33, l. 2 – p. 37, l. 22). Applicant was represented by Assistant Public Defenders Michael T. Cooper and Megan Ehrlich of the Ninth Circuit Public Defender's Office. Assistant Solicitor Culver Kidd of the Ninth Circuit Solicitor's Office prosecuted the case.

Immediately before trial, Applicant pled guilty to all charges except murder. Sentencing was deferred on the charges to which Applicant pled guilty. Applicant was tried for murder from January 5th – 9th, 2015, the Honorable Kristi L. Harrington, Circuit Court Judge, presiding. (Tr.

Vol. 1, p. 1). At the conclusion of the trial, the jury found Applicant guilty of murder. Judge Harrington sentenced Applicant to life imprisonment for murder (2013-GS-10-1153) and concurrent sentences of ten years for trafficking in cocaine (2013-GS-10-1457), five years for possession of a stolen vehicle (2013-GS-10-2602) and three years for failure to stop for a blue light (2013-GS-10-2603). (Tr. Vol. 5, p. 40, l. 3 – p. 41, l. 9).

Applicant filed a timely notice of appeal and was represented by Appellate Defender David Alexander of the South Carolina Commission on Indigent Defense-Office of Appellate Defense. On appeal, Applicant raised the following issues:

> 1. The trial court erred in refusing Applicant's requested charge that he did not have to wait until he was attacked and allow the assailant to "get the drop" on him because Applicant testified that the decedent threatened him with a gun, which appellant grabbed and used in self-defense.
>
> 2. The trial court erred in granting the State's motion pursuant to *Batson v. Kentucky,* 476 U.S. 79 (1986) because the defense gave race-neutral explanations for its strikes and the State failed to prove pretext.

Following the submission of briefs, the South Carolina Court of Appeals affirmed Applicant's convictions by unpublished opinion filed on July 12, 2017. *State v. Singleton,* Op. No. 2017-UP-283 (S.C. Ct. App. filed July 12, 2017). Applicant petitioned for rehearing, which was denied by the Court of Appeals on September 22, 2017. The remittitur was returned to the circuit court on January 16, 2018.

Applicant then submitted an application for post-conviction relief filed April 2, 2018. Respondent, the State of South Carolina, made its return on July 3, 2018, and moved for a more definite statement. Applicant subsequently amended the Application on November 13, 2019. An evidentiary hearing on this matter was held on January 23, 2020. Applicant appeared and was

represented by Tricia Blanchette and Jeremy Thompson. Assistant Attorney General Benjamin Limbaugh represented Respondent. Applicant testified, along with trial counsel, appellate counsel, and two other witnesses.

Following the evidentiary hearing, the Court issued an order of Dismissal signed January 7, 2022, denying and dismissing this action with prejudice. Applicant filed a motion for reconsideration pursuant to Rule 59(a) and 59(e) on January 28, 2022 asking this Court.

II. FINDING OF FACT AND CONCLUSION OF LAW

This Court issued an order of Dismissal signed January 7, 2022, denying and dismissing this action with prejudice. Applicant filed a motion for reconsideration pursuant to Rule 59(a) and 59(e) on January 28, 2022, where he asked the Court to reconsider its decision based on the entire record, which included by reference, all of the arguments attached in Applicant's proposed order granting relief.

Applicant's primary ground[1] for seeking reconsideration is that the Post-Conviction Court's ruling that counsel was not ineffective for failing to object to the trial court's lack of general permissive inference charge was in error. However, this Court disagrees, and denies Applicant's motion to reconsider.

The Jury in Applicant's case was charged with the following jury charge on malice:

> Express malice is shown when a person speaks words which express hatred or ill-will for another or when the person prepared beforehand to the act which was later accomplished. For example, acts of preparation going to show that the deed was within the

[1] Applicant has also asked the Court to review the record ensure specific findings of fact and conclusions of law were entered on each issue and to ensure the accuracy and completeness of the standing order. This court finds no basis to amend, alter or reconsider on these issues.

defendant's mind would be express malice. Malice may be inferred from conduct showing a total disregard for human life."

Tr. Transcript. Vol. 5. p. 17.

Accordingly, it is the Applicant's contention that because this charge lacks the "general permissive inference" charge[2], trial counsel was ineffective in failing to object the charge given to the jury. However, this Court determines that Applicant was not prejudiced by the omission of general permissive inference charge for a few reasons. First, taken as a whole, the jury charge properly informed the Jury about their ability to take facts and all circumstances into consideration. Before the charge in question was given, the jury was instructed to take into consideration the acts of parties and all facts and circumstances. Trial Tr. Vol. 6. p. 15. Furthermore, the jury was also charged that malice may be shown to exist by inference from the facts and circumstances which are proved, and was subsequently charge on the elements of self-defense. Trial. Tr. Vol 6. p. 16-17. If there was any error from the failure to charge the general permissive instruction and counsel's alleged failure to object to the charge, it was harmless as it was cured by the rest of the charge.

[2] The South Carolina Supreme Court issued a suggested jury charge to be used when *inferred malice due to the use of a deadly weapon arose*. The Charge is as follows: "The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive." *State v. Elmore,* 279 S.C 417, 308 S.E.2d 781 (1983).

This Court finds Applicant failed to present any sufficient reason why this Court should alter, amend, or reconsider its findings of fact and conclusions of law set forth in the Order of Dismissal. IT IS THEREFORE ORDERED that Applicant motion to alter, amend, or reconsider pursuant to Rule 59(e), SCRCP is denied,

AND IT IS SO ORDERED this 30th day of June, 2022.

EDGAR DICKSON
Presiding Judge
Fourteenth Judicial Circuit

Orangeburg, South Carolina

Atty
GS
SOL
AG

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Kadrin Singleton, #335449, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2018-CP-10-1658 **ORDER OF DISMISSAL**

This matter came before me in Charleston County on January 21, 2020 upon Applicant's request for post-conviction relief. The Applicant, Kadrin Singleton, made several arguments in support of his claim of ineffective assistance of trial counsel and appellate counsel. Those arguments and the Court's findings on each are discussed below.

I. Procedural History

Kadrin Singleton (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. On November 20, 2012, Applicant murdered Sharrell Williams in Charleston County. Applicant was arrested for the murder four days later on the night of November 24, 2012. On March 4, 2013, the Charleston County grand jury indicted Applicant for Williams' murder, possession of a stolen motor vehicle, failure to stop for a blue light, and trafficking in cocaine (Ind. #s 2013-GS-10-1153, 2602, 2603, & 1457). (Tr. Vol. 1, p. 11, lns. 5-24; p. 33, ln. 2 – p. 37, 1ns. 22). Applicant was represented by Assistant Public Defenders Michael T. Cooper and Megan Ehrlich of the Ninth Circuit Public Defender's Office. Assistant Solicitor Culver Kidd of the Ninth Circuit Solicitor's Office prosecuted the case.

Immediately before trial, Applicant pled guilty to all charges except murder. Sentencing

was deferred on the charges to which Applicant pled guilty. Applicant was tried for the murder before a jury of his peers from January 5th – 9th, 2015, the Honorable Kristi L. Harrington, Circuit Court Judge, presiding. (Tr. Vol. 1, p. 1). At the conclusion of the trial, the jury found Applicant guilty of murder. Judge Harrington sentenced appellant to life imprisonment for murder (Ind. # 2013-GS-10-1153) and concurrent sentences of ten years for trafficking in cocaine (Ind. # 2013-GS-10-1457), five years for possession of a stolen vehicle (Ind. # 2013-GS-10-2602) and three years for failure to stop for a blue light (Ind. # 2013-GS-10-2603). (Tr. Vol. 5, p. 40, ln. 3 – p. 41, ln. 9).

Applicant filed a timely notice of appeal and was represented by Appellate Defender David Alexander of the South Carolina Commission on Indigent Defense-Office of Appellate Defense. On appeal, Applicant raised the following issues:

> 1. The trial court erred in refusing Applicant's requested charge that he did not have to wait until he was attacked and allow the assailant to "get the drop" on him because Applicant testified that the decedent threatened him with a gun, which appellant grabbed and used in self-defense.
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> 2. The trial court erred in granting the State's motion pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986) because the defense gave race-neutral explanations for its strikes and the State failed to prove pretext.

Following the submission of briefs, the South Carolina Court of Appeals affirmed Applicant's convictions by unpublished opinion filed on July 12, 2017. *State v. Singleton*, Op. No. 2017-UP-283 (S.C. Ct. App. filed July 12, 2017). Applicant petitioned or rehearing, which was denied by the Court of Appeals on September 22, 2017. The remittitur was returned to the circuit court on January 16, 2018.

Applicant filed his application for post-conviction relief on April 2, 2018. The State submitted its Return and Motion for a More Definite Statement on July 3, 2018. On November 15,

2019, Applicant, through counsel, filed an Amendment to Application for post-conviction relief.

