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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Edgar W. Dickson, Circuit Court Judge

App. Case No.: 2022-001121

Kadrin Singleton, 335449, Petitioner,

vs.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether the lower court erred for not finding that defense counsel was ineffective and prejudice resulted when counsel did not properly utilize information given by jurors post trial and move for a new trial.

2. Whether the lower court erred in failing to find that defense counsel was ineffective for failing to request voluntary manslaughter instruction and that prejudice resulted.

3. Whether the lower court erred for failing to find that counsel was ineffective and resulting prejudice when counsel did not enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. *Smalls v. State*, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

I. STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. During the March 2013 term of the Charleston County Grand Jury, he was indicted for murder (2013-GS-10-1153). On January 5, 2015, a trial was conducted in front of the Honorable Kristi L. Harrington and a jury. Petitioner was represented by Megan Ehrlich, Esquire, and Michael Cooper, Esquire. The State was represented by Culver Kidd, Assistant Solicitor. On January 9, 2015, the jury rendered a guilty verdict, and the Honorable Kristi L. Harrington sentenced Petitioner to life.

A timely notice of appeal was filed and was perfected by David Alexander, Esquire. On July 12, 2017, the South Carolina Court of Appeals affirmed. *State v. Singleton*, 2017-UP-283 (S.C. Ct. App. filed July 12, 2017). Petitioner filed a *pro-se* Petition for Rehearing on August 3, 2017, which was denied via Order filed on September 22, 2017. The Remittitur was issued on January 16, 2018.

An Application for Post Conviction Relief was filed on April 2, 2018. The State submitted a Return and Motion for a More Definite Statement on July 3, 2018. On November 15, 2019, Petitioner, through counsel, filed an Amendment.

On January 21, 2020, an evidentiary hearing was convened at the Charleston County Courthouse in front of the Honorable Edgar W. Dickson. Petitioner was present and represented by Tricia A. Blanchette, Esquire, and Jeremy A. Thompson, Esquire. Respondent was represented by Benjamin Limbaugh, Esquire. Petitioner took the stand and called the following witnesses: Megan Ehrlich, Esquire, Michael Cooper, Esquire, David Alexander, Esquire, Deanne Vane, and Kendra Drayton. Petitioner introduced

eight exhibits. Respondent did not call a witness or mark an exhibit. The court also had before him a copy of the records stemming from Petitioner's underlying trial and appeal.

At the close of the evidentiary hearing, the court allowed time to obtain the evidentiary hearing transcript. Thereafter, the court requested proposed Orders from both parties. An Order of Dismissal was signed on January 7, 2022 and filed on January 10, 2022. Petitioner, through counsel, submitted a timely Motion pursuant to Rule 59, SCRCP. Respondent submitted a Return on March 16, 2022. The Honorable Edgar W. Dickson issued an Order denying the Motion on June 30, 2022, which was filed on July 5, 2022. This appeal timely follows.

II. ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Where an application for post conviction relief 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 the trial cannot be relied upon as having produced a just result." *Id.* 466 U.S. at 686; *see Butler v. State*, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State*, 321 S.C. 238 (1996); *see also Cherry v. State*, 300 S.C. 238 (1989); Rule 71.1(e), SCRCP.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). 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.

A. The lower court erred for not finding that defense counsel was ineffective and prejudice resulted when counsel did not properly utilize information given by jurors post trial and move for a new trial.

The lower court erred for not finding that defense counsel was ineffective for failing to properly utilize information given by jurors post trial and move for a new trial. By way of the Order of Dismissal, the lower court utilized a majority of the summary of the record and law as set forth in Petitioner's proposed Order, which was noted via Petitioner's Rule 59, SCRCP, Motion, and will be utilized herein. Yet, the lower court found no deficiency or resulting prejudice. Petition submits that the lower court erred in denying relief due to counsel's handling of the issue involving the jurors.

At trial, 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 to deliberate at 9:20 a.m. on Friday. App. p. 948. After addressing notes from the jury, the court informed the parties of a 6/6 jury split and her intention to give an *Allen* instruction. App. pp. 949-950. At 1:36 p.m., the jury returned and an *Allen* instruction was given, which

was the focus of the lower court's analysis. The jury was sent out at 1:39 p.m., and the jury returned with their verdict at 4:03 p.m. App. pp. 953, 955. Thereafter, the jury was polled. App. p. 957.

