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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2022-001244

Rajerick Knight, 353409, Petitioner,

vs.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUES ON APPEAL

1. The lower court erred by failing to properly address the matters raised in the Rule 59, SCRCP, Motion; therefore, a remand is necessary due to the failure of the court to ensure that specific findings of fact and conclusions of law were entered on each issue raised and that the record before the court and testimony of each witness was properly addressed.

2. The lower court must be reversed since the record establishes that counsel's utilization of a mental health expert and defense strategy involving the same amounted to ineffective assistance that resulted in prejudice.

3. The lower court erred by failing to find ineffective assistance and resulting prejudice from counsel's failure to offer further testimony regarding the 2011 incident to the jury.

4. The lower court erred for failing to find ineffective assistance and resulting prejudice when counsel failed to request a proper inferred malice instruction and failed to object to the instruction given to the jury.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. During the October 2011 term of the Beaufort County Grand Jury, he was indicted for murder (2011-GS-07-1673) and possession of a weapon during the commission of a violent crime (2011-GS-07-1674). App. pp. 638-654. On November 26, 2012, a trial was conducted in front of the Honorable D. Craig Brown and a jury. App. p. 1. Petitioner was represented by Arie Bax, Esquire, and Naki Bax, Esquire. The State was represented by Duffie Stone, Solicitor, and Sean Thornton, Assistant Solicitor. On November 29, 2015, the jury rendered a guilty verdict, and the Honorable D. Craig Brown sentenced Petitioner to life. App. pp. 622, 636.

A timely notice of appeal was filed and was perfected by Laura R. Baer, Esquire, and Kathleen Fowler Monoc, Esquire. App. p. 655. On April 1, 2015, the South Carolina Court of Appeals affirmed the conviction and sentence. *State v. Knight*, 2015-UP-170 (S.C. Ct. App. filed April 1, 2015). App. p. 720. The Remittitur was issued on April 1, 2015. App. p. 724

On August 3, 2015, an Application for Post Conviction Relief was filed. App. p. 726. The State filed a Return on May 13, 2016. App. p. 733. On January 10, 2018, Tricia A. Blanchette, Esquire, was substituted in as counsel via written Order. On March 16, 2020, Petitioner, through counsel, filed an Amendment to Application for Post Conviction Relief, which provided:

> Applicant, through counsel, would move to amend his Application, as addressed below. Additionally, Applicant would ask the Court for the relief in the form of having his conviction and sentences vacated to allow for a new trial and/or whatever relief the Court deems proper. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.
>
> In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial. Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of counsel:
>
> 1. Ineffective assistance of trial counsel for failure to obtain all necessary information to properly strike jurors, which resulted in the seating of jurors with media exposure and the denial of the motion for change of venue.
>
> 2. Ineffective assistance of trial counsel for failure to effectively present Applicant's primary defenses, to include failure to effectively utilize a mental health expert in trial and sentencing.
>
> 3. Ineffective assistance of trial counsel for failure to object to improper burden shifting statements to the jury by the court and the State's waiver of first closing argument.
>
> 4. Ineffective assistance of trial counsel for failure to offer further testimony regarding the 2011 incident to the jury.
>
> 5. Ineffective assistance of trial counsel for opening the door to the Solicitor's cross-examination of Applicant regarding a prior shooting incident.
>
> 6. Ineffective assistance of trial counsel for failure to request a proper inferred malice instruction and failure to object to the instruction given to the jury.

App. pp. 747-748.

On November 17, 2020, an evidentiary hearing was convened via the Webex Platform in front of the Honorable Edward W. Miller. App. p. 750. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Benjamin Limbaugh, Esquire. Petitioner testified and called the following witnesses: Arie Bax, Esquire, Dr Donna Maddox, and Deshaunaka Allen. Petitioner introduced one exhibit. App. p. 895. The court also had before him a copy of the records stemming from Petitioner's underlying trial and appeal. At the conclusion of the hearing, the court left the record open for Respondent to determine if additional witnesses needed to be called. App. pp. 890-892.

On March 2, 2021, a virtual hearing was conducted via the Webex platform in front of the Honorable Edward W. Miller. App. p. 900. Petitioner was present at Lieber Correctional Institution and was represented virtually by Tricia A. Blanchette, Esquire. Respondent was represented by Benjamin H. Limbaugh, Assistant Attorney General. After hearing from both parties, no additional witnesses were called and the record was closed.

On March 5, 2021, the court notified the parties of his intent to dismiss the application and asked Respondent to submit a proposed Order. On May 21, 2021, Petitioner, through counsel, provided the court a copy of the evidentiary hearing transcript. On July 14, 2021, Respondent submitted a proposed Order.[1] Upon receipt, Petitioner's counsel asked for the opportunity to address concerns with the proposed Order, and she was given until July 19, 2021 to make an informal response to the court. The informal response was submitted via email on July 19, 2021 and was later addressed via Rule 59, SCRCP, Motion. On November 16, 2021, the Honorable Edward W. Miller issued an Order of Dismissal, which was filed on November 23,

[1] Via the email submitting the proposed Order, Benjamin Limbaugh, Assistant Attorney General, also notified the Court and opposing counsel that he was leaving the Office of the Attorney General to engage in private practice as of the date of the email.