In his original application for post-conviction relief, Applicant, through retained counsel Blanchette, alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
   a. "Ineffective assistance of counsel for failure to properly prepare and investigate prior to trial"
      i. Counsel failed to conduct an independent investigation and properly review the evidence with Applicant prior to his trial date
   b. "Ineffective assistance of counsel for failure to properly handle the pre-trial motions/hearings."
      i. Counsel failed to call witnesses and make effective arguments
   c. "Ineffective assistance of counsel for failure to effectively present Applicant's defense and argue for charges in support of that defense"
      i. Counsel failed to utilize witnesses and evidence and argue properly for jury charges

Applicant raised the following allegations in his amended application:

1. Trial counsel rendered ineffective assistance related to the handling of matters related to the jury for the following:
   a. Failure to properly respond to the State's Batson Motion.
   b. Failure to properly utilize information given by jurors post trial and move for a new trial.
2. Trial counsel rendered ineffective assistance related to the juror instructions for the following:
   a. Failure to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction. Gibson v. State, 416 S.C 260, 786 S.E.2d 121 (2016).
   b. The handling of the self-defense instruction.
   c. Failure to request the lesser included manslaughter offenses.
   d. Failure to object to the Allen charge.
3. Appellate counsel rendered ineffective assistance for failing to raise all meritorious issues on appeal (911 call, Biggers) and for failing to file for rehearing.

On January 21, 2020, an evidentiary hearing was convened at the Charleston County Courthouse in front of the Honorable Edgar W. Dickson. Applicant was present and represented by Tricia A. Blanchette, Esquire, and Jeremy A. Thompson, Esquire. Respondent was represented by Benjamin Limbaugh, Esquire. Applicant took the stand and called the following witnesses:

Megan Ehrlich, Esquire, Michael Cooper, Esquire, David Alexander, Esquire, Deanne Vane, and Kendra Drayton. Applicant introduced eight exhibits. Respondent did not call a witness or mark an exhibit. This Court also had before him a copy of the records stemming from Applicant's underlying trial and appeal.

II. Summary of Facts Adduced at Trial

At the time of this murder, Singleton was an admitted marijuana dealer. (Tr. Vol. 4, p. 31, lns. 1-5). Before this murder, Singleton had also previously been convicted of several felonies, including third-degree burglary and strong armed robbery. (Tr. Vol. 4, p. 23, lns. 16-21, p. 86, lns. 5-21).

On November 20, 2012, Singleton was trying to obtain marijuana to sell. (Tr. Vol. 4, p 25, lns. 12-13). Singleton wanted to purchase a quarter (1/4) pound of marijuana. He contacted a friend, who set him up with Chris Felder ("Felder"), whose cousin by marriage, Kenneth Fludd ("Kenny"), could arrange a deal for the marijuana Singleton wanted to purchase. (Tr. Vol. 4, p. 25, lns. 12-16; Tr. Vol 2, pp. 68-69).

Felder contacted Kenny by phone at Kenny's place of employment, a Pizza Hut in Charleston, and asked if Kenny could arrange the transaction. Kenny informed Felder he thought he knew someone who could sell that amount of marijuana and would see what he could do. Kenny contacted his cousin by blood relation, Sherrell Williams ("Williams" or "the victim") by phone, and Williams agreed to sell the quarter (1/4) pound of marijuana to Singleton. (Tr. Vol. 2, pp. 68-70, 72).

Singleton and Felder drove from Summerville to the Pizza Hut where Kenny worked. After arriving at the Pizza Hut and waiting there for approximately five (5) minutes, Kenny came out of the Pizza Hut, and got in the car with the two (2) men. (Tr. Vol. 4, p. 28, ln. 23 – p. 31, ln.

12). They all sat and waited for approximately an hour for the victim to return from Walmart, where he was shopping with his girlfriend, so Kenny could take the men to the victim to get the marijuana. (Tr. Vol. 2, p. 72, lns. 20-74, ln. 25; Tr. Vol. 4, p. 28, ln. 23 – p. 31, ln. 12).

The victim eventually phoned Kenny and told him to meet him at a house on Cambridge Avenue. (Tr. Vol. 2, pp. 74–75). Kenny got in his own car, started it, and told Singleton and Felder to follow him, which they did for approximately five minutes. (Tr. Vol. 2, pp. 74-75; Vol. 4, p. 32, lns. 5-23).

Felder and Singleton then pulled-over a couple of blocks away from the final destination in order to be close to the interstate. (Tr. Vol. 2, p. 75, ln. 11 – p. 79, ln. 6). Kenny then instructed Felder and Singleton to ride with him, which Singleton initially refused to do because he was acting nervous. (Tr. Vol. 2, p. 79, lns. 9-14; Tr. Vol. 4, p. 32, ln. 20 – p. 36, ln. 6). After trying to reassure Singleton he was in no danger, Kenny, exasperated, left in his car alone giving up on the drug deal. (Tr. Vol. 2, p. 79, ln. 21 – p. 80, ln. 6).

Singleton and Felder then phoned Kenny in his car and informed him they had decided to go ahead with the transaction and ride with Kenny to meet the victim. (Tr. Vol. 2, pp. 79 - 80; Tr. Vol. 4, p. 36, ln. 20 – p. 37, ln. 5). Kenny turned his car around and returned to the location at which Singleton and Felder were parked. Singleton and Felder got in the car with Kenny, and left Felder's vehicle parked near the interstate. (Tr. Vol, 2, pp. 79–81).

Singleton, Felder, and Kenny then rode together to a house on Cambridge Avenue, 2364 Cambridge Ave., about two blocks from where Singleton and Felder parked their car, and pulled up alongside an SUV containing the victim Sharrell Williams, which arrived at approximately the same time. (Tr. Vol. 2, pp. 78-79, 82-86, State's Ex. 2; Tr. Vol. 4, p. 37, ln. 20 – p. 38, ln. 1). The victim's girlfriend was driving the SUV, and after dropping the victim off, she drove down the

street to her mother's house, just two houses away. (Tr. Vol. 2, pp. 84-86; State's Ex. 2; Tr. Vol. 3, pp. 11-24). Singleton, Felder, and Kenny got out of Kenny's vehicle and followed the victim Williams into the house. (Tr. Vol. 2, pp. 83-87; State's Ex. 2; Tr. Vol. 3, pp. 11-24; Vol. 4, p. 39, lns. 13-20).

Unknown to any of the four men involved in the drug transaction, the FBI had this residence under video surveillance [unrelated to this murder]. A video camera captured the men getting out of their cars and entering the residence before the murder. (Tr. Vol. 2, pp. 81-86; 121-22; State's Ex. 2).

Once all four men were inside the house, the victim got some marijuana out of the refrigerator and placed it on the counter. (Tr. Vol. 2, pp. 87-91; Tr. Vol. 4, p. 39, lns. 16-20). Kenny noticed that there was a pistol resting on the same counter in the kitchen. (Tr. Vol. 2, p. 92, ln. 23 – p. 94, ln. 8). The victim then began weighing the marijuana and bagged it for Singleton. (Tr. Vol. 2, pp. 87-91; Tr. Vol. 4, p. 40, lns. 5-9). Singleton sent Felder outside, allegedly to get his money to pay for the marijuana. (Tr. Vol. 2, p. 92, lns. 2-17). Felder was captured on the FBI surveillance video leaving the house. (Tr. Vol. 2, pp. 92, 94; State's Ex. 2). Kenny went to use the bathroom next to the kitchen. (Tr. Vol. 2, p. 94, lns. 22-25).

After Kenny returned from the bathroom, Kenny was standing in the kitchen area. Singleton and the victim were standing in the living room/den area, and Singleton was facing the victim. Felder had not returned with the money. Singleton had his hands behind his back. (Tr. Vol. 2, p. 96, lns. 20-23, p. 123, lns. 21-24).

At this point, Singleton stated: "give it up"—at which point Kenny and the victim laughed thinking it was a joke. (Tr. Vol. 2, p. 96, lns. 20-23). Singleton then pulled a gun [a .40 caliber semi-automatic pistol] out from behind his back and fired on the victim Williams. Williams was

shot several times and collapsed on the floor. (Tr. Vol. 2, p. 96, ln. 20 – p. 98, ln. 15).

In reaction to the gunshots, Kenny dove on the kitchen floor behind the kitchen counter. At gun point, Singleton ordered Kenny to give him his car keys. Kenny complied by tossing the keys up in the air to Singleton. Singleton then grabbed the quarter (1/4) pound of marijuana and the gun on the counter and fled out of the residence—firing again on Williams as he left with the pistol he retrieved from the counter. (Tr. Vol. 2, pp. 96-100).

Singleton was captured on the FBI surveillance video leaving the residence and fleeing toward Kenny's parked car. Singleton and Felder [who had remained outside the apartment and never reentered] then fled the crime scene in Kenny's car using Kenny's car keys to start and operate the vehicle. Singleton and Felder abandoned Kenny's car where Singleton and Felder had left Felder's car earlier near the interstate. Singleton and Felder then fled the area in Felder's car. (Tr. Vol. 2, p. 99, lns. 18-21, pp. 119-20; State's Ex. 2; Tr. Vol. 4, p. 55, ln. 7 – p. 56, ln. 9).

The victim Sharell Williams died from one of the gunshot wounds inflicted by Singleton. Williams bled to death at the scene. Kenny ran outside and called 911. Kenny was captured on the FBI surveillance video calling for assistance. The victim's girlfriend, who heard about the shooting, ran from her mother's house to the house where the victim was killed finding his body. (Tr. Vol. 3, pp. 117-33, p. 33; Tr. Vol. 2, pp. 99-103; State's Ex. 2; Tr. Vol. 3, pp. 1-24; Tr. Vol. 4, p. 101, lns. 6-13).

