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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Charleston County
Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2022-001121

KADRIN SINGLETON,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the PCR judge err by determining Singleton failed to meet his burden of establishing defense counsel was constitutionally ineffective for failing to utilize post-trial juror information to move for a new trial, failing to request a voluntary manslaughter instruction, and failing to object to the trial judge's jury charge on malice when Singleton neither demonstrated defense counsel's performance regarding any of those matters was objectively unreasonable under the circumstances involved nor showed there was a reasonable likelihood the result of the proceedings would have been different but for counsel's performance concerning those matters?

STATEMENT OF THE CASE

In November of 2012, Petitioner Kadrin Singleton was arrested in connection to a fatal shooting that occurred a few days earlier after he unsuccessfully attempted to flee from a traffic stop. Between March and May of 2013, the Charleston County Grand Jury indicted Singleton for murder, trafficking in cocaine, resisting arrest, possession of a stolen vehicle, and failure to stop for a blue light. On January 5, 2015, a jury trial was commenced on all the charges except resisting arrest in the Charleston County Court of General Session with the Honorable Kristi Lea Harrington, circuit court judge, presiding. Toward the outset of that trial, Singleton entered

guilty pleas to trafficking in cocaine, possession of a stolen vehicle, and failure to stop for a blue light, and the trial judge deferred sentencing for those convictions. Following that, the trial proceeded forward solely on the murder charge. At the conclusion of the five-day trial, the jury convicted Singleton as indicted. Following the verdict, the trial judge sentenced Singleton to terms of imprisonment of life without parole for murder, ten years for trafficking in cocaine, five years for possession of a stolen vehicle, and three years for failure to stop for a blue light. Thereafter, Singleton moved for a new trial, and the trial judge conducted a hearing on the matter on January 12, 2015. At the conclusion of the hearing, the trial judge denied the motion. A few days later, Singleton filed a motion seeking reconsideration of his sentence along with two juror affidavits. Through an order filed on February 11, 2015, the trial judge denied that motion. Singleton then filed and perfected an appeal.

On appeal, the Court of Appeals—following briefing—affirmed Singleton's murder conviction in an unpublished decision. State v. Singleton, Op. No. 2017-UP-283 (S.C. Ct. App. filed July 12, 2017). Singleton then personally petitioned the Court of Appeals for rehearing, and that petition was denied. Thereafter, on January 16, 2018, remittitur was issued.

Subsequent to the issuance of remittitur, Singleton timely filed an application for post-conviction relief ("PCR"), and, in response, the State filed a return requesting an evidentiary hearing and a more definite statement regarding the allegations being raised. Singleton—through PCR counsel—subsequently submitted an amendment to his application. On January 21, 2020, an evidentiary hearing was conducted in the Charleston County Court of Common Pleas with the Honorable Edgar W. Dickson, circuit court judge, presiding. At the conclusion of the hearing, the PCR judge took the matter under advisement and requested proposed orders from the parties. Thereafter, through an order filed on January 10, 2022, the PCR judge denied

and dismissed Singleton's PCR application with prejudice. Following that ruling, Singleton timely filed a motion seeking for the judgment to be altered or amended, and the State filed a return in opposition. Through an order filed on July 5, 2022, the PCR judge denied Singleton's motion. Singleton then timely filed a notice of appeal.

ARGUMENT

The PCR judge correctly determined Singleton failed to meet his burden of establishing defense counsel was constitutionally ineffective for failing to utilize post-trial juror information to move for a new trial, failing to request a voluntary manslaughter instruction, and failing to object to the trial judge's jury charge on malice because Singleton neither demonstrated defense counsel's performance regarding any of those matters was objectively unreasonable under the circumstances involved nor showed there was a reasonable likelihood the result of the proceedings would have been different but for counsel's performance concerning those matters.

Singleton contends the PCR judge reversibly erred by failing to find he received constitutionally ineffective assistance of counsel. As support for that contention, Singleton maintains the PCR judge should have determined defense counsel was constitutionally ineffective for: (1) failing to utilize post-trial juror information to move for a new trial; (2) failing to request a jury instruction on the lesser-included offense of voluntary manslaughter; and (3) failing to object to the trial judge's jury charge on malice. To the contrary, Singleton—just as the PCR judge correctly concluded—failed to meet his burden of establishing both defense counsel's performance concerning those matters was deficient and there was a reasonable likelihood the result of the proceedings would have been different but for defense counsel's performance on those matters. Under such circumstances, the PCR judge properly determined Singleton was not entitled to relief since he did not and could not meet his burden of establishing deficiency and prejudice as required. Singleton's petition for a writ of certiorari should be denied.

