THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Nov 28 2022

S.C. 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.

APPENDIX
VOLUME IV of IV

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INDEX

This Court finds that a charge on the lesser-included offense of voluntary manslaughter was warranted based on Applicant's testimony at trial. Applicant testified that he fired out of fear as an immediate reaction to Williams charging him. R. p. 775, lns. 13-18. Williams' charge at Applicant, in turn, came at the end of an argument where Williams repeatedly threatened Applicant, including through the use of the firearm that Applicant 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.")

Applicant's testimony that he shot Williams out of fear satisfied the sudden heat of passion element of voluntary manslaughter. Importantly, Applicant testified that he fired out of "instinct" or an immediate "reaction" to Williams charging him. R. p. 775, lns. 16-18. Applicant, therefore, was not acting "in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear." *Id.* Instead, Applicant was "acting under an uncontrollable impulse to do violence and [was] incapable of cool reflection as a result of fear." *Id.*

This Court finds Applicant's testimony 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, the Supreme 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, Applicant 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.

Trial counsel was deficient in failing to request an instruction on the lesser-included offense of voluntary manslaughter. As noted by the trial court, trial counsel never made such a request, even through his attempts to request "imperfect self-defense." *See* R. p. 980, lns. 5-17. Trial counsel's explanation for failing to do so, both before the trial court and before this Court, was that he did not believe that they could meet the sudden heat of passion requirement. *See* R. p. 980, lns. 8-10; lns. 24-25; PCR p. 70, lns. 1-3. Given that this Court has found that voluntary manslaughter was warranted, this was an incorrect conclusion. Furthermore, trial 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. *See* PCR p. 67, ln. 24-p. 68, ln. 5.

Instead of conducting basic research, trial 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. Trial 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 Applicant 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.

Trial counsel's deficient performance prejudiced Applicant as there is a reasonable probability that the jury would have found Applicant 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 to receive an *Allen* charge prior to convicting Applicant. R. 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, relief is warranted on this ground.

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.

iii. Whether trial counsel was ineffective for failing to object to the 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. 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.

2. Whether trial counsel was ineffective for failing to enter an objection or exception 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. *State v. Belcher*, 685 S.E.2d 802, 810 (n. 9) (2009), *overruled in part by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). This Court agrees.

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, ll. 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), 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. The Supreme Court further stated that "only slight deviations from this charge will be tolerated." *Id.* A murder instruction containing an inferred malice instruction that lacks the permissive inference instruction "clearly deviates from the suggested *Elmore* charge." *Gibson v. State*, 416 S.C. 260, 264, 786 S.E.2d 121, 123 (2016). Furthermore, a trial attorney's failure to object to the lack of a permissive inference instruction constitutes deficient performance. *Id.* at 265, 786 S.E.2d at 124.

This Court finds trial counsel's performance deficient. The trial court's malice instruction contains an inferred malice charge but no permissive inference charge. Trial

counsel failed to object to the lack of the permissive inference instruction, which renders his performance deficient. *See id.* at 265, 786 S.E.2d at 124. Moreover, trial counsel's failure to object to the charge was not strategic; indeed, trial counsel admitted as much before this Court. PCR p. 90, lns 10-11. Consequently, this Court now turns to the prejudice inquiry.

"In determining whether petitioner was prejudiced by trial counsel's deficient performance, this Court must decide whether the erroneous malice instruction contributed to the verdict based on all the evidence presented to the jury." *Id.* at 265, 786 S.E.2d at 124 (citing *Rose v. Clark*, 478 U.S. 570 (1986)). "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.* (citing *Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008)).

Trial counsel's deficient performance prejudiced Applicant. Applicant 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." R. p. 943, l. 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 Applicant'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. Applicant'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. R. 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. Accordingly, relief is warranted on this ground.

3. Whether trial counsel was ineffective for failing to enter an objection or exception 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 was sent out at 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 juror was split 6/6, and 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, 829 S.E.2d 723 (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 in its entirety, 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 agree with Applicant's allegation that 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.[7] Therefore, this Court finds that the allegation fails under both prongs of the *Strickland* analysis.

C. Allegations Related to 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 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

[7] This Court finds the testimony of the jurors to be credible regarding the *Allen* instruction, but this testimony is not relevant to how the trial or appellate court would have ruled on an objection to the *Allen* instruction

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.[8] 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."

[8] As is discussed above, he testified that he did not raise the issue of imperfect self-defense since counsel failed to request a voluntary manslaughter instruction. PCR pp. 114-117, 120. He further explained that he did not think he could be successful in arguing that counsel properly preserved the issue for appeal. PCR pp. 115-117, 120.

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.