Several days later, at night, Singleton was arrested after a car chase, with police blue lights flashing, and an eventual foot chase, and the use of a police dog. Singleton was driving a stolen vehicle before he fled on foot, and during the foot chase, he discarded a bag of cocaine and marijuana. In the bag with the drugs were two cell phones. At the time of Singleton's arrest, police did not recover these items because the officer chasing Singleton did not see him discard

the bag containing the items. (Tr. Vol. 3 pp. 153-69).

After his arrest, from the Charleston County Detention Center, Singleton phoned an associate and requested the associate or others recover the drugs and cell phones he had discarded during the foot chase. Before the drugs and phones could be recovered by Singleton's associates, a neighbor, in whose yard the drugs and phones had been thrown by Singleton during the foot chase with police, discovered the items and contacted police. Police recovered the evidence. One of these cell phones was directly linked to Singleton at trial, and Singleton's movements on the night of the murder were established with the use of cell phone tower information. The cell phone tower information established Singleton drove from Summerville to the Pizza Hut and then to the area of the house where the murder occurred. And, Singleton then fled the area after the murder occurred. (Tr. Vol. 3, pp. 95-112, 153-69, 173-78, 181-86, State's Ex. 62, 200-06; Vol. 4, pp. 81-82).

After his arrest, Singleton was questioned by police. He denied knowing anything about the victim's murder and denied being present when Williams was murdered. (Tr. Vol. 4, pp. 64-66). He claimed he was at a friend's house at the time the victim was murdered. (Tr. Vol. 4, pp. 64-66). Singleton admitted at trial this was a lie. (Tr. Vol. 4, p. 66).

Police also recovered the .40 caliber pistol used in the murder from another individual. (Tr. Vol. 3, pp. 188-98). The weapon forensically matched two fired shell casings found inside the crime scene. (Tr. Vol. 3, pp. 48-49, pp. 208-14, 216-21). Cell phone tower information also showed Singleton's cell phone "pinged" in Holly Hill, S.C., in close proximity to the residence of the individual who was arrested for possession of the .40 caliber pistol. (Tr. Vol. 3, pp. 188-98, 234-61). Singleton admitted at trial he gave the gun to a friend and asked him to hold it. (Tr. Vol. 4, p. 84-85).

III. Findings of Fact and Conclusions of Law

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the credibility presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a "'reasonably competent attorney.'" 466 U.S. at 687 (quoting *McMann v. Richardson*, 397 U.S. 759, 770 (1970)); Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. *Strickland*, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. *See generally id.*

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*, 466 U.S. 668. First, an applicant must prove that

counsel's performance was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. 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." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, *Wiggins*, 539 U. S. at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. *Id.* at 688; *Harrington v. Richter*, 562 U.S. 86 (2011).

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687; *Harrington*, 562 U.S. 86.

"Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney who observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.* at 689; *see also Bell v. Cone*, 535 U. S. 685, 702 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S at 690.

In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. *Wong v. Belmontes*, 558 U.S. 15 (2009); *Strickland*, 466 U.S. at 693. Instead, *Strickland* asks whether it is "reasonably likely" the result

would have been different. *Id.* at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *Id.* at 693, 697. The likelihood of a different result must be substantial, not just conceivable. *Id.* at 693; *Harrington*, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Each allegation is addressed fully below:

Failure to properly respond to the State's Batson Motion

Following the seating of the jury, the State made a motion pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). R. p. 87. The State challenged the use of the fourteen strikes utilized by the defense on white males and females. R. p. 87. The court requested that the defense offer an explanation for the strikes. R. pp. 87-88. The defense offered an explanation, arguments were made by both parties and the court ruled in favor of the State's motion finding the strikes were pre-textual. R. pp. 88-101. Thereafter, the parties selected a second jury. R. pp. 102-120.

At the evidentiary hearing, Megan Ehrlich, Esquire, addressed the make-up of the jury and the *Batson* motion. PCR p. 16-20. She agreed that the racial make-up of first jury was more diverse. PCR p. 17. She referenced her notes and admitted she did not have any notes regarding the struck jurors of concern. PCR p. 17-18. She admitted it was not good practice to have nothing written and the reason could be due to consultation with lead counsel or there simply was nothing. PCR p. 18-20. When asked, she responded that she had no idea if the first jury would have been better. PCR p. 46.

While Michael Cooper, Esquire, was on the stand, he testified that he did not exercise the strikes on basis of race. PCR pp. 61-62. He explained that he provided all reasons he had for making the strikes. PCR pp. 61-62. He further explained that he did not have a secret reason for striking the potential jurors. PCR p. 63.

During his testimony David Alexander, Esquire, discussed how he raised the *Batson* issue on appeal and his general thoughts on it. PCR pp. 110-111. He testified that he determined that trial counsel provided good reasons for the exercise of the jury strikes. PCR pp. 111, 121.

Also, Deanne Vane and Kendra Drayton, who served as jurors at Applicant's trial, addressed the make-up of the jurors during their testimony and the impact of the make-up of the jury on the jury deliberations. PCR pp. 141-176. Specifically, Ms. Drayton testified that she was on both juries and was the only black and youngest person on the second jury. PCR pp. 158-160.

This Court has thoroughly reviewed the record, *Batson v. Kentucky*, 476 U.S. 79 (1986), and other applicable case law on this issue. As a result, this Court finds that Applicant has failed to establish deficiency on the part of trial counsel for the handling of the *Batson* motion. This Court finds credible the testimony from Mr. Cooper that he did not exercise strikes on basis of race, that he provided all reasons he had for making the strikes, and he did not have a secret reason for striking the potential jurors. This Court also finds persuasive the testimony of Mr. Alexander that he determined that trial counsel provided good reasons for the strikes. This Court finds that Applicant has not established that counsel failed to provide representation within the range of competence required in criminal cases in the handling of the *Batson* motion.

Additionally, this Court finds that Applicant has failed to show resulting prejudice from counsel's performance. It is undeniable that the second jury was less diverse, and the testimony of the jurors raises serious concerns with this Court about the second jury and the fundamental

fairness of the outcome of Applicant's trial, which are addressed herein. Yet, this Court finds that any prejudice Applicant may have suffered from the issues raised regarding the second jury and the instructions given to the second jury are independent of counsel's performance on the matter of the *Batson* motion. As stated, counsel's performance was not deficient in handling the *Batson* motion nor has Applicant established that a more favorable result would have come from the first jury selected. Therefore, this claim must fail under both prongs of the *Strickland* analysis.

Failure to properly utilize information given by jurors post trial and move for a new trial

As is addressed above, the State made a successful *Batson* motion, and a second jury was selected. Juror 108 (Kendra Drayton) and Juror 368 (Deanne Vane) were selected on both juries. After closing arguments and the jury charge, the jury was sent out for deliberation at 9:20 a.m. on Friday morning. R. p. 948. The jury returned after submitting notes, which included a request to replay testimony. R. p. 949. Thereafter, the court informed the parties that the jury was split 6/6, and she intended to give an *Allen* instruction. R. p. 950. At 1:36 p.m., the jury returned and an *Allen* instruction was given, which will be discussed in detail below. The jury was sent back out at 1:39 p.m., and the jury returned with their verdict at 4:03 p.m. R. pp. 953, 955. Thereafter, the jury was polled. R. p. 957.

On January 12, 2015, a post-trial motion hearing was conducted. R. p. 973. As will be addressed below, the majority of the hearing was spent discussing the matters of self-defense, imperfect self-defense, and the lesser included charges. No mention was made of matters involving jurors. At the close of the hearing, the court denied all motions made by the defense. R. pp. 989-990.

On January 20, 2015, defense counsel filed a Motion for Reconsideration of Sentence. Counsel attached affidavits entitled "Affidavit in Mitigation Rule 28" signed by Ms. Vane and Ms.

Drayton. By way of this motion, defense counsel recounted his post-trial interaction with Ms. Vane and Ms. Drayton. Based upon the information contained in the affidavits regarding the jury deliberations, counsel asked for reconsideration of Applicant's life sentence.

On January 23, 2015, the State's Response to Defendant's Motion for Reconsideration of Sentence was filed. A majority of the response set forth the State's argument that the affidavits were improper under Rule 606(b), SCRE. The response argued that the affidavits did not fall under the exception that the "juror conduct rendered the trial 'fundamentally unfair.'" The State concluded that the submitted affidavits were improper since the affidavits did not bring to light misconduct or improper external influences and requested that the court deny the motion for reconsideration.

On February 9, 2015, the Honorable Kristi L. Harrington issued an Order denying the motion to reconsider. By way of the Order she held: "After review of the case, together with Defendant's Motion and State's Response, the Court finds that the sentence imposed January 9, 2015, shall remain in place and hereby denies Defendant's Motion." As the record reflects, the denial of the motion was not raised on appeal.