On January 12, 2015, a post-trial motion hearing was conducted. App. p. 973. Defense counsel did not address any matters involving jurors. At the close of the hearing, the court denied all motions made by the defense. App. pp. 989-990.

On January 20, 2015, defense counsel filed a Motion for Reconsideration of Sentence. App. p. 1053. Counsel attached affidavits entitled "Affidavit in Mitigation Rule 28" signed by Ms. Vane and Ms. Drayton. By way of the Motion, reconsideration of Petitioner's sentence was the only relief requested.

On January 23, 2015, the State's Response to Defendant's Motion for Reconsideration of Sentence was filed. App. p. 1061. 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." App. p. 1065. As the record reflects, the denial of the motion was not raised on appeal.

By way of the Amendment and at the evidentiary hearing, Petitioner alleged that counsel was ineffective for the failure to properly utilize information given by jurors post trial and move for a new trial. In regards to this issue, Ms. Ehrlich testified that she was aware that two jurors had reached out to Mr. Cooper after the trial. App. p. 1199. She identified and recalled Mr. Cooper sharing an email from Ms. Drayton with her, and she recalled him being highly annoyed and not understanding why the jurors had convicted if

they had second thoughts so quickly. App. p. 1201. She explained 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. App. pp. 1201-1203. She addressed the responses contained in the questionnaires and explained that she was not involved in any investigation into the responses or discussion of filing a motion for a new trial. App. pp. 1203-1205.

When asked how she would have responded to the information provided by the jurors if she was lead counsel, she responded that she would have further investigated and would have considered filing a motion for a new trial. App. pp. 1227, 1229. 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." App. p. 1227, ln. 25 – p. 1228, ln. 2. She also acknowledged that the jurors "reached out to Mr. Cooper directly after the verdict, and before the, the posttrial motions." App. p. 1228, 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 Petitioner's case was the only one with a complete trial. App. p. 1235. He recalled asking Ms. Ehrlich to assist as a second chair three to four weeks before trial. App. p. 1238.

After the verdict, he recalled one juror being visibly upset. App. pp. 1271-1272. He remembered leaving and driving to Greenville for a wedding. App. p. 1272. While driving, a juror called him and informed him that she wanted to change her vote because it was not murder and wanted to know what could be done about it. App. pp. 1272-1273.

He recalled meeting with the jurors at issue and obtaining the affidavits, but he could not remember the specifics. App. p. 1274 He acknowledged that he filed the motion for reconsideration and that he did consider filing a motion for a new trial. App. p. 1274. 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. App. pp. 1274-1275.

When Ms. Vane was called to the stand, the State entered an objection. App. pp. 1303-1305. In response, counsel explained how the issue developed, provided a copy of the discovery order issued regarding the jurors and referenced the relevant allegations in the Amendment. App. pp. 1306-1307. Counsel argued that juror testimony was relevant to whether counsel was ineffective in how he handled the information he received from the jurors post trial. App. p. 1309. In reliance upon the case law provided to the court and addressed in detail, 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.[1] 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. App. p. 1311. Thereafter, the State provided additional argument, and the court noted the State's objection and decided that he would hear the testimony. App. p. 1317.

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

Ms. Vane acknowledged that she served as juror 368. App. p. 1318. She recounted how she called trial counsel, answered the questionnaire, met with trial counsel and signed the affidavit. App. pp. 1319-1322. 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." App. pp. 1320, 1325.

Regarding the questionnaire, she did not recall discussing the information in it with Mr. Cooper. App. p. 1322. 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." App. p. 1322, 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 Petitioner guilty. App. pp. 1322-1323. When asked if it was pressure she put on herself or if it came from the other jurors, she stated:

> 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.

App. p. 1323, lns. 11-18. She explained the psychological pressure she felt from the other jurors and how she let ten others convince her she was wrong. App. pp. 1324-1325. She also explained how Ms. Drayton remained with her until the end and felt the same way she did. She recalled their communication after the trial. App. pp. 1328-1329.