2021. App. p. 918. On December 16, 2021, Petitioner, through counsel, filed a Motion Pursuant to Rule 59(a) & (e), SCRCP. App. p. 940. On July 29, 2022, an Order Denying Rule 59 Motion was issued, which was filed on August 1, 2022. App. p. 953. This appeal timely follows.

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).

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. STATEMENT OF THE FACTS

It is undisputed that Petitioner shot Travis Holmes (victim) in a Subway restaurant on July 26, 2011. At trial, the State called several female eyewitnesses who witnessed Petitioner, in varying parts, come into the restaurant with a female, get food, leave the restaurant, return and shoot victim. App. pp. 173-211. The State also called several eyewitnesses that saw victim come out of the restaurant and collapse and/or saw Petitioner leave in his car. App. pp. 130-138, 148-158. Twp of the witnesses called testified that they heard no words exchanged between Petitioner and victim. App. p. 180, 203, The State introduced a video recording from the surveillance cameras at the restaurant. App. pp. 161-162.

Shiecarra Smalls, the female with Petitioner in the restaurant, was called by the State to testify regarding her interaction with Petitioner and what she witnessed. App. pp. 212-221. She testified that Petitioner picked her up from work and took her to Subway to get food for them and his girlfriend. App. pp. 213-215. After getting their subs, victim walked into the restaurant and she exchanged words with him as they were leaving, but she did not hear any words or argument exchanged between Petitioner and victim. App. pp. 216. When they got back to the car, she got in but Petitioner returned to the restaurant. App. pp. 217. A short time later, Petitioner returned and she saw victim run out of the restaurant and fall on the floor. App. pp. 217-218. After driving away, Ms. Smalls heard Petitioner say on the phone that he shot someone. App. p. 218, lns. 13-17.

The defense proffered the expert testimony of Dr. Thomas Martin, which is discussed at length herein, and the court determined that the testimony regarding Petitioner's state of mind could not be presented to the jury. App. pp. 526-543, 577-580.

Trial counsel argued pre-trial and throughout the trial that he did not have to disclose his defense and what he intended to address regarding the victim's prior history of violence until it became an issue at trial. App. pp. 53-63, 109, 114, 116-123. The court finally agreed that he would rule upon the admissibility of the victim's history when it came up. App. p. 123. A chambers meeting was held, and it was put on the record that the State agreed to the admissibility of testimony regarding an incident in May 2011. App. p. 349. The court also allowed trial counsel to put on the record argument made in chambers regarding incidents in 2008 and 2009 and proffer the law enforcement report. App. pp. 350-367. At the conclusion of the argument and proffer, the court warned trial counsel to not mention the 2008 or 2009 incidents in front of the jury. App. p. 367.

Regarding the 2011 incident, the defense called Sergeant Frasier to testify regarding his investigation of the shooting that took place on May 30, 2011 at the trailer of Lashaunica Allen. App. p. 401. He recalled developing Antwan Robinson as a suspect and finding casing from two different caliber weapons. App. p. 404. He also testified that the victim Lashaunica Allen gave the name Travis Holmes and he informed her there were to individuals with that name. She stated it was the shorter one – Travis S. Holmes. App. p. 413-414.

Lashaunica Allen took the stand and testified about the shooting incident at her home that resulted in the loss of her unborn baby. App. p. 445. She recalled providing Sergeant Frasier the name of Mr. Robinson and Mr. Holmes and Sergeant Frasier stating that he had heard Mr. Holmes name too. App. pp. 465. She testified that she was giving names as they came up and

knew it was Mr. Holmes and Mr. Robinson due to everyone saying it was a white SUV. App. p. 468, 471.

DaQuan Cummings testified that he was Ms. Allen's neighbor and Petitioner was at his trailer when the shooting took place. App. p. 475. He recounted that earlier in the day three cars came in his yard, knocked on his door and the unknown individuals talked about shooting up his house. App. p. 481. He was able to identify the car types. App. p. 483.

Petitioner took the stand in his own defense. While on the stand, he recounted the events that took place in May 2011 and that it was his knowledge that the victim was involved in the shooting. App. p. 497. He testified that he was frightened by the situation at the trailer and it took his sense of security as he no longer felt safe at home. App. p. 498.

Petitioner recounted the events that occurred on July 26, 2011 and had admitted to shooting victim. App. pp. 499-504. He recalled seeing victim as he was leaving Subway with Ms. Smalls, Ms. Smalls trying to diffuse the tension by saying hello and victim walking past him and saying: "Man, I'm gone kill you boy." App. p. 501, ln. 19 – p. 502, ln. 2. After the shooting, he dropped off Ms. Smalls and traveled to Florida with his girlfriend to keep her safe from retaliation. App. p. 505.

B. ISSUES PRESENTED

1. The lower court erred by failing to properly address the matters raised in the Rule 59, SCRCP, Motion; therefore, a remand is necessary due to the failure of the court to ensure that specific findings of fact and conclusions of law were entered on each issue raised and that the record before the court and testimony of each witness was properly addressed.