By way of the Amendment and at the evidentiary hearing, Applicant, through counsel, alleged that trial counsel was ineffective for the failure to properly utilize information given by the jurors post trial and move for a new trial. Upon review of the record, to include the testimony and evidence offered at the evidentiary hearing, and the applicable case law, this Court finds that Applicant has failed to show that trial counsel was ineffective in his representation as well as failing to prove he suffered any prejudice as a result. Significantly, this Court finds that the testimony of the jurors did not invoke any recognized exception that would allow this Court to undermine the sanctity of the jury process. Further, this Court finds that there was no arguable

basis upon which trial counsel could have attained the testimony of the jurors that was presented at the evidentiary hearing. Again, the affidavits presented no basis for further inquiry nor did they provide an avenue to do so.

Ms. Ehrlich explained that it was common practice in the Ninth Circuit Public Defender's Office to send out juror questionnaires post trial. She identified and counsel admitted the questionnaires received from Ms. Vane and Ms. Drayton. PCR pp. 22-24. She addressed some of the responses contained in the questionnaires and responded to counsel's question about Ms. Vane's answer regarding the verdict being a weak compromise due to pressure in the deliberation room. She explained that she was not involved in any investigation into what was meant by that response. PCR pp. 24-25.

She testified that she could not specifically recall conducting research to determine what to do with the information provided by the jurors and that she was not involved in obtaining the affidavits attached to the filed motion. PCR pp. 24-25. She further could not recall discussing filing a motion for a new trial. PCR p. 26.

On cross-examination, she was asked if jurors provided information regarding outside pressures or racial bias, and she responded by reading the jurors written response and agreeing it did not mention race, outside threats or research. PCR pp. 47-48. On redirect, she was asked how she would have responded to the information provided by the jurors if she was lead counsel. She indicated that she would have further investigated and would have considered filing a motion for a new trial. PCR pp. 48, 50. When asked to explain why she would take that course of action, she responded: "Well, I've got two jurors who are saying that they have regrets about their verdict. I, I feel like that could be an appropriate remedy in this situation." PCR p. 48, ln. 25 – p. 49, ln. 2.

She also acknowledged that the jurors "reached out to Mr. Cooper directly after the verdict, and before the, the post-trial motions." PCR p. 49, lns. 9-10.

When Mr. Cooper was on the stand, he acknowledged he handled three murder cases while working as an Assistant Public Defender and that Applicant's case was the only one where a trial was completed. PCR p. 56. He recalled asking Ms. Ehrlich to assist as a second chair three to four weeks before trial. PCR p. 59. As will be discussed in detail below, he asserted that the primary defense was self-defense and/or imperfect self-defense and the backup plan was "this is not murder." PCR p. 65.

Regarding the jury, he recalled the jury was polled and one juror appeared visibly upset. PCR p. 92-93. He explained that he remembered the events that followed since he left the trial and drove to Greenville to participate in his best friend's wedding. He recalled Judge Harrington offering to continue the trial due to his need to be in Greenville for the wedding. PCR pp. 93-94. While driving to Greenville, the juror that was visibly upset called him on his cell phone and explained she wanted to change her vote because it was not murder. She wanted him to tell her what could be done about it. Tr. p. 94.

When asked, he recalled meeting with the jurors and obtaining the affidavits, but he could not remember the specifics. PCR p. 95. He acknowledged that he filed the motion for reconsideration and that he did consider filing a motion for a new trial. PCR p. 95. He explained that he did not file a motion for a new trial since it was his understanding that you cannot impeach a verdict, and he did not consider filing the motion based upon matters of fundamental fairness. PCR pp. 95-96.

While on the stand, he reviewed the previously admitted email he sent to Ms. Ehrlich. PCR p. 97. He testified that he could not recall sending it, but he recalled being annoyed since he did

his job and the jurors frustrated him for not doing their job. PCR p. 97. Specifically, he testified: "I mean I was basically angry and frustrated that these jurors did not – that they say – she says none of us thought Kadrin was a 'murderer.' But they convicted him of murder. So, I mean like I did my job, he did his job, and then these guys want to change their vote. Like I don't know how much more frustrating it could be." PCR p. 97, lns. 13-18.

During Mr. Alexander's testimony, he acknowledged that he had a copy of the motion for reconsideration, response and court's order when reviewing the record for issues to be raised on appeal. PCR pp. 112-113. He explained that the standard of review is not favorable on direct appeal for reviewing a motion to reconsider and such an issue is typically not successful unless there is a "real legal error" such as a sentence that exceeds the maximum provided. PCR p. 113, lns. 4-20. When asked if the assessment would have differed if the attorneys had filed a motion for a new trial or raised matters of fundamental fairness involving the jurors, he responded that he could not honestly answer that question since such was not presented for his assessment. PCR pp. 113-114.

When Applicant's counsel called Ms. Vane to the stand, the State entered an objection. PCR pp. 124-126. The State argued that juror testimony could be used if "there's some allegation or some evidence of an external force that is being put on the jury as in them getting some form of outside information or outside contact during deliberations, things of that nature." PCR p. 125, lns. 16-20. Counsel further argued that there were two grounds for when it could be taken on matters involving internal deliberations and misconduct, which were matters that addressed fundamental fairness at trial and racial prejudice at play within the internal jury deliberations." PCR p. 125, ln. 23 – p. 126, ln. 5. The State concluded that Applicant had not shown a basis "to put forth the juror testimony." PCR p. 126.

In response, Applicant's counsel explained to this Court how the issue developed, provided a copy of the discovery order issued regarding the jurors and referenced the allegations involving the jurors in the amendment. PCR pp. 127-128. In sum, Applicant's counsel argued that juror testimony was relevant to this Court's determination of whether counsel was ineffective in how he handled the information he received from the jurors post trial. PCR p. 130.

Additionally, Applicant's counsel submitted that the juror affidavits were part of the record from General Sessions and were not struck by Judge Harrington as the State requested. Applicant's counsel also noted that the juror questionnaires and testimony from the attorneys regarding the jurors had been admitted at the evidentiary hearing without objection from the State. PCR p. 130. In reliance upon the case law provided to the Court and addressed in detail, Applicant's counsel explained that the majority of the relevant cases utilized a direct appeal analysis, yet in *Shumpert v. State,* 661 S.E.2d 369 (2008), the court indicated that there may be a different standard for admission of juror affidavits or testimony in post conviction relief matters. After addressing Rule 606(b), SCRE, counsel argued that there were exceptions for taking juror testimony on internal jury deliberations such as when matters of fundamental fairness were invoked and to ensure due process. Counsel further explained:

> In these cases, they go through some guideposts because it's that beautiful gray language of what is fundamental fairness. So, they do give us some guideposts such as racial and gender discrimination, coercion, pressure, prejudice. And specifically the cases say, if there's claims of any type of prejudice, it must be investigated. ...what we're saying, by way of this PCR, is that counsel had information regarding these jurors. They even submitted a watered down version of it to the Court, but they didn't properly investigate it or present it via a motion for a new trial.

PCR p. 132, lns. 2-12. After addressing the relevant portions of *Shumpert*, *Hunter*, *Pittman*, and *Winkler* counsel informed the court that she would limit her questions to the exceptions set forth in the case law discussed.[1] PCR p. 136.

After additional brief argument from the State, this Court noted the State's objection and decided that he would hear the testimony and would hold Applicant's counsel to her offer to self-limit her questioning. Additionally, this Court reasoned that the absence of the jury allowed him to hear the testimony; then, he could determine how he would consider it. PCR p. 138.

When Ms. Vane took the stand, she acknowledged that she served as juror 368 at Applicant's trial. PCR p. 139. She recounted how she called trial counsel, answered the questionnaire, met with trial counsel and signed the affidavit. PCR pp. 140-143. She explained that she reached out to trial counsel immediately after trial because she had a "pit in her stomach the minute I walked out the door," and she knew that "justice had been neglected." PCR pp. 141, 146.

Regarding the questionnaire, she did not recall discussing the information in it with Mr. Cooper. PCR p. 143. When asked about her answer to question nine that there was pressure that caused her to change her verdict, she responded that the pressure in "that room was quite, quite high." PCR p. 143, lns. 17-24. She further explained that the *Allen* instruction felt like an admonishment and after it was given it was very difficult – she felt like there was no option but to find Applicant guilty. PCR p. 143-144. Thereafter, counsel asked her if it was pressure she put on herself or if it came from the other jurors, and she responded:

> It was definitely pressure from the rest of it. I think everybody in the, in the – rest of the jury, with one exception, was really ready to go. I heard several different things said in there that, that made me just feel really quite angry about how they were approaching it. Like is – it just didn't matter almost.

[1] *State v. Hunter*, 320 S.C. 85, 463 S.E.2d 314 (1995), *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007), *Winkler v. State*, 418 S.C. 643, 795 S.E.2d 686 (2016).

> But it was – and, and I – the – I don't know exactly what the final moment was that made me say okay, I'll, I'll go as the last one to say that he, he was guilty. I feel very badly about it. I don't know if it was a psycho – psychological kind of intimidation. I don't know what. It was, it was long, long day, a very difficult thing to talk about, something that we did not really have an option other than what the murder call was.
>
> And so I, I basically was just – I may have just caved to their, to their coercion. I, I don't want to use the word coercion necessarily, but I want to say that they, they were just really coming at me about it, and I don't think I, I just – I didn't do very well in that call.