She explained that she believed Petitioner was acting in self-defense in a "drug deal gone bad" and her opinion was not heard by the other jurors and things were said that truly "appalled" her. App. p. 1330, lns. 4-12. She recalled the following statements being made: "they're both criminals," "who cares," and they were "tired of talking about

it." App. p. 1330, lns. 9-20. She stated that she would have "absolutely" been willing to testify if called in front of Judge Harrington or any other setting and that her testimony was not just something she had just decided to offer years later. App. p. 1332-1333.

On cross-examination when asked if the comments made by the jurors were jurors stating their opinions or if they were directed at her, she responded 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. App. pp. 1334-1335. She stated: "That's not, that's not justice. You get justice no matter who you are." App. p. 1335, lns. 2-3.

When Ms. Drayton took the stand, she acknowledged that she served as juror 108. App. p. 1337. She recalled that she was twenty-four going on twenty-five 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. App. p. 1337. She recalled being on the first jury, and it being more racially split than the second jury. App. pp. 1338-1339. She testified: "The second selection was majority white." App. p. 1338, ln. 22. She explained that she was "the only black and youngest juror on the second selection." App. p. 1339, lns. 5-6. She also recalled there being more males on the second jury. App. p. 1339. Regarding her position as the youngest, she recalled: "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." App. p. 1340, lns. 5-10.

After trial, she obtained defense counsel's email from Ms. Vane and emailed him. App. pp. 1341-1342. 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.

App. p. 1342, lns. 7-12. She explained she immediately reached out to counsel because she believed Petitioner was only guilty of defending himself. App. pp. 1342-1343.

Regarding her interaction with defense counsel, she recalled counsel just wanting her to sign the affidavit and not asking any questions. App. p. 1343. She did not recall him asking her whether her age, race, or pressure/coercion were a factor in her changing her vote. App. p. 1343.

When asked about the jury polling process, she responded that she did not understand that she could say no or change her vote at that point. App. p. 1344. Later the court questioned her, and she affirmed that she would have changed her vote when she was polled if she would have known it was an option. App. pp. 1347-1348. After the court's questions, 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?" App. p. 1349, 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.

App. p. 1349, lns. 6-12.

On direct, she also addressed the reasons why she changed her vote to guilty after the *Allen* charge. App. pp. 1345-1347. She agreed with Ms. Vane's testimony that jurors made comments about it just being two drug dealers and "why does it matter." App. p. 1345, 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. App. pp. 1345-1346. She also recalled jurors just wanting to conclude deliberations to avoid traffic and get home. App. p. 1346. When asked about the comments, she agreed it was not justice. App. p. 1346. She testified that her unique perspective as a young black female was not valued and that her opinions were being dismissed by the other jurors. App. p. 1346, ln. 23 – p. 1347, 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.

App. p. 1350, ln. 21 – p. 1351, 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. App. pp. 1351-1352. She clarified that she never stated that she was threatened but that she was pressured. App. p. 1352, lns. 15-20. When the State called the pressures "normal," she responded that the pressures were not normal that caused her to change her vote. App. p. 1353, lns. 6-11. She also responded that she was not aware that the foreman could send 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. App. p. 1352, ln. 21- p. 1353, 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. App. pp. 1354-1355. On direct, she agreed that she would have been willing to testify immediately after trial. App. p. 1345.

When Petitioner took the stand, he testified that he was not present at the post trial motion hearing nor did he waive his appearance and would have wanted to be present. App. p. 1364-1365. He explained that he was not aware of the information counsel had obtained regarding jurors until several months after the motion was decided. App. p. 1365. 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. App. p. 1365. 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. App. pp. 1364-1366.

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 Petitioner, conceded by Respondent and found by the lower court, 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.

Also, as noted by the lower court, in *Shumpert v. State*, 661 S.E.2d 369 (2008), this Court found that the lower court did not err in excluding a juror affidavit in ruling upon a post conviction relief application.[2] This Court determined that the question was whether the affidavit offered suggested that the conduct of the jury rendered the trial fundamentally unfair. *Id.* at 372. This 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 370, 372.

This 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 371. This 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. Additionally, this Court acknowledged that if the testimony involves matters of prejudice; then, the matter must be investigated. *Id.* at 372.