Via Rule 59, SCRCP, Motion, Petitioner asked the court to "ensure that specific findings of fact and conclusions of law are entered and that the arguments and testimony of each witness is properly addressed" pursuant to South Carolina Code Section 17-27-80, *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007) (Holding a post conviction relief judge must make specific

findings of fact and state expressly the conclusions of law relating to each issue presented) and its progeny. App. p. 942-952. Specifically, Petitioner, through counsel, made a detailed listing of the issues with the Order and provided an outline previously given to the court. App. pp. 944-952. In conclusion, Petitioner requested that the court "review the full record, including the evidentiary hearing transcript, alter, amend or reconsider the standing Order of Dismissal, and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRCP." App. p. 947.

As discussed in Petitioner's Rule 59, SCRCP, Motion, *Marlar* and its progeny have resulted from the lower courts' repeated failure to adequately address issues raised at an evidentiary hearing in final orders or failure of counsel to file a Rule 59, SCRCP, motion. *See Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992) (Remanding and explaining the Court's concern with PCR orders that fail to address the issues raised at a PCR hearing, which result in depriving parties of rulings on the issues, make review by the appellate court and the workload of the appellate court more difficult, and require remand for new hearings and/or orders.); *Reese v. State*, 425 S.C. 108, 820 S.E.2d 376 (2018) (Granting the request for remand by both parties as result of the "patent inadequacies" of the PCR court's order.); *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019) (Remanding for the PCR court to make adequate findings of fact and conclusions of law regarding an unaddressed PCR claim despite a Rule 59, SCRCP, motion not being filed.).

Clearly, these cases have resulted from the failure of the lower courts to address issues raised at evidentiary hearings in final orders, which has required the appellate courts to remand and/or rule upon issues not properly addressed in a final order or in a Rule 59, SCRCP, motion. Here, Petitioner filed a detailed Rule 59, SCRCP, Motion, yet the court issued a blanket denial without addressing the substance of Petitioner's motion. App. p. 953. Petitioner submits that a

remand is necessary for the reasons addressed in the Rule 59, SCRCP, Motion, which is included in the record before this Court and incorporated by reference herein. Alternatively, if this Court finds that a remand is not required, Petitioner would ask the Court to review the issues raised via Amendment, at the hearings and addressed via the Order of Dismissal and the Rule 59, SCRCP, Motion, and as addressed herein.

2. The lower court must be reversed since the record establishes that counsel's utilization of a mental health expert and defense strategy involving the same amounted to ineffective assistance that resulted in prejudice.

By the end of the second day of trial, the State had called sixteen witnesses. After the jury was excused, the court informed the parties that the remaining witnesses needed to be ready as the trial was moving quickly and asked about the defense witness that could not be present until Thursday. App. p. 334. In response, trial counsel informed the court that Dr. Thomas Martin was in a federal case in New York, had to testify Wednesday in Richland County South Carolina and would be present to testify on Thursday morning. App. pp. 334-335.

After the jury was excused on Wednesday, the court wanted to address the length and purpose of Dr. Martin's testimony and whether the State intended to object. App. pp. 518-519. In response, counsel informed the court that he would qualify Dr. Martin in the area of "forensic psychology," and he did not intend to have him testify about competency. App. p. 519, lns. 12-19. He explained that Dr. Martin would not say that Petitioner "suffers from any kind of mental illness that would affect his ability under insanity." App. p. 519, lns. 16-19. He further explained: "I don't think he's going to say that he suffers from any specific diagnose under the DSM-4. He's purely here as a state of mind witness to talk about what he has as far as his opinion, the mental state of my client when this happened." App. p. 519, ln. 22- p. 520, ln. 1.

After the State responded that they were not clear on what Dr. Martin was testifying to, the court noted that trial counsel had said in chambers that this type of testimony "was something that happened on an ongoing basis," but he had never seen an expert "testify as to state of mind" in a non-death penalty case like this. App. p. 520, lns. 10-19. He requested trial counsel provide him "all case law" that supported his position before he made a ruling. App. pp. 520-521.

The next morning, Dr. Martin's testimony was proffered. App. p. 526. Dr. Martin explained what he had reviewed and addressed what he learned from meeting with Petitioner. App. pp. 526-533. He opined that Petitioner would have been criminally responsible as he found no major mental illness and no diminished capacity. App. p. 527, ln. 21- p. 528, ln. 3. He recalled what Petitioner told him about living under a reign of terror and he addressed the victim's history, which was previously ruled inadmissible. App. pp. 529-533.

During cross-examination, he confirmed that he found no diminished capacity and that Petitioner had the ability to control himself. App. p. 538. Thereafter, the State asked: "So the day in question when he was at the Subway armed with a gun, he made a conscious decision to go back inside and gun down an unarmed man down?," and Dr. Martin responded: "Yes.". App. p. 538, ln. 23 – p. 539, ln. 1.

When Dr. Martin was questioned by the court, he again stated that Petitioner had no competency issues, no mental illness, nothing psychologically that would impact his actions and was criminally responsible. App. p. 544-545. Dr. Martin also responded to the court that the only personal acts of violence towards Petitioner from the victim were verbal. App. pp. 545-547.