PCR p. 144, ln. 11 – p. 145, ln. 6. She continued to explain the psychological pressure she felt from the other jurors and how she let ten others convince her she was wrong. PCR pp. 145-146. She also explained how Ms. Drayton remained with her until the end and felt the same way she did. She recounted how they contacted each other immediately after the trial regarding their concerns. PCR pp. 149-150.

She explained how her position that Applicant was acting in self-defense in a "drug deal gone bad" was not heard by other jury members and things were said that truly "appalled" her. PCR p. 151, lns. 4-12. She further explained that the other jurors made statements, as follows: "they're both criminals," "who cares," they were "tired of talking about it." PCR p. 151, lns. 9-20. She concluded that she should have stood up to it all. PCR p. 151, lns. 9-20.

When asked if she would have been willing to testify if called in front of Judge Harrington or any other setting, she responded: "Absolutely." PCR p. 153, lns. 18-24. She agreed that her testimony was not just something she had just decided to offer years later. PCR p. 153, ln. 25 – p. 154, ln. 2.

On cross-examination when asked if the comments made by the other jurors were simply jurors expressing their opinions or if they were directed at her, she responded by stating that she heard things that were not appropriate to a jury discussion and that the comments were directed at

her and Ms. Drayton as the last ones holding out. PCR pp. 155-156. She stated: "That's not, that's not justice. You get justice no matter who you are." PCR p. 156, lns. 2-3.

When Ms. Drayton took the stand, she acknowledged that she served as juror 108 at Applicant's trial. PCR p. 158. She recalled that she was 24 going on 25 at the time of trial, and she "very nervous" and "super anxious" since she has missed her first jury duty and thought she was going to jail. PCR p. 158. She recalled being selected on the first jury and explained that it was more racially split than the second jury. PCR pp. 159-160. She testified: "The second selection was majority white." PCR p. 159, ln. 22. She further testified that she was "the only black and youngest juror on the second selection." PCR p. 160, lns. 5-6. She also recalled there being more males on the second jury. PCR p. 160. Thereafter, the following testimony was elicited:

> Question: Ms. Drayton, you indicated, like we already said, you were the lone black female on the second jury, and you also said you were the youngest. How did that affect you being the youngest?
>
> Answer: Being that I was the youngest juror, I felt that my, my input wasn't as valued as other opponent – well, not other opponents, but other jurors. Like I was looked at being the, the young, naïve one who doesn't really understand a lot of what's going on. So, it's like if – her vote is like not as important as another jurors.
>
> Question: And that was actively conveyed to you from the other jurors?
>
> Answer: Yes.

PCR p. 161, lns. 1-13.

She recounted how she obtained counsel's email address from Ms. Vane and emailed him. PCR pp. 162-163. When asked her reason for emailing counsel, she responded:

> Just after we came out, and they, you know, did the, the verdict, it just – it didn't sit right with me. Like I, I felt sick to my stomach and like I remember going back

> out, and sitting in the juror's area, and like I just held my head down. Like I couldn't look at Kadrin because I knew that I didn't feel that what was happening was right.

PCR p. 163, lns. 7-12. She further explained that she immediately tried to convey this to trial counsel. She testified that she thought Applicant was only guilty of trying to defend himself. PCR pp. 163-164.

Regarding her interaction with counsel, she recalled counsel just wanting her to sign the affidavit and she did not recall him asking her any questions or if she wanted to add or explain anything. PCR p. 164. Specifically, she did not recall him asking her whether her age, race, pressure or coercion played a factor into her changing her vote. PCR p. 164.

When asked about her understanding of the jury polling process, she responded that she did not understand that she could say no or change her vote at that point. PCR p. 165. Later this Court asked her about this testimony, and she affirmed that she would have changed her vote when she was polled if she would have known it was an option. PCR pp. 168-169. After this Court's questions on the matter, the State asked: "Why do you think you they would ask you if it is still your verdict if you had to answer the same thing that you had before?" PCR p. 170, lns. 3-5. She responded:

> Because we had just did that vote in the deliberation room. So, my point where I'm looking at it, is they're asking me if that's what I, what I voted. Maybe during the time of, you know, the, the emotions I had going on, maybe I didn't hear him say is this still your vote. Maybe I wasn't thinking clearly to say, you know, okay, he is asking me is this still my vote so I have the option of changing.

PCR p. 170, lns. 6-12.

On direct, she also addressed the reasons why she changed her vote to guilty after the *Allen* charge. PCR pp. 166-168. She agreed with Ms. Vane's testimony that jurors made comments about it just being two drug dealers and "why does it matter." PCR p. 166, ln. 22-25. Specifically, she recalled statements about it not mattering that you had one drug dealer going to jail and one drug

dealer that was dead. PCR pp. 166-167. She also recalled jurors just wanting to conclude deliberations to avoid traffic and get home. PCR p. 167. When asked about the comments, she agreed it was not justice. PCR p. 167. Thereafter, the following testimony was elicited:

> Question: Did you feel that, in that jury deliberation room, your unique perspective as the lone young, female, black juror was valued by the other jurors?
>
> Answer: No.
>
> Question: Do you want to explain that at all or have – do – you already have?
>
> Answer: I mean I feel like, at certain points, like I tried to explain to people like look at it from another point of view. Like take into consideration – put yourself in that person's shoes, and they were just like, you know, the facts are the facts. Like this happened, and this is a result. So, it's like – I just felt like, I, I – my opinions were being dismissed.

PCR p. 167, ln. 23 – p. 168, ln. 10.

On cross-examination the State asked her if there was any extraordinary pressure that caused her to change her vote, and she responded:

> I would say someone stating that it doesn't matter because one's a drug dealer and other one's dead, that that's a pressure. You basically saying that it's a waste of time to be here, and me arguing that I don't feel that this guy is guilty, you're telling me that it's pointless. Like were even doing this. I felt that that – well, I fell that that's a, a big pressure to be putting on someone when you have just a – at that time, it was probably two to three people who were still holding on to the not guilty verdict, and then you have other people who are just telling you that they want to get it over with, and that they're ready to go home, yeah, I do feel like that's extraordinary pressure to put on someone.

PCR p. 171, ln. 21 – p. 172 ln. 8.

When asked if the statements were truly directed at her, she explained that the statements were being directed at her and that the statements were clearly being made towards the hold-outs, which would include her. PCR p. 172-3. She clarified that she never stated that she was threatened

but that she was pressured. PCR p. 173, ln. 15-20. When the State called the pressures "normal," she responded that the pressures were not normal that caused her to change her vote. PCR p. 174, lns. 6-11. She further responded that she was not aware that the foreman could have sent a note stating that they could not reach a verdict, and she thought that they had to reach a unanimous verdict before they were able to leave. PCR p. 173, ln. 21 – p. 174, ln. 5.

On redirect, Ms. Drayton affirmed that she would have had a more vivid memory of the pressures and what occurred when she spoke with Mr. Cooper, but he did not ask her about it. PCR pp. 175-176. On direct, she agreed that she would have been willing to testify immediately after trial. PCR p. 166.

When Applicant took the stand, he testified that he was not present at the post trial motion nor did he waive his appearance. PCR p. 185. He stated that he would have wanted to be present. PCR p. 186. He explained that he was not aware of the information counsel had obtained regarding jurors until several months after the post-trial hearing and motion was decided. PCR p. 186. He testified that he would have wanted to be informed at the time the information was known or obtained by counsel, which was when the motion was pending. PCR p. 186. He further testified that he would have wanted counsel to present all available information and/or the full picture to the court, file and/or argue the appropriate motions and involve him in the process. PCR pp. 185-187.

Rule 606(b), SCRE, provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence

of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

As was argued by Applicant and conceded by Respondent, this Court finds that South Carolina courts have recognized exceptions to the exclusion of juror testimony or affidavits regarding internal influences: 1) to ensure fundamental fairness, and 2) to ensure due process. The appellate courts have also set forth guideposts to help define what invokes concerns of fundamental fairness such as racial and gender discrimination, coercion and prejudice.

In *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369 (2008), the South Carolina Supreme Court found that the lower court did not err in excluding a juror affidavit in ruling upon a post-conviction relief application.[2] The Court determined that the question was whether the affidavit offered suggested that the conduct of Petitioner's jury rendered his trial fundamentally unfair. *Id.* at 67–68, 661 S.E.2d at 372. The Court reasoned that the information could not simply amount to "buyer's remorse," and the affidavit at issue was based largely on speculation and hindsight. *Id.* at 65, 68, 661 S.E.2d at 370, 372.

The Court recognized the following exception to the Rule 606(b) categorical prohibition: juror testimony regarding internal misconduct may be received only when necessary to ensure fundamental fairness.[3] *Id.* at 67, 661 S.E.2d at 371. The Court acknowledged that no specific guideposts for defining fundamental fairness had been previously articulated, but in examining existing precedent the court noted that the testimony must raise concerns of substantial injustice.

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[2] In addressing the precedent, the Court noted: "Both of these cases were direct appeals from criminal convictions. The parties to the instant case did not argue that the rules for the introduction of juror testimony and the standard of a grant for post conviction relief based on internal jury misconduct differ from the standard applicable on direct appeal. We therefore assume, but do not decide, that the analysis outlined in our direct appeal precedent applies. *Id.* at 67, n.1, 661 S.E.2d at 371, n.1.