In *Shumpert*, this Court referenced *State v. Hunter*, 463 S.E.2d 314 (1995), which involved a direct appeal from a motion for a new a trial. In *Hunter*, this Court reasoned

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[2] In addressing the precedent, this 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 fn. 1.

[3] This 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 fn. 2.

that juror testimony involving internal matters is only competent when necessary to ensure due process, i.e. fundamental fairness. *Id.* at 316. This Court further reasoned that racial prejudice invokes matters of fundamental fairness. *Id.* at 316. This 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, this Court found no evidence of threats or coercion. *Id.* at 316.

Despite addressing the testimony summarized herein and above caselaw, the lower court found that trial counsel was not ineffective and no prejudice resulted when counsel failed to further investigate the information contained in the juror questionnaires and/or present it in a different manner. Petitioner submits that the lower court erred since the affidavits provided to the trial court did not encompass the disturbing testimony offered at the evidentiary hearing, which invokes concerns of fundamental fairness. Additionally, counsel was contacted by the jurors immediately and their concerns were made known to counsel prior to the post trial motion hearing, yet counsel did not address the matter with the trial court at the hearing. Furthermore, when counsel addressed the matter in the Motion for Reconsideration he simply asked for a sentence reduction and failed to address the totality of the situation testified to at the evidentiary hearing by the jurors. Petitioner was prejudiced by not having the opportunity to have the court rule on the complete information, by counsel not having the court rule on granting a new trial and, if denied, having the issue reviewed by the appellate court.

As stated, Petitioner submits the testimony and evidence presented at the evidentiary hearing invokes matters of fundamental fairness, which makes both the testimony proper to consider and the granting of a new trial necessary. In finding

otherwise, the lower court ignored the testimony of both jurors regarding the disregard for due process by the other jurors and pressures put on the testifying jurors to do the same. The court must have also ignored the reported prejudicial statements made about Petitioner and his right to a fair trial being disregarded by the other jurors. Furthermore, in finding the pressures to be "normal" the court failed to properly address the perceived prejudice against the youngest and lone black juror that caused her to believe that her opinion did not matter and more importantly caused her to abandon her not guilty vote. Respondent tried to classify the pressure in the jury room as normal, but both jurors made it clear that it was far from normal and described the outcome as injustice.

Additionally, the lower court was not concerned that both jurors misunderstood the *Allen* charge and Ms. Drayton's misunderstanding of the polling process. When questioned by the court and the parties, Ms. Drayton was adamant that she would have changed her vote when she was visibly upset during the polling process if she would have understood that she could. This testimony must be considered and warrants a finding of deficiency and prejudice since the jurors made their concerns known to counsel via phone call and email immediately, and counsel choose to be annoyed by it instead of fully investigating it and presenting the full picture to the trial court. It also must be noted that Ms. Ehrlich agreed that if she was acting as lead counsel, she would investigate such information and would consider a motion for a new trial, but she could not speak to what was done at the time. Based upon the full record, Petitioner submits that the lower court erred for failing to find that counsel provided ineffective assistance in his handling of the information provided by jurors and for failing to move for a new trial.

Regarding prejudice, the lower court found that Petitioner failed to establish any resulting prejudice, which is actively choosing to ignore the sentence of life imposed upon Petitioner. As a result of counsel's ineffective assistance, the information provided by the jurors in their questionnaires and addressed at the evidentiary hearing was not discussed with them nor was it presented to the trial court. The trial court was not given the opportunity to determine if a new trial was warranted and if she ruled it was not the appellate court was not given the opportunity to review her findings. Here, the lower court was presented with juror testimony that did not simply impeach the verdict but invokes matters of fundamental fairness that counsel chose to be annoyed by because he had done his job and the jury did not. Petitioner urges this Court to find that trial counsel did not do his job and his assistance "undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686. Therefore, a new trial must be granted.

B. The lower court erred in failing to find that defense counsel was ineffective for failing to request a voluntary manslaughter instruction and that prejudice resulted.

By way of his Amendment and at the evidentiary hearing, Petitioner argued that defense counsel was deficient for failing to request an instruction on the lesser-included offense of voluntary manslaughter. Petitioner also argued that he was prejudiced by counsel's failure. The lower court errantly found otherwise.