Standard of Review

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

Law Applicable to Ineffective Assistance of Counsel Claims

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). However, that does not mean entitlement to perfect or mistake-free representation. Burt v. Titlow, 571 U.S. 12, 24 (2013). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 687-688 (1984). Meanwhile, counsel's assistance is considered constitutionally ineffective only when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722

(2001). Pursuant to that two-pronged analysis, an applicant must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Harrington v. Richter, 562 U.S. 86, 110 (2011) (instructing the proper analysis "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind"). To establish deficiency, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thus, counsel's performance will be considered deficient only when it objectively amounted to incompetence under prevailing professional norms and not when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at 105.

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. For that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625

(1989). Importantly, "[t]he likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112; see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

Application of the Relevant Law to Singleton's Case

A. The PCR judge correctly concluded Singleton failed to meet his burden of establishing defense counsel was constitutionally ineffective for failing to use post-trial juror information to seek a new trial because the information Singleton contends should have been used for just such a purpose was neither admissible to impeach the verdict nor would or could have supported the grant of a new trial under the circumstances involved.

Relevant Facts

On the morning of the fifth day of Singleton's trial, the trial judge instructed the jury on the applicable law, and the jurors began their deliberations. (App'x p. 932; pp. 935-949). A little over four hours after that, the jury alerted the trial judge it was evenly split and deadlocked. (App'x pp. 949-950). In response, the trial judge—with the assent of both parties—presented an Allen[1] charge to the jury that included language expressly instructing the jurors not to surrender their firmly-held beliefs simply to reach a verdict. (App'x pp. 950-952). Upon receiving that supplemental instruction, the jurors resumed their deliberations, and, roughly two-and-a-half hours later, they returned with a unanimous verdict finding Singleton guilty of murder as indicted. (App'x pp. 952-953; p. 956). Following that, the trial judge polled the jurors individually, and all the member of the jury confirmed one by one the verdict announced was—and was still—their verdict. (App'x pp. 957-959).

Subsequently, defense counsel unsuccessfully sought a new trial. (App'x pp. 973-990). Shortly after that, defense counsel submitted a motion seeking reconsideration of Singleton's aggregate life sentence. (App'x pp. 967-968; pp. 989-990; pp. 1053-1060). Attached to that

[1] Allen v. United States, 164 U.S. 492 (1896).

motion, defense counsel included affidavits from two jurors—DeAnne Vane and Kendra Drayton—indicating they thought Singleton's testimony was credible, they did not believe the contradictory testimony given by an eyewitness, their fellow jurors also did not appear to believe the eyewitness, they did not believe Singleton went to the incident location for the purpose of committing a violent act or armed robbery, and they ultimately concluded all the required elements of self-defense were not met "[b]ased on the law that was given to" them. (App'x pp. 1056-1057; pp. 1059-1060). However, that motion was also denied. (App'x pp. 1065-1066).

Later on, during the PCR proceedings, Singleton raised an allegation defense counsel was ineffective for failing to properly utilize the information provided by Vane and Drayton to move for a new trial. (App'x p. 1187). During the ensuing evidentiary hearing, PCR counsel—over objection from the State—elicited testimony from those jurors. (App'x pp. 1303-1305; p. 1317).

Through her testimony, Vane explained she reached out to defense counsel shortly after trial because she felt badly about the verdict and believed "justice had been neglected." (App'x p. 1320). She further explained she believed the pressure in the jury room during deliberations was "quite high," she personally felt like she had been "sort of admonished" by the trial judge's Allen charge, she did not know the jury had an option for "anything else other than what happened," and she was angered by what some of the other juror said during deliberations because she felt it suggested they were ready to go and did not think the case mattered. (App'x pp. 1322-1323; p. 1330; p. 1335). Beyond that, she indicated she thought Singleton had acted in self-defense, was unable to convince her fellow jurors of that, heard "all kinds of excuses" from the others about why she should vote with them, was either unsure why she finally agreed to convict or did so "based on what the other people were saying to [her]," and "[m]ay have just caved to their . . . coercion." (App'x pp. 1323-1327; p. 1330). Now, in "retrospect," Vane

indicated she believed she should have "stood up' to the others and felt badly about the verdict—"especially when [she and Drayton] heard the sentence."[2] (App'x p. 1328; p. 1330). She further lamented "let[ting] somebody get to [her]" and convince her Singleton's act of taking the marijuana after shooting his victim was inconsistent with self-defense, which was a decision she affirmed she now regretted. (App'x p. 1328).