[3] The Court also held that even if circumstances called for the admission of the affidavit, prejudice must be established to warrant a new trial. *Id.* at 69, n.2, 661 S.E.2d at 371, n.2.

Additionally, the Court acknowledged that if the testimony involves matters of prejudice; then, the matter must be investigated. *Id.* at 67–68, 661 S.E.2d at 372.

In *Shumpert*, the Court referenced *State v. Hunter*, 320 S.C. 85, 463 S.E.2d 314 (1995), which involved a direct appeal from a motion for a new a trial. In *Hunter*, the Court reasoned that juror testimony involving internal matters is only competent when necessary to ensure due process, i.e. fundamental fairness. *Id.* at 88, 463 S.E.2d at 316. The Court further reasoned that racial prejudice invokes matters of fundamental fairness. *Id.* The Court determined that this standard was not met in the instant case despite the juror using a racial slur since there was no evidence it was directed at an individual. Additionally, the court found no evidence of threats or coercion. *Id.* at 89, 463 S.E.2d at 316.

In *State v. Pittman*, 373 S.C. 527, 553–54, 647 S.E.2d 144, 157 (2007), the South Carolina Supreme Court addressed the argument that the verdict returned by the jury was not a unanimous verdict based upon post trial comments and that the lower court erred in denying a post-trial motion on such grounds. The Court held that the lower court was correct in finding that the testimony offered did not implicate fundamental fairness. *Id.* at 553, 647 S.E.2d at 158. In consideration of precedent argued by Pittman concerning internal influences where courts have held that fundamental fairness required the granting of a new trial, the Court concluded: "In contrast, while the jurors in this case expressed that they felt coerced into voting guilty, no testimony was presented to actually show coercive behavior." *Id.* at 555, 647 S.E.2d at 158. After discussing the statements regarding the law allegedly made by the other jurors and the polling of the jury, the Court reasoned: "The jurors' post-verdict testimonies are representative of many jury deliberations where individuals are persuaded, for whatever reasons, to change their vote. As long as the reason

prompting the change was not coercive or oppressive, the court should not disturb the finality of the verdict." *Id.*, 647 S.E.2d at 158.

> We find that these misunderstandings of the law regarding the unanimity of the verdict were insufficient to warrant a new trial. The trial court was correct in its order that such instances of internal influence do not implicate fundamental fairness. Although Appellant cites several cases concerning internal influence where courts have held that fundamental fairness required the granting of a new trial, the instant case does not present similar circumstances. Most of the cases upon which Appellant relies contain an internal influence of a coercive nature (i.e. racial prejudice, gender bias). In contrast, while the jurors in this case expressed that they felt coerced into voting guilty, no testimony was presented to actually show coercive behavior. As other courts have held, a jury's misapprehension of the law is not enough to impeach a verdict. *See Chi., Rock Island & Pac. R.R. v. Speth,* 404 F.2d 291, 295 (8th Cir.1968).

Pittman, 373 S.C. at 554–55, 647 S.E.2d at 158.

> Additionally, even if the jurors mistakenly believed the incorrect information from another juror, they were given ample opportunity to voice those concerns before the trial court accepted the verdict. Before the deliberations, the trial court explicitly charged that a unanimous verdict was not the same as a majority verdict. Moreover, upon receiving the jury verdict, the foreman was asked if the verdict was actually what the jury decided. The trial court also polled each juror, confirming that each agreed with the verdict. *See Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002) (noting that the trial court conducts a poll of the jury for the specific purpose of ensuring a unanimous verdict). The jurors' post-verdict testimonies are representative of many jury deliberations where individuals are persuaded, for whatever reason, to change their vote. As long as the reason prompting the change was not coercive or oppressive, the court should not disturb the finality of the verdict.

Pittman, 373 S.C. at 555, 647 S.E.2d at158.

> Both of those decisions recognize that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.' This might occur in the gravest and most important cases; and without attempting to define the exceptions, or to determine how far such evidence might be received by the judge on his own motion, it is safe to say that there is nothing in the nature of the present case warranting a departure from what is unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict.

McDonald v. Pless, 238 U.S. 264, 268–69 (1915).

> Although Rule 606 expressly prohibits the introduction of juror testimony regarding both the content and the effect of statements occurring during the jury's deliberations, this Court has recognized an exception to that categorical prohibition. In *State v. Hunter,* this Court held that juror testimony involving internal misconduct may be received only when necessary to ensure fundamental fairness. 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995). That case involved allegations by a juror that the verdict was tainted by racial prejudice, and this Court affirmed the rule announced in *Hunter* in the later case *State v. Aldret,* 333 S.C. 307, 509 S.E.2d 811 (1999), which involved allegations that the jury began deliberations prematurely. The Court has instructed that a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial. *Id.* at 314, 509 S.E.2d at 814.

Shumpert v. State, 378 S.C. 62, 67, 661 S.E.2d 369, 371 (2008).

> *State v. Hunter,* the seminal case from this Court on the issue of juror testimony regarding statements and conduct during the deliberative process, involved a juror's allegations that she was coerced through racial intimidation to cast her vote one way. We held "[i]f a juror claims prejudice played a role in determining the guilt or innocence of a defendant, investigation into the matter is necessary." 320 S.C. at 88, 463 S.E.2d at 316. "To hold otherwise," we stated, "would violate 'the plainest principles of justice.' " *Id.* The case *McDonald v. Pless,* a federal decision, similarly recognizes the potential for "instances in which [juror testimony] could not be excluded without violating the plainest principles of justice." 238 U.S. 264, 268-69, 35 S.Ct. 783, 59 L.Ed. 1300 (1915) (internal quotation marks omitted). This Court relied on *McDonald* in announcing the limited exception to the exclusion of juror testimony regarding deliberations, *see Hunter,* 320 S.C. at 88, 463 S.E.2d at 316, and other federal precedent echoes *McDonald*'s language that juror testimony must raise significant questions of substantial injustice in order to be admissible. *See, e.g., Downey v. Peyton,* 451 F.2d 236, 239-40 (4th Cir.1971) (describing evidence that the jury's verdict was based on certain extrinsic information as creating such a probability of prejudice that the verdict was deemed inherently lacking in due process.)

Shumpert v. State, 378 S.C. 62, 67–68, 661 S.E.2d 369, 372 (2008).

This Court finds that Applicant has failed to meet his burden of proof in showing any ineffective assistance of counsel or any resulting prejudice. This Court considered the testimony of the jurors presented at the evidentiary hearing and the resulting actions of trial counsel. As noted in the above cited case law, the affidavits and testimony of the jurors in this case presented nothing

that would implicate fundamental fairness and alluded to the normal pressures associated with jury deliberations. "Normal" is used not to minimize the pressure placed on jurors during deliberation nor to disparage the affidavits and testimony of these appropriately concerned jurors. However jury service requires the most serious attention of each juror and honest discussion among the jurors *before* a verdict is reached.

The substance of the original charge from *Allen v. United States*, 164 U.S. 492 (1896) instructed the split jury that:

> in a large proportion of cases absolute certainty could not be expected; that, although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, unon the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

Allen, 164 U.S. at 501.

During Applicant's trial, in providing the jury with the *Allen* charge, Judge Harrington instructed:

> When a matter is in dispute, it isn't always easy for people to agree, even two people to agree, so when twelve of you must agree it becomes increasingly more difficult. In most cases, absolute certainty cannot be reached or expected. However, you have a duty to make every reasonable effort to reach a unanimous verdict. In doing this, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors, tell each other how you feel and why you feel that way, discuss your differences with open minds.
>
> Although the verdict of the jury must be unanimous, every one of you has the right to your own opinion. The verdict you agree to must be your own verdict, the results of your own convictions, and you should not give up your firmly-held beliefs merely to be in agreement with your fellow jurors. The majority should and – should consider the minority's opinion and the minority should consider the

> majority's opinion. You should carefully consider and respect the opinions of each other and reevaluate your own opinions for reasonableness, correctness, and impartiality. You must lay aside all outside matters and reexamine the questions before you, based upon the law and the evidence in this case.
>
> If you do not agree on a verdict in this case, I must declare a mistrial. In that case, it does not mean anybody wins. It simply means that at some future time, I will try this case with some other jury sitting exactly where you are. The same participants will come in and the same lawyers will ask basically the same questions of basically the same witnesses and get the same answers and we'll go through this whole process again.
>
> You were selected in the same manner and from the same source as any future jury will be and there is no reason for me to suppose that this case would ever be submitted to twelve more intelligent, competent, impartial, and conscientious jurors that you are here today.

Tr. Vol. 5, p. 24 ln. 7 – p. 25 ln. 18.

All these direct and focus the jury on each juror's duty to their conscience, to determine the facts, to apply the law and to speak the truth to the parties that placed their trust in them. It is not an easy job, nor should it be taken lightly. However once the verdict is pronounced and the jury polled, the jury's decision cannot be overturned without substantial verifiable reason. A juror's failure to speak his conscience, or to ignore the judge's instructions, or to second guess his decision is not grounds to overturn a verdict nor to grant PCR.