In addressing this issue, the relevant facts as presented at trial must be considered. Petitioner testified that he acted in self-defense when he shot Williams. Specifically, Petitioner testified that he and Williams got into a disagreement after Williams shorted him twenty grams of marijuana. App. 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." App. p. 770, l. 15-p. 771, l. 6. Petitioner grabbed the gun off the counter, at which point Williams "charged" him. App. p. 771, ln. 15-p. 773, ln. 5. Petitioner then shot Williams out of fear for his life. App. 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." App. p. 775, lns. 16-17.

Prior to Petitioner's testimony at trial, the court questioned defense counsel about "unusual" jury requests, and counsel stated that "I would potentially request to argue against precedent for an imperfect self-defense charge." App. p. 715, lns. 15-19. During the portion of the charge conference held on the record, 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 counsel that "I'll allow you to place everything on the record, including the imperfect self-defense, after the verdict." App. p. 953, lns. 18-22. However, that discussion did not occur immediately following the verdict.

Instead, 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." App. p. 978, lns. 21-24. When asked if he requested a charge on the lesser-included offense of voluntary manslaughter, counsel admitted that he had not. App. p. 978, lns. 7-20, p. 982, lns. 10-11 ("We did not request a

[4] According to counsel, the matter of imperfect self-defense was discussed in chambers, but not on the record, and that the court indicated that she would not give such an instruction. App. p. 1253, ln. 20-p. 1254, ln. 14.

voluntary manslaughter charge.") The 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." App. p. 984, ln. 22-p. 985, ln. 1.

At the evidentiary hearing, Mr. Cooper testified that he knew Petitioner was going to testify that he fired out of fear. App. p. 1246, lns. 21-23. He further testified that he did not recall researching whether fear could serve as a basis for sudden heat of passion. App. p. 1246, ln. 24 - p. 1247, 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." App. p. 1247, lns. 9-13. He believed instead that he "was requesting voluntary manslaughter through the imperfect self-defense theory." App. p. 1246, lns. 1-2. He further testified that he did not articulate his basis for requesting imperfect self-defense until the post-trial hearing. App. p. 1258, 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*, 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*, 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 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).

"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.")

Here, the lower court erred for failing to find that a charge on the lesser-included offense of voluntary manslaughter was warranted based on Petitioner's testimony at trial. At trial, Petitioner testified that he fired out of fear as an immediate reaction to Williams charging him. App. p. 775, lns. 13-18. Williams' charge at Petitioner, in turn, came at the end of an argument where Williams repeatedly threatened Petitioner, including through the use of the firearm that Petitioner used to shoot Williams. There is no doubt that Williams' attack met the sufficient legal provocation element of voluntary manslaughter. *See Starnes*, 698 S.E.2d at 608 ("[W]e have held an unprovoked attack with a deadly weapon to an overt threatening act can constitute sufficient legal provocation.")

Petitioner's testimony that he shot Williams out of fear satisfied the sudden heat of passion element of voluntary manslaughter. Importantly, Petitioner testified that he fired out of "instinct" or an immediate "reaction" to Williams charging him. App. p. 775, lns. 16-18. Petitioner, therefore, was not acting "in a deliberate, controlled manner,

notwithstanding the fact that he is afraid or in fear." *Id.* Instead, Petitioner was "acting under an uncontrollable impulse to do violence and [was] incapable of cool reflection as a result of fear." *Id.*

Petitioner submits that his testimony is analogous to that presented in *State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272 (1993). There, Lowry and the decedent were engaged in an argument outside a grocery store. *Id.* at 398, 434 S.E.2d at 273. "The decedent then moved toward Lowry in a menacing fashion with his arms and hands outstretched toward Lowry as if to grab him." *Id.* Once that occurred, Lowry shot the decedent twice, once in the chest and once in the head. *Id.* Although Lowry testified that he acted in self-defense, this Court found that a charge on voluntary manslaughter was warranted because "[h]ere, there is testimony which, if believed, tends to show that the decedent and Lowry were in a heated argument and that the decedent was about to initiate a physical encounter when the shooting occurred." *Id.* at 399. Here, Petitioner and Williams "were in a heated argument" and "the decedent was about to initiate a physical encounter when the shooting occurred." *Id.* A charge on voluntary manslaughter, therefore, was warranted.