Similarly, Drayton, who was twenty-four years old at the time of Singleton's trial and was identified as the only black juror to serve on the jury, explained she felt her input was not as valued as the other jurors—whom she perceived as being flippant about the situation—since she was the youngest member of the jury, and she claimed that fact was somehow conveyed to her by the others. (App'x pp. 1337-1340; pp. 1346-1347). Drayton further explained she reached out to defense counsel post-trial after obtaining his email address from Vane because she felt sick about the verdict. (App'x pp. 1341-1342). As to why, Drayton indicated she could not say Singleton "wasn't guilty" but nonetheless did not personally think he went to the incident location to kill or rob his victim. (App'x p. 1342; p. 1349). Beyond that, Drayton claimed she did not understand she could change her verdict when polled despite the simplicity of the questions posed to her, and she alleged she ultimately changed her vote to guilty because she could not say Singleton was "not guilty of anything at all," people on the jury were purportedly being pushy and wanted to go home, and she did not want to deal with it anymore. (App'x pp. 1345-1346; p. 1350). She also claimed she felt pressured by the others but conceded she was not threatened by them. (App'x p. 1350; p. 1352). Furthermore, she acknowledged she was an adult

[2] Vane's apparent concern about Singleton's sentence is *exactly* why evidence regarding the potential sentence a defendant is facing if convicted is ordinarily inadmissible during trial. See State v. Brooks, 271 S.C. 355, 358-359, 247 S.E.2d 436, 438 (1978) ("The function of the jury is to determine whether a defendant is guilty or not guilty. The rule in this State is that ordinarily the jury is not concerned with the punishment fixed by law, nor with the discretion of the court in deciding upon the sentence.").

at the time of Singleton's trial and was, thus, capable of making up her own mind. (App'x p. 1353).

Ultimately, upon considering the matter, the PCR judge declined to grant relief. (App'x p. 1423; pp. 1440-1441; p. 1452). In refusing to do so, the PCR judge determined the jurors' testimony and affidavits neither fell within any recognized exception to Rule 606, implicated fundamental fairness, nor could have validly supported overturning the verdict in Singleton's case. (App'x pp. 1424-1425; pp. 1438-1439). As a result, the PCR judge concluded Singleton failed to establish defense counsel's performance concerning the jurors was deficient and the result of the proceedings would have been different had defense counsel moved for a new trial based on the juror information. (App'x pp. 1440-1441).

Analysis

Historically, in South Carolina, the centuries-old general rule has been the final verdict of a jury in a criminal case cannot and will not be disturbed based on the comments or conclusions expressed by the jurors during deliberations. Schumpert v. State, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008); see Pena-Rodriguez v. Colorado, 580 U.S. 206, 212 (2017) ("A general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations. This principle, itself centuries old, is often referred to as the no-impeachment rule."). Now, a version of that general rule has been embedded into South Carolina law via the adoption of Rule 606 of our state's rules of evidence. Schumpert, 378 S.C. at 66, 661 S.E.2d at 371.

Pursuant to Rule 606, a juror *cannot* properly testify about any matter or statement occurring during the jury's deliberations, about the effect anything had upon that juror's or any

other juror's vote, or about anything concerning the juror's mental processes concerning the verdict. Rule 606(b), SCRE. Likewise, no juror affidavit or other evidence can permissibly be received about such matters. Id. Critically, the *only* recognized exceptions contained in that rule are "a juror may testify on the question whether *extraneous* prejudicial information was improperly brought to the jury's attention or whether any *outside* influence was improperly brought to bear upon any juror." Id. (emphasis added).

However, in addition to Rule 606's limited defined exceptions, "a well-recognized exception exists where the misconduct affects the fundamental fairness of the trial." Ethier v. Fairfield Memorial Hospital, 429 S.C. 649, 654-655, 842 S.E.2d 355, 358 (2020). Importantly though, that exception is a narrow one and should not be interpreted in a manner that would undermine the very interests the no-impeachment rule is designed to promote and protect. See State v. Franklin, 341 S.C. 555, 562, 534 S.E.2d 716, 720 (Ct. App. 2000) (emphasizing the "fundamental fairness" exception to the general no-impeachment rule "is a narrow one" and reiterating "the integrity of the jury system is jeopardized any time a court finds it necessary to intrude into the internal deliberation process").

As a result, that limited "fundamental fairness" exception has only been found to be applicable in the context of the internal workings of the jury in situations involving things like premature deliberations, discussion of outside matters not introduced as evidence during trial, and racial or gender intimidation. Ethier, 429 at 657, 842 S.E.2d at 359-360; State v. Hunter, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995); State v. Gray, 438 S.C. 130, 145, 882 S.E.2d 469, 477 (Ct. App. 2022). Meanwhile, it has been found *not* to be applicable to situations involving things like misunderstanding of the law, perceived pressure resulting from name calling or constant yelling, juror dishonesty during the voir dire process, and juror intoxication. Warger v.