At most, the affidavits presented to the trial court and the testimony presented to this Court allege internal influences placed on the jurors. This Court finds no reference to any racial bias alleged towards the defendant nor was there any allegation of truly coercive behavior towards any of the jurors. This Court shares the frustration of trial defense counsel. While this Court allowed considerable latitude in the juror's testimony, their testimony did not establish extraneous prejudicial influences or any improper outside influences. Consequently considering the testimony of the jurors, there was no legally recognized justification for overturning the verdict or granting PCR. There was no testimony presented that would warrant this Court finding ineffective

assistance of trial counsel nor any prejudice resulting from the alleged deficiency. Applicant has also failed to prove any prejudice resulting from the alleged ineffective assistance of counsel. Applicant has not proven the result of his trial would have been different had counsel made a new trial motion. There were no grounds upon which trial counsel could have attained the testimony of the jurors and if he had, this Court finds it unlikely that the trial court would have decided differently in regards to the nature of the deliberations.

Failure to request voluntary manslaughter instruction

Applicant alleges that trial counsel was deficient for failing to request an instruction on the lesser-included offense of voluntary manslaughter. Applicant argues that he was prejudiced by trial counsel's failure to request a voluntary manslaughter instruction. This Court finds Applicant has failed to meet his burden in proving deficiency or any resulting prejudice. Applicant also argues that trial counsel was ineffective for failing to preserve his request for a jury charge on imperfect self-defense. This Court does not find relief is warranted on the imperfect self-defense allegation.

At trial Applicant testified that he acted in self-defense when he shot Williams. Specifically, Applicant testified that he and Williams got into a disagreement after Williams shorted him twenty grams of marijuana. R. p. 767, ln. 14-p. 768, ln. 20. He further testified that Williams placed a firearm on the bar top counter, which he took to mean that "he's the king of the jungle, and I'm in his jungle right now." R. p. 770, ln. 15 – p. 771, ln. 6. Applicant grabbed the gun off the counter, at which point Williams "charged" him. R. p. 771, ln. 15 – p. 773, ln. 5. Applicant then shot Williams out of fear for his life. R. p. 774, ln. 23-p. 775, ln. 23. He testified that "[w]hen it all happened, it happened so fast, it was like a [sic] instinct." R. p. 775, lns. 16-17.

Prior to Applicant's testimony at trial, the trial court questioned defense counsel about "unusual" jury requests, and trial counsel stated that "I would potentially request to argue against precedent for an imperfect self-defense charge." R. p. 715, lns. 15-19. During the portion of the charge conference held on the record, however, trial counsel did not request a jury charge on "imperfect self-defense" nor the lesser-included offense of voluntary manslaughter.[4] "Imperfect self-defense" was next mentioned after the jury had reached a verdict, but before the verdict was announced. At that point, the trial court informed trial counsel that "I'll allow you to place everything on the record, including the imperfect self-defense, after the verdict." R. p. 953, lns. 18-22. However, that discussion did not occur immediately following the verdict.

Instead, trial counsel addressed "imperfect self-defense" at the post-trial hearing referenced above. There, he argued that "[t]he intent of requesting an imperfect self-defense charge would be to ask the Court for a charge on manslaughter based on the inference—the concept of imperfect self-defense." R. p. 978, lns. 21-24. When asked if he requested a charge on the lesser-included offense of voluntary manslaughter, trial counsel admitted that he had not. R. p. 978, lns. 7-20; *see also* R. p. 982, lns. 10-11 ("We did not request a voluntary manslaughter charge.") The trial court then questioned the State regarding the propriety of such a request, and the State responded that "I think if they had specifically said, we want a voluntary manslaughter charge, if the Court wanted to look for evidence of provocation and the defendant's direct testimony, arguably one could find it." R. p. 984, ln. 22 – p. 985, ln. 1.

At the evidentiary hearing, Mr. Cooper testified that he knew that Applicant was going to testify that he fired out of fear. PCR p. 67, lns. 21-23. He further testified that he did not recall researching whether fear could serve as a basis for sudden heat of passion. PCR p. 67, ln. 24 – p.

[4] According to trial counsel, the matter of imperfect self-defense was discussed in chambers, but not on the record, and that the trial court indicated that she would not give such an instruction. *See* PCR p. 74, ln. 20-p. 75, ln. 14.

68, ln. 5. He testified that he did not believe that a charge of voluntary manslaughter "was worth requesting under a normal scenario or a classical scenario." PCR p. 68, lns. 9-13. He believed instead that he "was requesting voluntary manslaughter through the imperfect self-defense theory." PCR p. 67, lns. 1-2. He further testified that he did not articulate his basis for requesting imperfect self-defense until the post-trial hearing. PCR p. 79, lns. 2-6.

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). "[B]oth heat of passion and sufficient legal provocation must be present at the time of the killing." *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010). "[A] person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion." *Id.* at 598, 698 S.E.2d at 609. "[T]he 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.* (emphasis in original). For instance, "[t]here can be little argument that an unprovoked knife attack constitutes sufficient legal provocation to warrant the requested charge." *State v. Knoten*, 347 S.C. 296, 307, 555 S.E.2d 391, 397 (2001).

> We reaffirm the principle that a person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion. However, the mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge. Consistent with our law on voluntary manslaughter, in order to constitute "sudden heat of passion upon sufficient legal provocation," 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. Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence.
>
> A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not. Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter—it will not justify it. This is the

> distinction between voluntary manslaughter and self-defense. We reiterate that evidence of self-defense and voluntary manslaughter may coexist and that a charge on self-defense **and** voluntary manslaughter may be warranted. *See State v. Gilliam,* 296 S.C. 395, 373 S.E.2d 596 (1988) (holding the evidence supported both a self-defense charge and a voluntary manslaughter charge).

State v. Starnes, 388 S.C. at 598–99, 698 S.E.2d at 609.

"Under the 'imperfect self-defense' doctrine, the crime is reduced from murder to voluntary manslaughter where a defendant had a genuine but unreasonable fear of imminent peril from the victim, and killed the victim, or where the slayer, although acting in self-defense, was not himself or herself free from blame, as where he or she was the aggressor or used excessive force, although without murderous intent." *State v. Sams*, 410 S.C. 303, 315, 764 S.E.2d 511, 517 (2014) (quoting 40 C.J.S. *Homicide* § 110 (2006)). South Carolina does not recognize the doctrine of imperfect self-defense. *See id.* ("Heretofore, South Carolina has not expressly adopted the doctrine of imperfect self-defense"); *State v. Finley*, 277 S.C. 548, 551, 290 S.E.2d 808, 809 (1982) (the doctrine of "imperfect self-defense" "is not the law in South Carolina.").

This Court finds that Applicant has failed to meet his burden in proving ineffective assistance by trial counsel or any prejudice resulting from the alleged deficiency. Applicant has failed to show how trial counsel was ineffective where the trial court would not have charged the jury on voluntary manslaughter as such facts were not present in the record to support the instruction. Applicant was not entitled to an instruction on voluntary manslaughter when facts in the record did not support acting in a sudden heat of passion upon sufficient legal provocation. Here, unlike in *Knoten*, the actions of the victim that lead to the shooting were directly provoked by Applicant. Applicant, as is noted above by his own testimony, reached for and grabbed the gun before the victim made any aggressive acts towards him. No testimony was presented that would amount to sufficient legal provocation, especially considering the victim only began acting

physically aggressive toward Applicant after Applicant grabbed the gun. Further, as noted in the case law above, Applicant stating he was afraid after the fact is not alone sufficient to meet the standard for sudden heat of passion. Considering these elements and the underlying facts together, this Court finds that Applicant has failed to show deficiency on the part of trial counsel for failing to request a jury instruction on voluntary manslaughter. Further, this Court finds that Applicant has failed to prove prejudice where it is unlikely that if the issue had been preserved for appellate review the appellate courts would have overturned the conviction. As previously stated, this Court finds that Applicant was not entitled to receive an instruction on voluntary manslaughter.

This Court does not conclude, however, that trial counsel was ineffective as to his handling of the "imperfect self-defense" charge. While it does not appear that trial counsel preserved his argument for appeal, this Court cannot conclude that it would have been this case that would have compelled the Supreme Court to recognize "imperfect self-defense" when the Supreme Court has heretofore not recognized that doctrine. The fact that it has now been close to six-and-a-half years since *Sams* only reinforces this Court's conclusion. Accordingly, this allegation is denied, as Applicant cannot show he was prejudiced by trial counsel's failure to preserve his "imperfect self-defense" argument for appeal.

Failure to object to self-defense charge as burden shifting

Applicant argues that trial counsel was ineffective for failing to object to the self-defense charge as it shifted the burden of proof for establishing the defense from the State to the defense. This Court disagrees. The trial court's instruction, when read as a whole, constituted a proper statement on the law of self-defense. *See* Tr. Vol. 5, p. 16 ln. 17 – p. 19 ln. 7. Accordingly, trial counsel was not ineffective for failing to object to jury charges that were proper when given. This allegation is therefore denied since it fails to meet either prong of the *Strickland* analysis.

Failure to object to the jury instruction on malice for lacking the general permissive inference instruction

Applicant alleged that trial counsel was deficient for failing to object to the inferred malice instruction. *See* R. p. 943, lns. 15-16. Applicant argues that he was prejudiced by trial counsel's failure to request that the "general permissive instruction" be given alongside the inferred malice instruction.

