STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Georgetown County

Honorable Paul M. Burch, Circuit Court Judge

DOMINIC A. LEGGETTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-001793

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when he failed to object to the jury instruction on the lesser included offense of voluntary manslaughter since there was no evidence Petitioner shot the decedent in the sudden heat of passion upon sufficient legal provocation, rather the evidence showed Petitioner either acted with malice or in self-defense, and where Petitioner was prejudiced because, after deliberating for nearly twelve hours and receiving an Allen charge, the jury compromised and found Petitioner guilty of voluntary manslaughter?

STATEMENT OF THE CASE

A Georgetown County grand jury indicted Petitioner on November 12, 2008 for murder and assault and battery with intent to kill. App. 674-677. His case was called to trial on March 29, 2010 before the Honorable Benjamin H. Culbertson, and a jury. App. 1. Deputy Solicitor Scott Hixson represented the state, and Ronald Hazzard represented Petitioner. App. 1.

On April 1, 2010, the jury acquitted Petitioner of murder and assault and battery with intent to kill, but found him guilty of the lesser included offenses of voluntary manslaughter and assault and battery of a high and aggravated nature (ABHAN). App. 479, ll. 8-20. The judge sentenced Petitioner to thirty years for voluntary manslaughter and ten years concurrent for ABHAN. App. 496, ll. 4-10; App. 678-679.

Petitioner filed a timely notice of appeal. The Court of Appeals affirmed Petitioner's convictions and sentence. State v. Leggette, Op. No. 2012 UP-203 (S.C. Ct. App. filed March 28, 2012); App. 527-529. Petitioner filed a petition for writ of certiorari with the Supreme Court on August 29, 2012. App. 540-554. By order dated May 7, 2014, the Supreme Court denied the petition. App. 566.

On May 21, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 567-573. The state filed a return to this application dated February 23, 2016. App. 574-579. An evidentiary hearing was convened on May 9, 2016 before the Honorable Paul M. Burch. App. 580. Assistant Attorney General Jessica Kinard represented the state, and Steven Fowler represented Petitioner. App. 580. By order filed September 24, 2018, Judge Burch denied Petitioner relief. App. 656-673.

On March 13, 2019, Petitioner filed a petition for writ of certiorari with the Supreme Court. The state filed a return to the petition for writ of certiorari on August 2, 2019. By order dated

August 14, 2019, the Supreme Court transferred the appeal to the Court of Appeals pursuant to Rule 243(1), SCACR. By order filed September 15, 2021, this Court granted the petition for writ of certiorari and ordered further briefing.

This brief of petitioner follows.

STATEMENT OF FACTS

In 2008, Petitioner, who was nineteen years old, lived in uptown Andrews, South Carolina. Al Ingram and Antonio Tisdale, the decedent, lived on Jones Avenue on the westside of Andrews. There had been a long lived feud between individuals who lived in uptown Andrews and those who lived on the westside of town. App. 204, l. 3 – 205, l. 3. About a year before the shooting which led to Petitioner's conviction, there was an altercation between individuals from uptown and those from the westside at a club called Take a Break. According to Ingram, both Petitioner and Ingram were involved in the altercation. Petitioner was "helping his people" and Ingram was helping his own. App. 233, ll. 9-22. Over the course of the next year, there were multiple confrontations that occurred between the two groups, including "a couple of lynchings" and "jumpings." App. 335, ll. 1-7. Petitioner's group was usually outnumbered, but they would "lick [their] wounds and . . . go on about [their] business." App. 335, ll. 18-20.

On Saturday, August 9, 2008, Ingram and about eight people from the westside had a physical altercation with Petitioner and some of his "associates" at the Take a Break club. App. 234, l. 13 – 235, l. 2; App. 334, l. 22 – 339, l. 7. Two days later, on August 11, 2008, individuals from the two sides had another confrontation at the Arbor Place Apartments. App. 234, ll. 5-9; App. 235, ll. 3-8; App. 339, l. 10 – 340, l. 5. As a result of these prior altercations, particularly the incident that occurred on August 11, 2008, Petitioner feared Ingram. Petitioner also knew Ingram had a "prior weapons charge." App. 340, ll. 1-15.

On Wednesday, August 13, 2008, Petitioner was at the Arbor Place Apartments when his girlfriend called him and asked him to bring her a phone charger at Carnell's, a club about one hundred yards from the apartments. App. 340, l. 19 – 341, l. 16. Carnell's was located next door to Blue's, another nightclub. At first, Petitioner refused because he had "an iffy feeling." He had

"a messed up feeling that something was going to happen" because, while Carnell's and Blue's were in uptown Andrews where Petitioner lived, individuals from the westside and Jones Avenue "tend to be up there." App. 342, ll. 8-18. However, his then girlfriend insisted Petitioner bring her the charger and he agreed. App. 342, ll. 18-20.