Shauers, 574 U.S. 40, 42 (2014); Tanner v. United States, 483 U.S. 107, 125 (1987); Gray, 438 S.C. at 145, 882 S.E.2d at 477; Franklin, 341 S.C. at 562, 534 S.E.2d at 720.

In his petition for a writ of certiorari, Singleton contends the PCR judge erred by refusing to grant relief based on defense counsel's failure to properly utilize the post-trial information provided by Vane and Drayton to move for a new trial. However, to the contrary, Singleton—just as the PCR judge correctly found—wholly failed to meet his burden of establishing either deficiency or prejudice in regard to the manner in which defense counsel responded to the post-trial information provided by the two jurors.

Initially, as to the deficiency prong, defense counsel was not and could not have been deficient for failing to seek a new trial based on the information provided by Vane and Drayton because—despite Singleton's unsupported opinion to the contrary—that information did not implicate fundamental fairness and, thus, was patently inadmissible to impeach the verdict based on the plain mandates of Rule 606 and the no-impeachment rule. Critically, the information provided by the two jurors did *not* relate to any outside influences on the jury or any extraneous information brought out in the jury room. Likewise, it did not relate to any improper gender-or-race-based discrimination or premature deliberations. Cf. Gray, 438 S.C. at 145, 882 S.E.2d at 477 (explaining defenses counsel's requested juror inquires were properly rejected because they would have involved juror testimony about internal influences unrelated to fundamental fairness since nothing suggested the jurors were impacted by outside influence, were exposed to extraneous information, engaged in premature deliberations, or reached a verdict as a result racial or gender intimidation). Instead, it related directly to the precise subject Rule 606 and the no-impeachment rule exist to prevent from being inquired into or revealed—the jury's deliberative process. Significantly, through their testimony and affidavits, Vane and Drayton

revealed information about matter and statements from the deliberations, about the effect various things had on their votes, about their mental processes in arriving at the verdict, and about their perceived views of the other jurors' mental processes. Rule 606(b), SCRE; see United States v. Vincent, 648 F.2d 1046, 1049-1050 (5th Cir. 1981) (explaining "the mental processes of the jury in its deliberations are not subject to judicial scrutiny" and concluding juror testimony concerning the effect of an Allen charge was not proper because it "would have concerned the juror's internal mental processes in reaching the verdict"). Based on the exceedingly-important public policy reasons at the heart of Rule 606 and the no-impeachment rule, such information was flatly inadmissible and could not validly have been used to attack the verdict. See McCleskey v. Kemp, 481 U.S. 279, 296 (1987) (explaining controlling public policy considerations dictate jurors *cannot* be called to testify to the motives and influences that led to their verdict). In fact, it should not have even been permitted to be elicited at all. State v. Parris, 163 S.C. 295, __, 161 S.E. 496, 498 (1931); cf. Winkler v. State, 418 S.C. 643, 668-669, 795 S.E.2d 686, 700 (2016) (Hearn, J., concurring) (concluding "the PCR court erred in its interpretation of Rule 606(b), SCRE, by allowing PCR counsel to elicit a significant amount of testimony as to the jury's deliberative process"). Accordingly, defense counsel was not deficient for failing to seek a new trial based on inadmissible evidence that could not have properly been used to impeach the verdict in Singleton's case. See Cox v. State, 832 S.E.2d 354, 360 (Ga. 2019) ("[C]ounsel cannot be deficient for failing to make a meritless objection.").

Meanwhile, as to the prejudice prong, Singleton—for highly-similar reasons—did not and could not establish there was a reasonable likelihood the result of proceedings would have been different but for defense counsel's failure to seek a new trial based on the post-trial juror information he obtained. Significantly, although Vane and Drayton presented information

suggesting they felt pressured by their fellow jurors, may have misunderstood various things, and ultimately—in hindsight—were unhappy with their decisions to convict, nothing presented by those two could have validly supported the grant of a new trial as it did *not* implicate any fundamental fairness or due process concerns. Cf. State v. Pittman, 373 S.C. 527, 554-555, 647 S.E.2d 144, 158 (2007) (concluding fundamental fairness was not implicated and a new trial was not warranted even though two jurors submitted post-trial affidavits indicating they did not think Pittman was actually guilty and they only voted guilty due to pressure from other jurors coupled with a misunderstanding of the law that led one of the two to incorrectly believe "majority rules"); Franklin, 341 S.C. at 562, 534 S.E.2d at 720 ("It appears that Juror Simmons become very sensitive to the pressure applied by the other jurors. The degree of sensitivity is highlighted by her statement that the Allen charge led her to believe even the judge was mad at her. This reaction is unfortunate, but it not of such a nature as to implicate due process."). Accordingly, just as the PCR judge correctly concluded, Singleton failed to meet his requisite burden and was not entitled to relief. See Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

B. The PCR judge correctly concluded Singleton failed to meet his burden of proving defense counsel was constitutionally ineffective for failing request a jury instruction on voluntary manslaughter because the evidence and testimony presented during trial did not support the required elements of such a charge and, as a result, neither deficiency nor prejudice could possibly be established.