The trial court instructed the jury on murder and self-defense. *See* R. p. 942, ln. 17 – p. 746, ln. 6. The trial court gave the following instruction regarding express and inferred malice:

> Malice aforethought may be express or inferred. These terms express and inferred do not mean different kinds of malice but merely mean the manner in which the malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proved.
>
> Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished. For example, acts of preparation going to show that the deed was within the defendant's mind would be express malice. Malice may be inferred from conduct showing a total disregard for human life.

R. p. 943, lns. 4-16. Trial counsel did not object to this portion of the jury charge, nor did he request that the trial court give the "general permissive inference" instruction.

At the evidentiary hearing convened in this case, Mr. Cooper testified that he was not familiar with the general permissive inference instruction. PCR p. 89, lns. 4-9. He further testified that he was "sure" that the general permissive inference instruction would have been helpful. PCR p. 90, lns. 13-16. He did not provide a strategic reason for failing to object to the instruction and stated that "[i]f I didn't object, I didn't object." PCR p. 90, lns. 10-11.

In *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), and *overruled by State v. Burdette*, 427

S.C. 490, 832 S.E.2d 575 (2019), the Supreme Court set forth the standard general permissive inference instruction:

> If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

279 S.C. at 421, 308 S.E.2d at 784. However, the above referenced "general permissive inference" instruction is preceded by the following line: "The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise." *Elmore*, 279 S.C. at 421, 308 S.E.2d at 784. *Elmore* was overruled by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), where the South Carolina Supreme Court held that "the 'use of a deadly weapon' implied malice instruction has no place in a murder . . . prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing." 385 S.C. at 610, 685 S.E.2d at 809. Applicant argued that he should be entitled to the above cited jury instruction, counsel was ineffective for failing to request the instruction, and Applicant was prejudiced as a result of the alleged failure. However, this Court disagrees. Applicant's reliance on *Elmore* in support of his argument is flawed, as Applicant's case does not involve an instruction on malice based on the use of a deadly weapon, and even if it did, evidence was presented warranting a jury charge on self-defense. Thus, the charge in Applicant's case does not merit the mandatory permissive inference instruction. Therefore, Applicant has failed to prove both deficiency on the part of trial counsel and any resulting prejudice.

Failure to object to the Allen Charge

Applicant alleges that trial counsel was ineffective when he failed to object or enter an exception to the *Allen* charge. As discussed above the jury began deliberation on Friday morning at 9:20 a.m. R. p. 948, ln. 5. The jury returned after submitting notes, which included a request to

replay testimony. R. p. 949. Thereafter, the court informed the parties that the jury was split 6/6, and she intended to give an *Allen* instruction. R. p. 950. Trial counsel responded that he thought the charge was appropriate at that time. R. p. 950, ln. 18. At 1:36 p.m., the jury returned and an *Allen* instruction was given. R. pp. 951-952. The jury was sent back out at 1:39 p.m., and no exception was made to the charge. R. p. 953. The jury returned with their verdict at 4:03 p.m. R. p. 955. Thereafter, the jury was polled. R. p. 957.

At the evidentiary hearing, Mr. Cooper testified he recalled the court telling the parties that the jury was split 6/6, and he thought there was no way six people would get "rolled." PCR p. 91. He recalled that they likely verbally reviewed the *Allen* charge, and he recalled not having an objection to the contents of it. PCR p. 92. When asked if he considered objecting to the instruction on any basis, he responded: "I wanted the *Allen* charge." PCR p. 92, lns. 9-13.

When Applicant was on the stand, he testified that he would have wanted counsel to object to the *Allen* charge. PCR p. 185, lns. 2-9.

In *State v. Taylor,* 427 S.C. 208, 214–15, 829 S.E.2d 723, 727 (Ct. App. 2019), the Court of Appeals explained:

> South Carolina approves the use of a modified *Allen* charge, which must be neutral and evenhanded, instruct both the majority and minority to reconsider their views, and cannot be directed at the jurors in the minority. *Workman v. State*, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015); *Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, *State v. Taylor*, 427 S.C. 208, 829 S.E.2d 723 (S.C. App. 2019) 323 (2002). A trial judge has a duty to urge jurors to reach a verdict, but must do so in a way that does not coerce them, eroding their independence and impartiality. No set definition of coercion has emerged; instead, we detect its presence by viewing the charge in context and in light of four factors: (1) whether the charge speaks "specifically to minority jurors"; (2) whether the charge includes "you must return a verdict" type language; (3) whether there was an "inquiry into the jury's numerical division," which is generally coercive; and (4) whether the time between when the charge was given and when the jury returned a verdict demonstrates coercion. *See Tucker v. Catoe*, 346 S.C. 483, 492–95, 552 S.E.2d 712, 717–18 (2001) (per curiam). Like most multi-factor constructs, the *Tucker* test does not tell us the relative weight each factor carries, nor is the list of factors exclusive. *Id.* at

491, 552 S.E.2d at 716 (emphasizing the coercion inquiry "is very fact intensive"); *Workman*, 412 S.C. at 130, 771 S.E.2d at 638 (stating coerciveness must be gauged by context and circumstances).

This Court has reviewed the *Allen* instruction in its entirety, *supra* pp. 30–31, along with the relevant portions of the trial and evidentiary hearing transcripts. Transcript pp. 951–52. This Court is not convinced that trial counsel was ineffective for failing to object to the *Allen* instruction. Trial counsel testified that he wanted the court to give the *Allen* instruction after being informed of the numerical split of the jury. When considering counsel's strategy over the converse strategy of objecting, this Court finds counsel's strategy to be reasonable. Therefore, this Court does not find Applicant's trial counsel was ineffective.

Additionally, this Court finds no prejudice resulting from counsel's decision when considering the viability of such an objection. If counsel had objected and the court denied the objection, this Court finds Applicant would not have been successful on appeal. Despite the brevity of the jury deliberations following the instruction, this Court finds that the instruction could not have improperly spoken to the minority when the jury was evenly split at the time of the instruction. Therefore, this Court finds that the allegation fails under both prongs of the *Strickland* analysis.

Ineffective assistance of Appellate Counsel

Applicant alleges that appellate counsel provided ineffective assistance for failing to raise all meritorious issues on appeal and for failing to file for rehearing. At the evidentiary hearing, David Alexander, Esquire, testified regarding his experience as an attorney and his handling of Applicant's direct appeal.

Mr. Alexander testified that he is an attorney with the Office of Appellate Defense, and he serves as an appellate defender. PCR p. 107. He testified that he has been an appellate defender

for eight years and has been an attorney for twenty years. PCR p. 107. During his time at appellate defense, he estimated that he has handled hundreds of criminal appeals. PCR p. 107.

When asked to explain the process he utilized to prepare his brief in Applicant's case, he responded: "I read the transcript, and I make note of any objections or motion by either side that might be a fruitful issue on appeal, and then just use process of elimination to try to select the best issues for appeal." PCR p. 108, lns. 11-14.

Thereafter, Applicant's counsel asked him about specific issues not raised on appeal. Regarding the *Biggers* hearing, he responded that he did not raise the issue "because of the self-defense and his testimony." PCR p. 108, lns. 19-21. When asked about not raising the defense objection to the cell phone records, he explained that he strongly considered raising the issue, but he did not since law enforcement obtained two warrants and concerns with having to overcome inevitable discovery and good faith exceptions. PCR pp. 108-109. Finally, he explained that he did not have a specific reason for not raising counsel's objection to the 911 call, but he had crossed it off in his notes. Therefore, he could say that he had considered it and decided to not raise it on appeal. PCR pp. 109-110. On cross-examination, he explained that he raised the best issues he found properly preserved in the record. PCR p. 122.

In analyzing a claim of ineffective assistance of appellate counsel, the South Carolina Supreme Court has held that this Court must apply the two prong *Strickland* test just as it would be to a claim of ineffective assistance of trial counsel. *See Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). In *Bennett v. State*, 383 S.C. 303,309, 680 S.E.2d 273, 277 (2009), the South Carolina Supreme Court explained that the lower court should "ask 1) whether appellate counsel's performance was deficient, and 2) whether Petitioner was prejudiced by appellate counsel's deficient performance."

Based upon the record, testimony presented and applicable case law, this Court finds that Applicant has failed to establish that the assistance offered by appellate counsel was deficient or that that he was prejudiced as a result. At the evidentiary hearing, counsel testified to his appellate experience and the process he undertook to identify and argue the issues presented in Applicant's appeal. He addressed the issues not raised and provided a reasonable explanation for not briefing further issues. He also addressed his reasons for not filing for rehearing. It must be noted that filing for rehearing is discretionary and rehearing was filed by Applicant and denied by the appellate court; thus demonstrating the lack of prejudice resulting from counsel not filing for such on Applicant's behalf. Therefore, this Court finds that Applicant's claims regarding appellate counsel must fail for failure to establish ineffective assistance or resulting prejudice.

IV. Conclusion

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

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 Respondent.

AND IT IS SO ORDERED this 7th day of January, 2022.

EDGAR W. DICKSON
Presiding Judge
Fourteenth Judicial Circuit

Orangeburg, South Carolina