The State surmised that the defense wanted to introduce testimony regarding state of mind based on having a reasonable fear. The State argued that Petitioner's case was distinguishable from the precedent since Petitioner did not suffer from diminished capacity and it

was not a self-defense case. App. pp. 547-549. In response, trial counsel provided lengthy argument and the State again argued that the defense had not provided a case where the defendant did not suffer from diminished capacity where this type of testimony was allowed. App. pp. 549-557.

After questioning trial counsel and counsel responding, the court informed the parties that he needed time to consider his ruling and stated that he was not inclined to charge manslaughter or self-defense. App. p. 563. He stated that he knew the defense would be disappointed and offered to hear legal argument from trial counsel. App. p. 563. In response, counsel referenced an email he sent to the court and argued the doctrine of imperfect self-defense. App. pp. 563-564. He argued that the jury needed to hear testimony on the state of mind of the defendant and be instructed on self-defense and manslaughter. App. pp. 564-565. In response the State argued:

> Your Honor, one of the things in that the court says is appellate's testimony that the victim threatened him and then fired at him would support a finding of legal provocation or heat of passion. Well, clearly, Judge, somebody that threatens you and then fires at you would justify that. The interesting person is – it then goes in to talk about heat of passion for voluntary manslaughter. And it says heat of passion renders the mind of an ordinary person incapable of cool reflection and produces an uncontrollable impulse to do violence. If I could pass this up, Your Honor. Their own expert just go up and testified that he made a conscience decision to walk back into the Subway and gun an unarmed man down.

App. p. 567, lns. 5-19.

After hearing continued argument from both sides, the court stood down to contemplate his ruling. App. p. 572. Following the break, the court addressed the elements of imperfect self-defense, self-defense and voluntary manslaughter and informed the parties he would not charge self-defense or voluntary manslaughter. App. pp. 572-577.

Regarding the testimony of Dr. Martin, the court noted that the defense wanted to utilize Dr. Martin's testimony to address Petitioner's mental state and the reasonableness of his conduct.

App. pp. 578-579. The court also recalled and had Dr. Martin affirm that Dr. Martin had opined that Petitioner was competent, was criminally responsible and did not suffer from mental illness or diminished capacity. App. p. 578. The court reasoned that Dr. Martin's testimony was simply being offered to bolster Petitioner's testimony, and he would not allow it. App. pp. 579-580.

After the guilty verdict was handed down, trial counsel requested that the courtroom be unlocked, so Dr. Martin could offer mitigation testimony at sentencing. App. p. 627. In response, the court allowed Dr. Martin in, but he informed counsel that he would only hear new information from Dr. Martin prior to sentencing. App. p. 627, lns. 20-25. During mitigation, trial counsel mentioned Dr. Martin, but he was not called. App. p. 630. In sentencing Petitioner, the court referenced Dr. Martin and the testimony he offered before handing down the sentence of life, plus five years. App. pp. 633-636.

By way of the direct appeal, Petitioner argued that the trial court erred in (1) failing to charge the jury on the lesser included offense of voluntary manslaughter and (2) excluding additional relevant evidence that supported the charge of voluntary manslaughter. App. p. 658. Via *per curiam* decision, the court addressed issue one and held in relevant part:

> Even assuming arguendo, as Knight contends, that the verbal threat at the restaurant, combined with his belief that Victim had shot at this trailer two months prior to the fatal encounter, satisfies the sufficient legal provocation prong required for voluntary manslaughter charge, we nonetheless find there is no evidence to support such a charge. While there is evidence that Knight was in fear, there is no evidence he "was out of control as a result of fear or was acting under an uncontrollable impulse to do violence" at the time he shot Victim. *Starnes*, 388 S.C. at 599, 698 S.E.2d at 609.
>
> Essentially, Knight's own testimony shows he did not shoot Victim in sudden heat of passion, but that he did so after reflecting on his situation with Victim, noting he was tired of avoiding Victim and wanted to end the matter between the two of them by killing Victim.

App. pp. 721-723.

Regarding issue two, the Court held:

> Because Knight was not entitled to a voluntary manslaughter charge based upon the fact that there was no evidence he shot Victim in sudden heat of passion, we need not reach the issues concerning whether the trial court erred in excluding evidence relevant to his state of mind.

App. p. 723.

By way of his Amendment and at the hearings in front of the lower court, Petitioner alleged that counsel failed to effectively present Petitioners' primary defenses and failed to effectively utilize a mental health expert in trial and sentencing. As addressed above, the Order of Dismissal failed to properly address the issue as alleged and raised by Petitioner. App. pp. 944-945. Petitioner submits that the lower court failed to find that trial counsel's strategy to obtain a manslaughter instruction and utilization of Dr. Martin as a whole was unreasonable and requires that relief be granted.

In support of this claim, Petitioner called Dr. Donna Maddox at the evidentiary hearing. Dr. Maddox was qualified as an expert in the area of forensic psychiatry and explained how she became involved in the case. App. pp. 772-773. She also explained the records she reviewed, her evaluations and interactions with Petitioner and the report she had issued. App. p. 896. She noted the testimony of Dr. Martin that Petitioner "did not have mental illness" and she explained:

> I performed just a routine psychiatric evaluation, looking for any diagnosis and anything that was pertinent to those proceedings, and I did diagnose him with mental illness. It's my opinion, to a reasonable degree of medical certainty, he suffers from post-traumatic stress disorder, and that was not – it was relevant to his proceedings and it was not diagnosed by Dr. Martin.