Petitioner and Leron Gardner walked the one hundred yards from the Arbor Place Apartments to Carnell's. As they were walking, Petitioner showed Gardner a gun he had concealed around his waistline. Petitioner bought the gun for protection after the altercation two nights before because he "was scared of Mr. Ingram." App. 342, l. 22 – 343, l. 4. As they walked passed Blue's, Petitioner saw individuals from the westside and Jones Avenue. He quickly "moved away from them." When he got to Carnell's, his girlfriend was at the door waiting for him. He handed her the phone charger and briefly talked to her. App. 344, l. 14 – 345, l. 2.

As Petitioner was talking to his girlfriend, several individuals confronted him. He was scared and "knew [he] was going to get jumped." App. 345, ll. 2-21. At that time, Antonio Tisdale and Al Ingram drove by in a car and one of the individuals who confronted Petitioner flagged Ingram down and told him Petitioner was there. Petitioner immediately walked away and called his cousin to come pick him up from Super Chic, a convenience store located next to Carnell's. App. 346, ll. 7-17. As Petitioner was walking toward Super Chic, he heard running footsteps behind him and someone say, "What's up now?" App. 346, ll. 11-24. When he turned around, Ingram and Tisdale were approximately three feet behind him. App. 346, l. 19 – 347, l. 1. Petitioner saw Ingram reach toward his waist. Because Petitioner knew Ingram was "known for carrying guns," he "automatically thought" Ingram was "reaching for a gun." Petitioner pulled out his gun, fired two to three times, and ran. App. 347, ll. 3-25.

Leron Gardner, who was with Petitioner that night, testified consistent with Petitioner. He said as soon as he and Petitioner arrived at Carnell's "a bunch of people just rushed up on us out of nowhere." App. 276, ll. 4-12. Gardner was scared. He testified that Petitioner immediately "took off running" toward Super Chic. Ingram and Tisdale ran after Petitioner. Gardner heard gunshots. App. 276, ll. 10-21; App. 280, ll. 13-23. After the gunshots, Ingram and Tisdale came running back. Tisdale lifted up his shirt and said, "Dominic [Petitioner] shot me." App. 278, ll. 12-25.

Al Ingram also testified consistent with Petitioner and Gardner. Ingram claimed that as soon as he arrived at Carnell's and Blue's with Tisdale, he saw "words being exchanged with people from my side of town and Dominic Leggette [Petitioner]." App. 204, ll. 11-16. However, he did not hear what was said. App. 228, ll. 8-12. As Ingram was approaching, one of his friends exclaimed, "Al [Ingram], there goes Dominic [Petitioner]." App. 229, ll. 5-8. According to Ingram, as soon as Petitioner saw Ingram, Petitioner began to walk away toward Super Chic. App. 205, ll. 22-24; App. 208, ll. 7-12; App. 209, ll. 14-16; App. 229, ll. 19-22. Ingram admitted he and Tisdale followed behind Petitioner. However, Ingram claimed the two were "never following him." Rather, they were merely walking to Super Chic to buy cigarettes. App. 209, l. 14 – 210, l. 1; App. 229, ll. 23-25.

As Ingram and Tisdale were walking behind Petitioner, Petitioner suddenly turned around and started shooting. App. 210, ll. 2-14. Ingram claimed that neither he nor Tisdale said anything to Petitioner before the shooting and that neither of them were armed nor pulled any type of weapon. Ingram testified that Petitioner "maybe said two or three words to us but [Ingram] didn't hear . . . exactly what he said." App. 210, ll. 15-22; App. 212, l. 22 – 213, l. 10. Petitioner shot "three to four times" and then ran. App. 212, ll. 4-11; App. 215, ll. 4-16.

After the shooting, Tisdale and Ingram ran back toward Carnell's and Blue's where Tisdale's car was parked. As they were running, Ingram told Tisdale that Petitioner shot him. Tisdale said Petitioner shot him too. App. 217, ll. 13. Tisdale eventually collapsed. App. 217, ll. 14-18. Tisdale was shot in the chest and died from his injuries. App. 197, l. 18 – 198, l. 1. Ingram was shot in the ankle. App. 218, ll. 8-14.

Jamar Mitchum, Antonio Tisdale's brother, testified for the state. Mitchum was at Blue's when Tisdale was shot. He saw Petitioner walk passed Blue's, where Mitchum was standing outside, "to meet a girl at Carnell's." According to Mitchum, Ingram and Tisdale decided to walk to Super Chic to buy cigarettes. The two were walking behind Petitioner. Mitchum testified that he heard gunshots, and saw Ingram fall to the ground. Ingram and Tisdale then came running back to Blue's. When Tisdale reached Mitchum he said, "Miles [Mitchum], carry me to the hospital. Dominic [Petitioner] just shot me." Tisdale then collapsed. App. 285, l. 17 – 286, l. 7. Mitchum maintained there was "no argument and no fight" before the shooting. Everyone "was just standing around." App. 286, ll. 8-18; App. 287, ll. 2-12. He heard no loud voices or any sort of altercation. App. 291, l. 19 – 292, l. 13.