Counsel was deficient in failing to request an instruction on the lesser-included offense of voluntary manslaughter. As noted by the trial court, counsel never made such a request, even through his attempts to request "imperfect self-defense." App. p. 980, lns. 5-17. Counsel's explanation for failing to do so, both before the trial court and before the lower court, was that he did not believe that they could meet the sudden heat of passion requirement. App. p. 980, lns. 8-10; lns. 24-25, App. p. 1249, lns. 1-3. As explained, this is an incorrect conclusion. Furthermore, counsel's strategy was unreasonable, as his

testimony makes clear that he did not recall researching whether fear could serve as a basis for sudden heat of passion prior to trial. App. p. 1246, ln. 24 - p. 1247, ln. 5.

Instead of conducting basic research, counsel endeavored to receive a charge of voluntary manslaughter through the doctrine of "imperfect self-defense." South Carolina, however, does not recognize that doctrine, and it would have been error for the trial court to grant trial counsel's request. Counsel's strategy, in other words, was to argue an issue that he knew would lose in the hopes that the Supreme Court would change the law if Petitioner was convicted instead of researching how his client's testimony could serve as a basis for voluntary manslaughter under the established law of South Carolina. This is not a situation where there were two equally competing options and trial counsel reasonably selected one. Instead, trial counsel picked the option certain to lose instead of picking the option likely to succeed.

Clearly, counsel's deficient performance resulted in prejudice as there is a reasonable probability that the jury would have found Petitioner guilty of voluntary manslaughter instead of murder had that option been available to them. The jury had difficulty reaching a verdict, as evidenced by their need to hear additional testimony and receive an *Allen* charge. App. pp. 949-953. Had the jury been given the alternative of voluntary manslaughter, there is a reasonable probability that the jury would have carried its evident disbelief of the State's evidence to a guilty verdict on that charge. Accordingly, the lower court erred and relief is warranted on this ground.

C. The lower court erred for failing to find that counsel was ineffective and prejudice resulted when counsel did not enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction.

At trial, the court instructed the jury on murder and self-defense. App. p. 942-946. 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.

App. p. 943, lns. 4-16. 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, Mr. Cooper testified that he was not familiar with the general permissive inference instruction. App. p. 1268, lns. 4-9. He further testified that he was "sure" that the general permissive inference instruction would have been helpful. App. p. 1269, 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." App. p. 1369, lns. 10-11.

Petitioner submits that the court committed an error that is not supported by the record or the law by finding that the permissive inference instruction set forth 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), should not have been

given by the trial court; therefore, counsel did not render ineffective assistance of counsel despite his admissions that it would have been helpful and he had no reason for not requesting it.

An inferred malice charge has two components, the charge detailing the circumstances from which malice can be inferred, which is not limited to a deadly weapon, and the general permissive malice instruction. Here, as the Order acknowledges before erroneously finding it was not required, the trial court's charge on murder lacks the general permissive inference instruction. In *State v. Elmore*, 279 S.C. at 421, 308 S.E.2d at 784, this Court set forth a standard permissive inference charge to be used when instructing the jury on the inference of malice from a deadly weapon:

> 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.

As is ignored in the Order, this Court set forth the the standard charge, and issued the following warning: "We caution the bench, that hereafter only slight deviations from this charge will be tolerated." *Id.* As relied upon in the Order, *Belcher* and *Elmore* deal specifically with a charge that permits the inference of malice from the use of a deadly weapon, yet the South Carolina Supreme Court has stated that **all** inferences should be accompanied by the general permissive inference instruction. *State v. Belcher,* 385 S.C. 597, 685 S.E.2d 802 (2009); *State v. Mattison*, 276 S.C. 235, 238, 277 S.E.2d 598, 600 (1981) ("[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the

implication does not require the jury to infer malice but only permits it"), *overruled on other grounds by Belcher*.