App. p. 774, ln. 21 – p. 775, ln. 9. She further explained how PTSD is often undiagnosed in the male population and how she came to her diagnosis. App. pp. 774-775. Regarding her review of Dr. Martin's records, she testified: "There was no trauma history reported

or that I visualized in his work." App. p. 776, lns. 1-9. She agreed that Petitioner's trauma history was a significant factor in reaching her diagnosis. App. p. 776, lns. 10-12.

When asked about Dr. Martin addressing Petitioner's fear of victim, she explained in great detail one of the symptoms of PTSD is autonomic arousal and how it affected Petitioner. App. pp. 777-778. She also detailed the stressors Petitioner had experienced prior to the shooting as detailed in her report and his prior history of being exposed to violence as a child. App. pp. 778-781. She explained the physiologic arousal of breaking out into a sweat and getting anxious that Petitioner exhibited when discussing the event in question with her. App. pp. 780-781. She explained how Petitioner could also appear calm when out of control due to having a constricted affect as part of his illness. App. pp. 784-785. She also explained how he she saw evidence of hyper vigilance during her interaction with Petitioner. App. p. 786.

When asked about Dr. Martin's agreeing at trial that Petitioner made a conscious decision to go back into the Subway and shoot the victim, she responded:

> Well, it was a conscious decision, but it was – there was diminished capacity involved. This was not just pure volition, in my opinion. I mean, he perceived a threat, and he was tired of being threatened. He was frightened. So, it certainly, I think – I would just say his capacity to make decisions at that time was impaired. So, I don't know if I have an issue with the word "conscious" but I think he was suffering from mental illness, and this his fear, his panic, those were intensified because of his interactions with the victim, the prior history, and then his prior history of being exposed to violence as a child.

App. p. 781, lns. 9-21. She later explained that that even after Petitioner shot the victim, he was in a state of fear. App. p. 783, lns. 5-17. After being asked if she took issue with Dr. Martin's testimony that Petitioner was criminally responsible and did not suffer from diminished capacity, she responded:

> I do. I think – it's my opinion he was mentally ill. He was criminally responsible. He had capacity to conform, but his capacity was certainly diminished, and that was information that should have been presented to the Judge or to the jury.

App. p. 782, lns. 11-22. She further explained:

> I think it's my opinion that he had a mental illness. His mental illness was active at this time. It's influenced all of his behaviors. It influenced how he thought. It influenced his actions. It certainly intensified his emotions. Prior to the DSM 5, we used to think PTSD was an anxiety disorder. We now have totally changed its classification. It's classified as a trauma, another stressor related disorder, and the reason it is, is because it's so much more than an anxiety disorder. It affects your emotions, it affects your cognition. People with PTSD, they think differently than us. They see – for example, they have a sense of foreshortened future. They blame themselves more than other people do. There are just a whole set of thinking disruption that occurs in this illness as well, and so, it's so much more than an anxiety disorder. So, I think that to present him as someone that was not suffering from mental illness., that went into the store, that saw someone who had threatened him, went out to the car, went back into the store to kill the victim is not an accurate representation. It does not account for his mental illness.

App. p. 783, ln. 25 – p. 784, ln. 23.

Finally, Dr. Maddox addressed how she would have advised defense counsel prior to trial, assisted in preparing Petitioner to take the stand and assisted at trial. App. pp. 788-789. She affirmed that she would have been willing to assist prior to and during trial and that her opinions would have been the same at that time. App. pp. 789-790.

On redirect, Dr. Maddox agreed she could have assisted in mitigation to include assisting the defense in getting a voluntary manslaughter charge or plea. App. p. 796, lns. 15-21. Thereafter, the following testimony about the appellate decision was elicited:

> Question: I provided you the appellate records where they found that Judge Brown was correct in not charging voluntary manslaughter, and specifically they say, "While there is evidence Knight was in fear, there is no evidence he was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence at the time he shot

the victim." Would you have been able to testify that he was out of control at the time due to his mental illness?

Answer: Yes. I would – well, I would have testified, that's why, that his fear was so intense that it impaired his judgment, and he was paranoid, he was scared, and he was going to confront the victim.

App. p. 796, ln. 22 – p. 797, ln. 10.

When defense counsel took the stand, he recalled obtaining indigent funds to retain the services of Dr. Thomas Martin. He explained that he had worked with Dr. Martin "many times in the past" and he added: "I still respect his opinion as psychiatrist and had him examine Mr. Knight for preparation of the trial." App. p. 809, lns. 20-25. When asked why he utilized Dr. Martin, he explained that he wanted a psychiatrist to talk to Petitioner about his state of mind because of the "series of events that he underwent" with the victim. He further explained that he thought having a psychiatrist would allow "more evidence to allege self-defense." App. p. 817, ln. 23 – p. 818, ln. 1.