II. Conclusion

As detailed above, this Court find that Applicant has met his burden of proof as to his specific allegation of ineffective assistance of trial counsel, but Applicant has failed to meet his burden of proof as to all other allegations of ineffective assistance of trial counsel. This Court further finds that Applicant has failed to meet his burden of proof as to the allegation of ineffective assistance of appellate counsel as detailed above. This Court also finds that no further issues were raised that have not been ruled upon above.

Therefore, this Court finds that the Application for Post Conviction Relief is hereby granted, as detailed above, that Applicant's convictions be vacated, and that Applicant be granted a new trial. Applicant shall be transferred from the custody of South

Carolina Department of Corrections to the custody Charleston County pending the disposition of his criminal case, with normal bond proceedings.

IT IS THERFORE ORDERED:

1. That Applicant has met his burden of proof as to his specific allegation of ineffective assistance of trial counsel as detailed above, but has failed to meet his burden of proof as to all other allegations of ineffective assistance of trial counsel as detailed above;

2. That Applicant has failed to meet his burden of proof as to the allegation of ineffective assistance of appellate counsel;

3. That the Application for Post Conviction Relief be granted, Applicant's convictions be vacated, and Applicant be granted a new trial;

4. That Applicant be transferred from the custody of South Carolina Department of Corrections to the custody of Charleston of his criminal case, with normal bond proceedings.

AND IT IS SO ORDRED this ___ day of _____, 2021.

_____
Honorable Edgar W. Dickson
Presiding Judge, Ninth Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA) COUNTY OF CHARLESTON)) Kadrin Singleton, #335449,) Applicant,) v.)) State of South Carolina,) Respondent.)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT 2018-CP-10-1658 CERTIFCATE OF SERVICE

I, Tricia A. Blanchette, Attorney at for Applicant, hereby certify that Pursuant to the Order issued by the South Carolina Supreme Court entitled *RE: Operation of the Trial Courts During the Coronavirus Emergency* (S.C. Sup. Ct. Order amended November 23, 2021), that a true copy of a Motion Pursuant to Rule 59 (a) & (e), SCRCP, has been served on opposing counsel this 28th day of January 2022 by sending an email to her following registered email address:

Lauren Mims, Assistant Attorney General
Laurenmims@scag.gov

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January 28, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
	)	Case No. 2018-CP-10-01658
Kadrin Singleton #335449	)	
Applicant,	)	
	)	
v.	)	**RETURN TO APPLICANT'S MOTION**
	)	**PURSUANT TO RULE 59(e), SCRCP**
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

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 7, 2022. Applicant is asking this Court to alter, amend or reconsider its Order of Dismissal by granting post-conviction relief in the reconsideration of the portion of the Order finding Counsel for Applicant was not ineffective for failing to request that the general permissive interference instruction accompany the malice charge given to the jury. Respondent makes the following return to the motion:

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 Williams' 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 the 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 appellant 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 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 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 ruling pursuant to Rule 59(a) and 59(e) on January 28, 2022.

II. CURRENT MOTION

In his motion, Applicant asks the Court to reconsider its ruling pursuant to Rule 59(e), SCRCP and asks that the Court "review the full record, including the evidentiary hearing transcript, and ensure the accuracy and completeness of the order and/or reconsider the denial of relief." Applicant also asks the Court to "reconsider the facts, reasoning and findings set forth in the Applicant's proposed order" and argues that significant portions of Applicant's proposed order were utilized in the Order of Dismissal." However, the Court's Order of Dismissal contains the required findings of fact and conclusions of law necessary to dispense with Applicant's allegations as required by S.C. Code Ann. § 17-27-80 and Rule 52(a), SCRCP; *see also McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991).

Furthermore, Applicant argues that the Court has "committed an error of law that is not supported by the record in finding that the permissive inference instruction should not have been given by trial court. And accordingly, Applicant argues the Court erred in finding counsel was not ineffective for failing to request a general permissive inference charge to accompany the malice

charge being given, despite an admission that it would have been helpful and there was no strategic reason for not requesting the charge. As a result, Applicant argues that Trial Counsel was deficient, and the Court should conduct a prejudice analysis pursuant to *Gibson v. State* or reconsider the ruling on this issue. Accordingly, Respondent responds to the Rule 59(a) and (e), SCRCP motion in this return and submits that the Court properly ruled on all issues before it, and Applicant's motion should be denied.

III. ARGUMENT

Applicant's assertion that the Court committed an error of law in finding that the permissive inference instruction given in *State v. Elmore*, 279 S.C. 417 (1983), was not required in the charge given to the jury in the instant case has no merit. Accordingly, this allegation should be denied as the Court's reasoning for finding that trial counsel for Applicant was not deficient in failing to request to the malice charge be read with the permissive inference instruction, and thus, Applicant was not prejudiced by this action is valid.

Applicant argues that the permissive inference instruction is required when the "total disregard" malice inference charge is given. However, Respondent submits this assertion is unfounded due to case law surrounding this subject.