Relevant Facts

On the night of November 20, 2012, Singleton repeatedly shot his victim, Sharell Williams ("Victim"), inside a residence located on Cambridge Avenue shortly after Victim allowed Singleton, Kenneth Fludd, and Chris Felder inside for the illicit purpose of a drug transaction. (App'x pp. 266-271; pp. 281-283; pp. 292-293; p. 336; pp. 774-775). Victim was

shot in four distinct locations, including in the mouth, the side of his chest, his right arm, and the back of his left arm. (App'x p. 569; p. 572; p. 578). He died as the result of the gunshot wound to the side of his chest, which pierced both his lungs. (App'x p. 572; p. 594). Notably, due to the absence of stippling and soot on Victim's body, the fatal shots were fired from a distance of at least two-and-a-half feet away. (App'x pp. 571-572; pp. 583-584; p. 588).

During Singleton's subsequent murder trial, Fludd, who was an eyewitness to the killing, offered one account of what occurred. (App'x pp. 261-387). In that version of events, Victim weighed and bagged Singleton's marijuana while behind the residence's bar, asked for payment, and then moved near Singleton while waiting for Felder to retrieve the money from outside. (App'x p. 283; pp. 287-292; p. 383). When Victim got close to him, Singleton suddenly said "give it up," which prompted laughter from Victim and Fludd due to their belief he was merely joking. (App'x p. 292; p. 384). Immediately after that, Singleton—who had never been physically touched by Victim—pulled out a gun and shot Victim before Victim had time to react. (App'x pp. 292-293; pp. 295-296; p. 365; p. 385). He then demanded Fludd's vehicle keys at gunpoint, took them and the marijuana, and absconded from the scene while firing additional shots along the way. (App'x pp. 294-295).

Conversely, Singleton testified on his own behalf and offered a sharply-divergent account of what occurred. (App'x pp. 743-824). In his version of events, Singleton reluctantly went to the Cambridge Avenue residence to buy marijuana after initially believing the transaction was going to occur at a Pizza Hut restaurant. (App'x p. 748; pp. 754-760). At the residence, Singleton, who was completely unarmed, waited for Victim to measure out the desired amount of marijuana for him. (App'x pp. 760-762). Once the marijuana was weighed out, Victim handed it to Singleton, and Singleton traded cash in return. (App'x p. 762; p. 766). Following that,

Singleton asked Victim to put the marijuana back on the scale so he could personally verify it was the right weight, and Victim complied. (App'x pp. 766-767). Ultimately, the scale revealed the marijuana weighed approximately twenty grams less than it was supposed to, and Singleton demanded either the full amount or a refund in response. (App'x pp. 766-768; p. 770). When he did, Victim asked Fludd what was wrong with Singleton, and Fludd chuckled. (App'x pp. 769-770). Victim then pulled out a gun, *placed it on the counter*, and stated Singleton was "going to get what [he] paid for." (App'x p. 770). Concerned Victim might grab it, Singleton grabbed the gun himself, *pointed it at Victim*, and *demanded his money back at gunpoint*. (App'x p. 772; p. 782). Singleton then heard Fludd tell him not to do what he was doing, turned to look, and realized Fludd had a gun pointed at him. (App'x p. 772). Upon Singleton shifting his attention to Fludd, Victim charged at him, and Singleton—either without thinking, instinctually, or because he thought he might die and had no other choice—reacted by shooting Victim, whom he did *not* want to shoot. (App'x p. 743; pp. 773-775; pp. 782-783; p. 793). Fludd shot, too, but his gun jammed. (App'x p. 776). Singleton then fell onto a couch, jumped back up, took Fludd's keys at gunpoint as Fludd begged for his life, grabbed the marijuana off the counter, and fled the scene with Fludd's vehicle, Victim's gun, and the drugs. (App'x pp. 777-778).

Following the presentation of those accounts along with all the other evidence and testimony, the trial judge instructed the jury on the applicable law, including on the elements of murder and self-defense. (App'x pp. 942-946). However, the trial judge did not—and was not asked to—instruct the jury on the lesser-included offense of "classic" voluntary manslaughter.[3]

[3] Although he did not request a "classic" voluntary manslaughter charge, defense counsel did submit a request for a charge on imperfect self-defense. (App'x pp. 1408-1409). Had that charge been given, it would have instructed the jurors to convict Singleton of voluntary manslaughter if they found he acted pursuant to an actual but *unreasonable* fear of death or great bodily injury when he used deadly force against Victim. (App'x pp. 1408-1409).