He recounted working with Dr. Martin to set up a meeting with Petitioner. App. p. 819. He did not recall Dr. Martin addressing Petitioner's history of trauma. App. p. 820, lns. 10-16. After referencing Dr. Martin's testimony, counsel was asked about his strategy behind proffering Dr. Martin's testimony. App. p. 820. In response, he explained that the strategy for utilizing Dr. Martin was to have him testify to the jury about Petitioner's paranoia and fear to get a charge of manslaughter and support self-defense. App. p. 821, lns. 1-10, pp. 823-825. He explained that "our most reasonable best hope was to be able to get enough evidence – and this was also something that I had called Dr. Martin specifically for, to argue sufficient provocation to get a manslaughter charge." App. p. 824, lns. 1-6. He also added: "I think having manslaughter on the table was essential." App. p. 825, lns. 18-19.

When asked about Dr. Maddox's report and testimony, he responded that he could not recall a discussion with Dr. Martin about PTSD or diminished capacity. App. p. 821, ln. 23 – p. 822, ln. 5, p. 827. Regarding her diagnosis, defense counsel responded that he did not know how it would have affected the defense. App. p. 822, lns. 6-16. He recalled that the only offer in the case was to life. App. p. 810. He also could not recall discussing a mitigation strategy with Dr. Martin for sentencing. PCR p. 79. He explained that he wished that Dr. Martin could have gone so far as to say Petitioner was "stark raving mad," but he had to work with his opinion. App. p. 821, lns. 13-22. He agreed that the trial court "absolutely" used what Dr. Martin had said against Petitioner. App. p. 829. He also recounted being called into chambers two to three times a day and being asked repeatedly to provide his defense, which he opposed. App. p. 830.

While Petitioner was on the stand, he recounted his meeting with Dr. Martin and his meetings with Dr. Maddox. App. p. 874-875. When asked to compare his interactions with the two experts, he responded:

> My interaction with Dr. Martin was more of – he had just wanted to know, like, things about the Subway incident and just trying to ask me, like, prior acts against me from Mr. Holmes, mainly about the day at hand, the day at Subway. And Dr. Maddox was more of questioning of, like, she asked the questions to more understand me, my childhood, everything that led up to the incident of Subway. And Dr. Maddox was more of a questioning of, like, she asked the questions to more understand me, my childhood, everything that led up to the incident of Subway, but if I stayed two hours with her, she might have asked me – well, I spent three hours with her, she might have spent one hour on that and more hours just asking me questions about growing up, where I went to school, things of that nature.

App. p. 875, lns. 4-22. He also explained that it is hard for him to express himself, and Dr. Maddox asked questions that helped him express himself better. App. p. 876, lns. 1-9.

By way of the Order of Dismissal, the lower court found defense counsel's strategy and utilization of Dr. Martin did not amount to ineffective assistance and that Petitioner established

no resulting prejudice from the same. App. pp. 929-930. "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360. In *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008), McKnight argued that counsel was ineffective in calling an expert witness whose testimony undermined the defense and in failing to call an expert witness whose testimony supported the defense. In granting relief, this Court addressed counsel's decision to not utilize a defense expert utilized in McKnight's first trial and to call an expert that essentially bolstered the State's theory of the case. The South Carolina Supreme Court noted:

> This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable "only to the extent that reasonable professional judgment supports the limitations on the investigation." *See Von Dohlen v. State,* 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) (*quoting Wiggins v. Smith*, 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). Although we accept counsel's assertion that she was pressed for time in preparing for the second trial, in light of counsel's familiarity with the first trial and the relative ease with which counsel could have procured favorable expert testimony at the second trial, we conclude that counsel's decision to call Dr. Conradi alone to testify at the second trial was unreasonable. *See Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002) (finding ineffective assistance of counsel where defense counsel called a witness whose testimony contradicted the defense's theory of the case).

Id. at 359. This Court further reasoned:

> In our opinion, counsel's two-fold error in calling an expert witness whose testimony was known to have previously been used to bolster the State's case, while neglecting to elicit favorable testimony from other experts when such testimony was known to exist and readily available, represents counsel's inadequate preparation for trial rather than a valid trial strategy. Accordingly, we find that counsel's performance in this regard was deficient. Because we further find that this deficient performance prejudiced McKnight's case, we hold that the PCR court erred in determining that counsel was not ineffective on these grounds.

Id. at 360.

Petitioner submits that *McKnight* is analogous to the instant case, whereby counsel was not prepared to effectively utilize Dr. Martin in a way that was advantageous to the defense and resulted in Dr. Martin's testimony being utilized to defeat the opportunity for a manslaughter charge and was relied upon by the court in imposing a life sentence.[1] As trial counsel testified "having manslaughter on the table was essential." App. p. 825, lns. 17-19. Not only does the trial record alone establish ineffective assistance and prejudice, but Petitioner also provided the testimony of Dr. Maddox, as detailed above, to establish the same. The Order of Dismissal errantly finds: "Dr. Maddox essentially testified to the same key components as Dr. Martin, with the addition of a PTSD diagnosis." App. p. 930.