In *State v. Elmore*, 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. Specifically, the court suggested:

> 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.

Id. at 421.

In the instant case, the trial judge delivered a charge that did not include the instruction that malice could be inferred from the use of a deadly weapon. Instead, the court charged:

> 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 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.

As stated in *Elmore*, the permissive inference instruction is to be used when there is an instruction given that malice can be inferred from the use of deadly weapon. Respondent submits that the finding of the Court in the order of dismissal is valid based upon *Elmore,* as there was no inferred malice by the use of a deadly weapon instruction given.

Furthermore, Applicant cites to several cases in his motion to the Court that are argued to support that the permissive inference instruction should be given despite the charge of inferred malice based on the use of a daily weapon not being given. However, the cases do not necessarily support that assertion and are distinguishable from the instant case. Initially, Applicant cites *State v. Lewellyn*, 281 S.C. 199 (1984) to display that a permissive inference charge was not required only in inference from the deadly weapons cases, as the underling charge in *Lewellyn* was a malicious injury to real property. In the motion, Applicant points the Court to the assertion that "trial bench is reminded that the proper charge on implied malice is that suggested in *Elmore.*" However, in *Lewellyn*, the Court held that improper burden-shifting was given in the charge. The trial judge in *Lewellyn* charged the jury that "malice is a term of art implying wickedness and excluding a just cause or excuse. It may be implied from an unlawful act, willfully done, until the

contrary be proved." *Id.* Accordingly, the South Carolina Supreme Court found that this language was improper burden-shifting, and reminded the trial bench the charges in *Elmore* did not contain the expressions "rebuttable" "reasonable explanation" or "unless the contrary be proved" suggesting the charge was exemplary in preventing the instance of burden-shifting. *See Id.* at 201. In the instant case, there are no words that would indicate burden-shifting. Additionally, Applicant suggests *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 to support his proposition that the general permissive inference charge is required when the standard malice instruction is given. Similarly in *Peterson*, the Supreme Court of South Carolina found that the trial judge's charge was erroneous due to an improper burden shifting presumption given in the charge. *See Id.* Although Applicant cites to a portion of the ruling that compares presumption of malice from the use of deadly weapon and presumption of malice from the intentional wrongdoing of an unlawful act[1], the South Carolina Supreme Court again used *Elmore* to suggest a malice charge that did not use words or presumptions that could constitute or suggest unlawful burden shifting. *See Id.* at. 247 Accordingly, because there were no words charged that would indicate burden-shifting in the instant case, *Lewellyn* and *Peterson* are inapplicable.

Moreover, Applicant suggests that *State v. Belcher*, 385 S.C. 597, states that all inferences should be accompanied by the general permissive instruction. However, the opinion does warrant that overall conclusion. The opinion states, in a footnote, that the general permissive inference instruction and standard implied malice instruction "remains valid" and is a "correct statement of law" in light of the Court holding that when evidence presented that would reduce, mitigate, excuse, or justify a homicide caused the use of a deadly weapon, juries should not be charged that

[1] Applicant's motion states "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 from the intentional doing of an unlawful act." Applicant's Motion for 59(e), p. 5.

malice can be inferred from the use of a deadly weapon. *Id.* Applicant has not shown that the permissive instruction should be given for all general inferences of malice based upon *Belcher.*

Furthermore, Applicant relies on *State v. Mattison*[2], 276 S.C. 235, 238, 277 S.E.2d 598, 600 (1981) and *State v. Wilds*, 355 S.C. 269, 277, 584 S.E.2d 138, 142. (Ct. App. 2003)[3] to show that it should be made clear to juries that they have the ability to reject or accept the permissive inferences based on the evidence. However, the underlying jury charges in both *Mattison* and *Wilds* included that malice could be inferred from the use of the deadly weapon, which is contrary to the jury charge given here.

In conclusion, Respondent submits that the PCR court did not err in finding that trial counsel was not ineffective for failing to request the general permissive inference instruction at trial because *Elmore* requires the general permissive instruction be read when there is an inference of malice based upon the use of a deadly weapon. Furthermore, because this Court did not err in denying relief based upon counsel not being ineffective, the prejudice analysis in *Gibson v. State*, cited and requested by Applicant is unnecessary, as there was no deficiency, thus no prejudice.

[2] Applicant's motion states " [W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary natural of presumption and that the implication does not require the jury to infer malice but only permits it." Applicant's Motion for 59 (e). p. 5.

[3] Applicant's motes states " In a charge to the jury, the judge would make clear to the jury that it is free to accept or reject the permissive inferences depending on its view of the evidence." *Id.*

IV. CONCLUSION

WHEREFORE, Respondent respectfully requests this Court to deny Applicant's Rule 59(e), SCRCP motion.

Respectfully submitted,

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March 16, 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