(App'x pp. 935-948; p. 978; p. 980; p. 1245). Upon deliberating on the matter, the jury found Singleton guilty of murder as indicted. (App'x p. 956).

Later on, during the PCR proceedings, Singleton raised an allegation defense counsel was ineffective for failing to request a jury charge on the lesser-included offense of voluntary manslaughter. (App'x p. 1187). During the ensuing evidentiary hearing, defense counsel explained the overriding defense strategy was to pursue an acquittal based on self-defense and confirmed no request was made for a jury instruction on "classic" voluntary manslaughter. (App'x p. 1243; p. 1250; pp. 1279-1280). Furthermore, Singleton's primary defense counsel indicated he considered requesting such an instruction but only decided against doing so because he did not believe one was warranted based on the facts of Singleton's case. (App'x pp. 1245-1246; p. 1277). Similarly, Singleton's secondary defense counsel, too, questioned whether sufficient evidence was presented during trial to support the charge. (App'x p. 1219; p. 1225).

Ultimately, upon considering the matter, the PCR judge declined to grant relief. (App'x pp. 1441-1445; p. 1452). In refusing to do so, the PCR judge determined defense counsel was not deficient for failing to request a voluntary manslaughter instruction because such an instruction was not warranted by the evidence since: (1) Singleton's act of grabbing the gun off the counter occurred before Victim made any aggressive actions and provoked the response from him; and (2) fear standing alone was not sufficient to constitute "heat of passion." (App'x p. 1444). Furthermore, for the same reasons, the PCR judge found Singleton was not prejudiced by defense counsel's performance because there was no reasonable likelihood of a different result at trial or on appeal since the facts did not support a voluntary manslaughter charge. (App'x pp. 1444-1445). Accordingly, the PCR judge concluded Singleton failed to establish defense

counsel's performance was deficient and the result of the proceedings would have been different but for a voluntary manslaughter charge not being requested. (App'x pp. 1444-1445; p. 1513).

Analysis

During trial, the law to be charged is determined by the evidence presented. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). For a lesser-included offense instruction to be warranted, there must be *some* evidence from which the jury could conclude the defendant committed the lesser rather than the greater offense. State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009); see Hopper v. Evans, 456 U.S. 605, 611 (1982) ("[D]ue process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction.").

Voluntary manslaughter is a lesser-included offense of murder. State v. Sims, 426 S.C. 115, 131, 825 S.E.2d 731, 739 (Ct. App. 2019). That offense is defined as "the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation." State v. Gardner, 219 S.C. 97, 104, 64 S.E.2d 130, 134 (1951). For a killing to constitute voluntary manslaughter, both heat of passion *and* sufficient legal provocation must exist at the time of the killing, and the heat of passion must result from the legal provocation. State v. Starnes, 388 S.C. 590, 596-597, 698 S.E.2d 604, 608 (2010). Significantly, sudden heat of passion resulting from sufficient legal provocation "must be such as would naturally disturb the sway of reason, render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011).

In his petition for a writ of certiorari, Singleton contends the PCR judge erred by refusing to grant relief based on defense counsel's failure to request a voluntary manslaughter charge.

However, to the contrary, Singleton—just as the PCR judge correctly found—wholly failed to meet his burden of establishing either deficiency or prejudice in regard to defense counsel's failure to request a voluntary manslaughter charge because such a charge was not supported by the evidence and testimony presented, including Singleton's own.

Even when viewed in a light most favorable to Singleton, what was presented during trial did not support a finding of either of the required elements of voluntary manslaughter. Turning to the "sudden heat of passion" element, Singleton's own testimony established he was in fear, did not want to shoot Victim, and only did so to save his own life. Significantly though, such testimony did *not* establish Singleton lost control and was acting pursuant to an uncontrollable impulse to do violence as necessary for the "sudden heat of passion" element to be satisfied. See Starnes, 388 S.C. at 598, 698 S.E.2d at 609 (instructing "the presence of fear does not end the inquiry regarding the propriety of a voluntary manslaughter instruction"); cf. Cook v. State, 415 S.C. 551, 558, 784 S.E.2d 665, 668 (2015) (concluding Cook's statement "before I knew it, I fired a shot" was not "indicative as to whether Cook was acting under an uncontrollable impulse to do violence" and, thus, did not support a jury instruction on the lesser-included offense of voluntary manslaughter); Sims, 426 S.C. at 138-139, 825 S.E.2d at 743 ("While Sims acknowledged that she shot out of fear, she never indicated that she lost control or was overcome with an uncontrollable impulse to do violence. . . . [W]e find the only evidence in the record is that Sims deliberately and intentionally shot David and that she either shot him with malice aforethought or in self-defense." (citations omitted)). Meanwhile, turning to the "sufficient legal provocation" element, Singleton's testimony established he fired the fatal shots in response to Victim charging at him, but, critically, Victim only was doing so because Singleton first grabbed a gun off the bar, pointed it Victim, and used it to make demands of Victim at gunpoint. In light