As discussed in detail above and as is reflected in her testimony, Dr. Maddox testified that she diagnosed Petitioner with a mental illness that was active at the time of the shooting and resulted in his capacity to conform being diminished. She also explained why she took issue with Dr. Martin's testimony that Petitioner was criminally responsible and did not suffer from diminished capacity. App. pp. 782-784. When asked about the appellate court finding that there was no evidence Petitioner was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence and whether she would have been able to testify that Petitioner was out of control at the time due to his mental illness, she responded: "Yes. I would -- well I would have testified that's why, that his fear was so intense that it impaired his judgment, and he was paranoid, he was scared, and he was going to confront the victim." App. p. 796, ln. 22 – p .797, ln. 10. She also testified about how his mental illness would have affected how he

[1] In sentencing Petitioner, the court referenced Dr. Martin's testimony, and he stated that it was important to note for the record: "There was no mental illness. There was no diminished capacity." App. p. 633, ln. 22 – p. 634, ln. 8. As the record reflects and the Order of Dismissal finds errantly otherwise, the testimony of Dr. Maddox was not "essentially" the same and established that Petitioner has a mental illness and suffered from diminished capacity, which was information that should have been provided to both the Judge and the jury. App. pp. 774, 782-784, 929-930.

presented himself despite not being in control and being in a state of fear. App. pp. 777-778, 780-786.

As addressed with Dr. Maddox, the South Carolina Court of Appeals found no error in the trial court's refusal to charge the jury on voluntary manslaughter. App. p. 721. After a discussion of *State v. Starnes*, 388 S.C. 590, 698 S.E.2d 604 (2010) and Petitioner's testimony[2], the Court opined: "Though Knight may have very well been fearful and afraid when he initially encountered Victim in the restaurant, he did not act 'under an uncontrollable impulse to do violence' at which time he was incapable of cool reflection as a result of fear,' but acted 'in a deliberate controlled manner' when he returned to the restaurant and shot Victim. *Starnes*, 388 S.C. At 599, 698 S.E.2d at 609." App. pp. 722-723. Petitioner submits that the proper utilization of a mental health expert, as demonstrated by the testimony of Dr. Maddox, would have resulted in a different finding by the Court of Appeals.

In sum, the lower court's Order finding counsel's strategy reasonable and no resulting prejudice is not supported by the record and fails to properly address the record and claims as presented via Amendment, at the hearing and via the Rule 59, SCRCP, Motion. What is supported by the record is that Petitioner received ineffective assistance in how counsel handled and presented his mental health and that he was prejudiced at both the trial and appellate levels as a result of counsel's ineffective assistance.

3. The lower court erred by failing to find ineffective assistance and resulting prejudice from counsel's failure to offer further testimony regarding the 2011 incident to the jury.

Petitioner submits that the lower court erred in finding that counsel was not ineffective nor was he prejudiced when counsel failed to offer further testimony regarding a 2011 incident to

[2] Dr. Maddox also testified about how she could have advised trial counsel about putting Petitioner on the stand and assisted in preparing Petitioner to take the stand. App. pp. 787-788.

the jury. As summarized above, the court only allowed testimony regarding a 2011 incident with victim to come in at trial, and testimony was elicited from Sergeant Frasier, Lashaunica Allen, Da'Quan Cummings, and Petitioner regarding the incident. App. pp. 367, 404-415, 424, 465-471, 475-483, 487-495, 497-498. Petitioner submits that counsel was ineffective and he was prejudiced when counsel failed to utilize Deshaunaka Allen as a witness.

This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. *Pauling v. State,* 331 S.C. 606, 503 S.E.2d 468 (1998*)*, *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992) *Bannister v. State,* 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

At the evidentiary hearing, Petitioner offered the testimony of Deshaunaka Allen. App. p. 753. Ms. Allen stated that she knew Petitioner because he was her twin sister's ex-boyfriend and father of her nephew. She recalled being present at Petitioner's trial because she anticipated being called to the stand to testify about a prior shooting despite never meeting with anyone from the defense to prepare. App. p. 755, 762-763. She did not know why she was not called to testify. App. pp. 758-759. On redirect, she recalled telling defense counsel about her knowledge of the events on May 30, 2011, but not speaking with Petitioner about it. App. pp. 763-764.

When asked what she was willing to testify to at trial, she recounted the events that took place on May 30, 2011. App. pp. 756-757. She remembered being in the living room at her sister's when they heard a knock at the door. App. p. 756. She looked out the blinds and saw victim "bamming," and she did not feel safe. When her grandmother pulled up, she got in the car and saw victim "firing into the home of my sister" as she left. App. p. 757, lns. 1-13. She later got in touch with her sister and confirmed that a shooting had taken place. App. p. 757, lns. 14-21.

Ms. Allen stated that she knew exactly who she saw on the night of the shooting that resulted in her sister losing her unborn baby. App. p. 758. She identified the shooter as the victim for which Petitioner was convicted of murdering and explained how she knew victim. App. p. 758. On cross-examination, she explained that she did not see victim pull the trigger, but he was pointing a gun at her sister's home. App. p. 762.

When counsel was asked about not utilizing Ms. Allen, he could not recall why she was not utilized and stated: "I don't know why." App. p. 841, lns. 5-8. Regarding the information she offered, he did not recall having that information and explained: "I feel like if I had had that information, I would have tried to put it up, but I can't tell you why I didn't call her." App. p. 841, lns. 20-22, pp. 861-862.