In *Belcher*, this Court explained that *Elmore*'s first sentence constituted "[t]he standard implied malice charge" whereas the second sentence constituted "the general permissive inference instruction." 385 S.C. at 612, 685 S.E.2d at 811, fn. 9. Since *Elmore*, South Carolina's appellate courts have repeatedly instructed trial courts to give the general permissive inference charge when the standard implied malice instruction is given and have not limited this instruction to when a deadly weapon inference charge is given. *See State v. Lewellyn*, 281 S.C. 199, 201, 314 S.E.2d 326, 327 (1984) ("The trial bench is reminded that the proper charge on implied malice is that suggested in *Elmore*."), *State v. Peterson*, 287 S.C. 244, 247-8, 335 S.E.2d 899, 802-3 (1985) ("Even though the *Elmore* charge dealt only with the prohibition of a presumption of malice from the use of a deadly weapon, the principle behind the case likewise prohibits the presumption of malice form the intentional doing of an unlawful act."); *Belcher*, 385 S.C. at 612, 685 S.E.2d at 811, fn. 9 (2009) (distinguishing the standard implied malice charge from the general permissive inference charge); *State v. Wilds*, 355 S.C. 269, 277, 584 S.E.2d 138, 142 (Ct. App. 2003) ("In a charge to the jury, the judge should make clear to the jury that it is free to accept or reject the permissive inferences depending on its view of the evidence.").

Also, in *Belcher*, this Court concluded that the inference of malice from the use of a deadly weapon is a "half-truth" because "[o]ther facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of [malice's] component parts" which "include the absence of justification, excuse and mitigation." *Belcher*, 385 S.C. at

609-10, 685 S.E.2d at 808. Similarly, the blanket instruction that malice can be inferred from conduct that shows a total disregard for human life conveys a half-truth because there are circumstances where an individual would act in such a way with justification, excuse or mitigation. Contrary to the Order, Petitioner submits the permissive inference instruction is required when the "total disregard" malice inference charge is given.

A trial attorney's failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient conduct. *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016). Turning to the question of prejudice, the court "must decide whether the erroneous malice instruction contributed to the jury's verdict based on all the evidence presented to the jury." *Gibson* at 265, 786 S.E.2d at 265. "The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge." *Id.* Here, the lower court did not conduct the analysis set forth in *Gibson* but merely concluded: "Thus, the charge in Applicant's case does not merit the mandatory permissive inference instruction. Therefore, Applicant has failed to prove both deficiency and any resulting prejudice." App. p. 1447.

If the lower court had conducted the proper analysis, he would have found that counsel's deficient performance resulted in prejudice. Petitioner testified that he acted in self-defense when he shot Williams. Intentionally shooting a firearm at another individual is clearly "conduct showing a total disregard for human life." App. p. 943, ln. 16. The jury needed to know that it could disregard that inference after it weighed all other evidence presented in the case. Instead, there is a reasonable probability that the jury

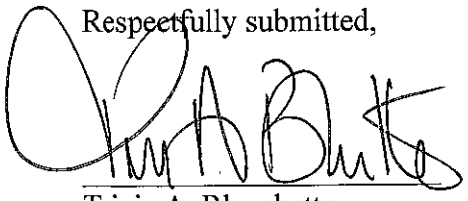
believed that malice had been conclusively proven by Petitioner's testimony alone, as his actions meet the definition of malice as instructed by the trial court.

Furthermore, there was not "overwhelming evidence of malice." *Id.* at 266, 786 S.E.2d at 124. Petitioner's testimony refuted the central allegations against him and established a defense of self-defense. Additionally, his testimony was not unbelievable or lacking in credibility that there was no possibility that the jury would have disregarded his testimony entirely. Moreover, the jury's deliberations show that the State's evidence was not overwhelming. During deliberations, the jury needed to hear additional testimony and required an *Allen* charge to reach a verdict. App. pp. 949-953. Had the jury been instructed that they could disregard the inference of malice, there is a reasonable probability that the jury would have carried its evident disbelief of the State's evidence to a not guilty verdict. Therefore, relief was warranted on this ground.

III. CONCLUSION

Based upon the arguments and record before this Court, Petitioner would respectfully ask that this Court grant certiorari, allow briefing of the issues addressed herein, and/or grant relief.

Respectfully submitted,



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