of that, Singleton provoked Victim's response and, therefore, could not validly rely upon that provoked response to satisfy the "sufficient legal provocation" element. See State v. Tyson, 283 S.C. 375, 379, 323 S.E.2d 770, 772 (1984) (explaining resistance from a victim does *not* qualify as a sufficient legal provocation); cf. State v. Tucker, 324 S.C. 171, 478 S.E.2d 260, 269 (1996) (concluding evidence the victim tried to grab Tucker's gun before he shot her did not establish "sufficient legal provocation" because she was only trying to defend herself from him). Therefore, since the evidence and testimony did not establish the existence of all the required elements of voluntary manslaughter, such a charge was not warranted in Singleton's case. See State v. Rocheville, 310 S.C. 20, 26, 425 S.E.2d 32, 36 (1993) ("Both legal provocation and heat of passion are required."). Accordingly, just at the PCR judge correctly concluded, defense counsel was not and could not have been constitutionally ineffective for failing to request an unwarranted jury instruction. Cf. Mayo v. State, 347 S.C. 422, 426, 556 S.E.2d 380, 382 (2001) (holding a PCR judge's grant of relief based on defense counsel's failure to raise an objection to be without factual support where "there was no sustainable objection" defense counsel could have made).

C. The PCR judge correctly concluded Singleton failed to meet his burden of establishing defense counsel was constitutionally ineffective for failing to object to the trial judge's jury charge on malice because—when considered as a whole—the jury instructions presented were sufficient to ensure the jurors would not have interpreted or applied them in an unconstitutional or improper manner.

Relevant Facts

During Singleton's trial, the trial judge—as part of her jury charge—explained to the jury Singleton was presumed innocent, emphasized Singleton had no burden to prove his innocence, made clear the burden of proof rested solely on the State, and instructed the State was required to prove Singleton's guilt beyond a reasonable doubt in order for him to be convicted. (App'x pp.

936-939). Likewise, the trial judge explained the jurors were the sole judges of the facts, indicated the determination of the facts was solely a matter for them, and made clear the jurors were free with *any* evidence to give it the weight they thought it deserved. (App'x p. 936; p. 941). Furthermore, the trial judge explained intent was "always" a matter to be determined by the jury, it was "up to them" to determine Singleton's intent, and intent could be established via inference like any other fact, which she indicated simply meant taking into consideration the acts of the parties along with all the facts and circumstances of the case. (App'x pp. 941-942). Following that, the trial judge instructed the jury on the elements of murder, including the malice element. (App'x pp. 942-942). In doing so, the trial judge—without objection—explained:

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

(App'x p. 943; p. 948) (emphasis added).

Later on, during the PCR proceedings, Singleton raised an allegation defense counsel was ineffective for failing to object to the trial judge's malice jury instruction based on the purported absence of general permissive inference language. (App'x p. 1187). During the course of the ensuing evidentiary hearing, Singleton's defense counsel confirmed no objections were raised to the trial judge's jury charge on malice, including based on the supposed absence of language concerning permissive inferences. (App'x pp. 1204-1205; pp. 1269).

Ultimately, upon considering the matter, the PCR judge declined to grant relief. (App'x pp. 1446-1447; p. 1452). In refusing to do so, the PCR judge determined Singleton's case was

distinguishable from State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), since that case specifically addressed an instruction on inferring malice from the use of deadly weapon, which was *not* given during Singleton's trial. (App'x p. 1447). Based on that, the trial judge found no further language was necessary for the charge given in Singleton's case to be sufficient and, thus, defense counsel was not deficient for failing to object. (App'x p. 1447). Furthermore, even assuming more language was appropriate, the PCR judge found Singleton was still not prejudiced by its absence due to the information conveyed by the trial judge's jury instructions as a whole. (App'x p. 1447; p. 1513). Accordingly, the PCR judge concluded Singleton failed to establish defense counsel's performance was deficient and the result of the proceedings would have been different had defense counsel objected to the malice charge. (App'x p. 1447; p. 1513).

Analysis

When instructing the jury on the law, a trial judge is required to charge the jury on the current and correct South Carolina law applicable to the case based on the evidence presented. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003). In doing so, the trial judge is only required to instruct the jury on the substance of the law and does not have to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). Importantly, so long as the trial judge's jury instructions are substantially correct and adequately cover the applicable law, those instructions are considered to be appropriate and not erroneous. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996).