While Petitioner was on the stand, he testified that he provided counsel information about the 2011 incident and the people he would need to speak to about it. App. p. 878, lns. 1-11. It was his understanding that Deshaunaka Allen was on the witness list, and he also had an understanding of what she was going to testify to, which was the same as what she testified to at the evidentiary hearing. App. p. 879. He testified that he wanted her to be called as a witness at trial, and counsel never explained to him why she was not called at trial. App. p. 879, ln. 23 – p. 880, ln. 3. Specifically, he testified that he wanted her utilized to provide testimony of her eyewitness account of victim's involvement in the shooting that took the life of his unborn child. He agreed that the trial court noted that no one provided testimony that they saw victim at the time of the shooting. App. p. 880.

By way of the Order of Dismissal, the lower court errantly held: "This Court finds that trial counsel was not ineffective for failing to call a witness that was not interviewed at the time of trial, did not provide this information at the time of trial, and whose testimony would not have been

dispositive as to any issue at trial." App. p. 935. In support of this finding, the Order states: "Allen also testified that she did meet with trial counsel's office," which simply does not make sense in light of the testimony offered. App. p. 935. Clearly, the lower court's findings are not supported by the testimony offered, which is addressed above.

"Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Gilchrist v. State* , 350 S.C. 221, 226–27, 565 S.E.2d 281, 284 (2002). However, "strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" *McKnight v. State* , 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (*quoting Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); *Hillerby v. State*, 431 S.C. 323, 847 S.E.2d 500 (Ct. App. 2020). Here, counsel response that he did not know why he did not utilize Ms. Allen does not amount to a strategic decision following a complete investigation.

Additionally, the finding regarding prejudice is in error as Ms. Allen's testimony was dispositive to the court's ruling on charging voluntary manslaughter. In denying Petitioner's request to charge voluntary manslaughter and while addressing the sudden heat of passion element, the court referenced the 2011 incident and stated: "There was no testimony specifically attributing this incident with direct knowledge or firsthand knowledge of this victim being involved in that particular incident which occurred approximately 60 days before the matter we are her for now." App. p. 576. Petitioner submits that Ms. Allen was the missing link of eyewitness testimony of victim being involved and counsel was ineffective when he failed to utilize Ms. Allen's testimony to support his primary defense and obtain a voluntary manslaughter charge. Clearly, the lower court's findings are erroneous in both reference to the record and conclusions and must be reversed.

4. The lower court erred for failing to find ineffective assistance and resulting prejudice when counsel failed to request a proper inferred malice instruction and failed to object to the instruction given to the jury.

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 counsel having no recollection of the discussion of the malice charge or his reasons for not requesting the instruction set forth in *Elmore*. App. pp. 845-848.

Here, the lower court put on the record the discussion had in chambers regarding the malice instruction. He read the inferred malice instruction and explained that he intended to omit the section regarding a deadly weapon since it was "no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify homicide." App. pp. 582-584. When charging the jury on murder, the court stated:

> Malice aforethought may be expressed or inferred. These terms express and inferred do not mean different kinds of malice, but merely the manner in which malice may be shown to exist, that is either direct evidence or be 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 person or when the person prepared beforehand to do the act, which was later accomplished.
>
> For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's mind would be express malice. Malice may be from conduct showing a total disregard for human life.

App. p. 609, lns. 10-24.

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 a proper inferred malice instruction, to include a 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 standard charge, and issued the following warning: "We caution the bench, that hereafter only slight deviations from this charge will be tolerated." *Id.* It is true that 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.").

As noted in the Order, 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; App. p. 937. 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 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 dismissed the allegation finding the instruction was not warranted.

If the lower court had conducted the proper analysis, he would have found that counsel's deficient performance resulted in prejudice. Here, the court acknowledged that the deadly weapon charge should not be given under *Belcher* due to the mitigation evidence offered, yet the court did not give the jury the correct instruction. The jury needed to know that it could disregard the inference of malice 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 inferred malice as instructed by the trial court even after omitting the deadly weapon portion of the charge. Ironically, the court was careful to omit the deadly weapon charge, but he nevertheless failed to give the proper inferred malice charge.

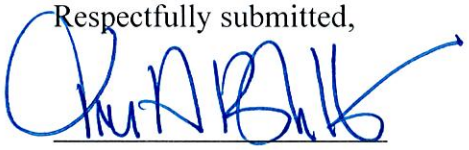
Furthermore, there was not overwhelming evidence of express malice. *Id.* at 266, 786 S.E.2d at 124. Petitioner's testimony demonstrated that he did not prepare beforehand to commit the act nor was testimony offered regarding words spoken by Petitioner that amount to express malice. As explained by trial counsel the strategy was to show "sufficient provocation to get a manslaughter charge." App. p. 824, lns. 1-6. Moreover, the jury's deliberations were brief, but counsel admitted that based upon the position he and his client were placed in he did not "know what other choice they had." App. p. 835, lns. 21-23. Throughout the trial and in his closing argument, counsel attempted to demonstrate that this was a case that was lacking in malice and was not murder, but he failed to ensure that a proper malice instruction was given. As a result,

Applicant submits that the lower court's analysis on this issue is erroneous, incomplete and must be reversed.

CONCLUSION

Based upon the arguments and record before this Court, Petitioner would respectfully ask that this Court remand to the lower court to enter a proper Order or alternatively grant certiorari, allow briefing of the issues addressed herein, and/or grant relief.

Respectfully submitted,



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