When reviewing the propriety of a trial judge's jury charge, the appropriate test involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal of a conviction is not justified or

warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal."); see also Rauch v. Zayas, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) ("[A]n alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial.").

In his petition for a writ of certiorari, Singleton contends the PCR judge erred by failing to find defense counsel was constitutionally ineffective for not objecting to the trial judge's jury charge on malice due to the absence of general permissive inference language. However, to the contrary, Singleton—just as the PCR judge correctly found—did not meet his burden of establishing either deficiency or prejudice concerning defense counsel's failure to object to the malice charge when the jury instructions are considered as a whole as required.

Looking to the specific jury instructions presented in Singleton's case, the trial judge's malice instruction did *not* include any language on malice arising or being inferred from the use of a deadly weapon as occurred in Elmore. Cf. State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) ("[Elmore] . . . argues that the trial judge's instruction on the presumption of malice *from the use of a deadly weapon* constituted a mandatory presumption rather than a permissive inference. We agree." (emphasis added)). Meanwhile, the brief portion of malice charge dealing with inferring malice from conduct showing a total disregard for human life made clear from the language employed such an inference only *may* be inferred—as opposed to must be presumed—from such conduct. See State v. Peterson, 287 S.C. 244, 247, 335 S.E.2d 800, 802 (1985) (explaining terms such as "might infer" and "may be presumed" denote a permissive inference), overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019); cf. Lowry v. State, 376 S.C. 499, 506, 657 S.E.2d 760, 764 (2008) (concluding a malice jury instruction

was improper and burden-shifting because it "contained no permissive language indicating that the jury *may* infer malice from Petitioner's participation in the armed robbery"). Beyond that, both the trial judge's malice charge itself and immediately-preceding intent charge included language making clear inferences regarding the defendant's mental state were dependent on the facts and circumstances involved while the rest of the trial judge's jury instructions properly explained to the jury the State alone possessed the burden of proof, the defendant was not required to prove anything, determining the facts of the case was solely a matter for the jurors, and they were free to give *any* evidence presented the weight they thought it deserved. See Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) (explaining jury instructions must be viewed as a whole and not in isolation when determining their propriety); cf. Gibson v. State, 416 S.C. 260, 265, 786 S.E.2d 121, 124 (2016) (concluding the presence of "dependent upon the facts and circumstances" language was not sufficient to cure an error in the omission of permissive inference language from a charge on inferring malice from the use of a deadly weapon because the "dependent upon the facts and circumstances" language was *not* tied to inferring malice but, instead, was tied to determining whether an instrument was used as a deadly weapon). Resultantly, while the trial judge did not bolster her malice charge with additional language specifically stating the jury was free to accept or reject an inference, the jury could not have reasonably interpreted and applied the malice charge given in an unconstitutional or improper manner when considering the instructions presented as a whole as required. See Lowry, 376 S.C. at 506, 657 S.E.2d at 764 ("The relevant inquiry for the Court . . . is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution."); cf. State v. Norris, 285 S.C. 86, 91, 328 S.E.2d 339, 342 (1985) (holding a jury charge solely indicating the jury was allowed to infer malice if the homicide was

the direct result of the commission of a felony and could imply malice if the person was committing a felony at the time of the fatal blow was not inadequate or improper since it made clear malice could be inferred—as opposed to would be presumed—from the commission of a felony and, thus, "could not reasonably have been understood by the jury as shifting the burden of proof to [the defendant] to disprove malice or the implication of malice"), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 80 (2009).

Because the trial judge's jury instructions as a whole properly conveyed the law, were not burden-shifting, and made clear any inferences referenced were permissive as opposed to mandatory, the PCR judge correctly declined to find defense counsel was ineffective for failing to raise an objection based on the absence of additional permissive inference language because the charge given was sufficient with or without such language and there was no reasonable likelihood the result of the proceedings would have been different but for defense counsel's failure to so object. See Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (explaining a petitioner must prove defense counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability the result at trial would have been different but for counsel's conduct in order to be entitled to post-conviction relief); see also see also Dunn v. Reeves, __ U.S. __, 141 S. Ct. 2405, 2410 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." (citation, internal quotations, and brackets in original omitted)). Singleton's petition for a writ of certiorari should be denied.

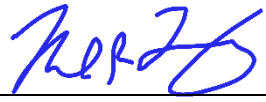
CONCLUSION

For all the foregoing reasons, it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Deputy Attorney General

BY: 
Mark R. Farthing
S.C. Bar Number 76901

ATTORNEYS FOR RESPONDENT

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