Craig Jackson also testified for the state. He was outside Carnell's talking to friends. There were a lot of people standing around, but no one was being rowdy or loud. App. 304, l. 2 – 305, l. 5. Jackson heard someone say, "That's Dominic [Petitioner] right there." Ingram and Tisdale then began to follow Petitioner toward Super Chic. Jackson thought he was "about to see a fight." He eventually saw Petitioner turn around and start shooting. Petitioner shot three or four times. Ingram and Tisdale fell to the ground and then began running back toward Carnell's and Blue's. Tisdale stopped by Jackson and said, "Dominic [Petitioner] shot me." He then collapsed. App. 301, l. 12 – 302, l. 16; App. 305, l. 6 – 306, l. 2. Before the shooting, Jackson never heard Petitioner

say anything. He also never heard Ingram or Tisdale say anything. He testified, "Nobody wasn't saying anything." App. 306, l. 12 – 307, l. 9.

The trial judge charged the jury with the lesser included offense of voluntary manslaughter. See App. 422, l. 17 – 424, l. 3. Trial counsel did not object to the charge.

The jury struggled to reach a verdict. During its deliberations, the jury asked to rehear testimony from Al Ingram, Jamar Mitchum, and Petitioner. They also asked to be recharged on the law of voluntary manslaughter and self-defense. App. 439, l. 15 – 473, l. 14. After nine hours of deliberation, the jury informed the judge that it was deadlocked. The judge gave the jury an Allen[1] charge. App. 473, l. 21 – 476, l. 25. Approximately two and a half hours later, the jury returned with a compromised verdict acquitting Petitioner of murder but finding him guilty of the lesser included offense of voluntary manslaughter. App. 477, l. 12 – 479, l. 20. Trial counsel did not object to Petitioner's conviction.

During his PCR hearing, Petitioner testified his trial counsel was ineffective for failing to object to the jury instruction on voluntary manslaughter as a lesser included offense of murder because there was no evidence to support the charge. See App. 585, l. 1 – 587, l. 12. Ronald Hazzard, Petitioner's trial counsel, admitted he had previously "questioned whether I did a good enough job with the jury charges." App. 637, ll. 1-5; App. 647, l. 19 – 649, l. 1. Hazzard asserted that he "never felt they [the state] disproved self-defense" or "truly proved any guilt . . . beyond a reasonable doubt." App. 636, ll. 5-12. Hazzard believed the jury compromised by finding Petitioner guilty of voluntary manslaughter and assault and battery of a high and aggravated nature, both lesser included offenses. App. 636, ll. 12-16.

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

The PCR judge denied Petitioner relief. App. 656-673. Quoting State v. Smith, 363 S.C. 111, 115, 609 S.E.2d 528, 530 (Ct. App. 2005), the judge stated, "When the record contains no evidence to support it, a voluntary manslaughter charge should not be given." App. 660. While the judge acknowledged trial counsel did not object to the jury instruction on voluntary manslaughter, he found a "review of the complete trial record shows that the voluntary manslaughter instruction was appropriate and supported by facts in the record." App. 660. Consequently, the judge concluded Petitioner failed to prove deficient performance on the part of counsel, or any prejudice therefrom. App. 660.

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). The Court reviews questions of law de novo, with no deference to trial courts. Id. at 180-181, 810 S.E.2d at 839-840 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

"The trial court must determine the law to be charged based on the evidence at trial." State v. Smith, 363 S.C. 111, 115, 609 S.E.2d 528, 530 (Ct. App. 2005) (citing State v. Crosby, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003)). "When the record contains no evidence to support it, a voluntary manslaughter jury charge should not be given." Id. (citing State v. Cooley, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-669 (2000)).

ARGUMENT

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when he failed to object to the jury instruction on the lesser included offense of voluntary manslaughter when there was no evidence Petitioner shot the decedent in the sudden heat of passion upon sufficient legal provocation, rather the evidence showed Petitioner either acted with malice or in self-defense, and where Petitioner was prejudiced because, after deliberating for nearly twelve hours and receiving an *Allen* charge, the jury compromised and found Petitioner guilty of voluntary manslaughter.

The PCR judge erred by finding trial counsel was not ineffective when he failed to object to the jury instruction on the lesser included offense of voluntary manslaughter when there was no evidence Petitioner shot the decedent in the sudden heat of passion upon sufficient legal provocation. Rather, the evidenced showed Petitioner either acted with malice or in self-defense. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if counsel had properly objected to the charge. After deliberating for nearly twelve hours and receiving an Allen charge, the jury compromised and found Petitioner guilty of voluntary manslaughter.

Initially, the state argued the issue as raised by Petitioner is not preserved for appellate view. Ret. at 7. In its return, the state claimed during his testimony at the evidentiary hearing, "Petitioner maintained counsel was ineffective for failing to object to his conviction for voluntary manslaughter because he was only indicted for murder." Ret. at 7. The state interpreted Petitioner's "argument was that he did not recognize voluntary manslaughter as a lesser included offense" of murder. Ret. at 7. However, based on his ruling, the PCR judge clearly understood the grounds of Petitioner's allegation. In the order of dismissal, the judge emphasized that Petitioner never filed an amended application and

"proceeded [on] broad allegations of ineffective assistance of counsel *without objection by the State*." App. 657 (emphasis added). Consequently, the judge was "left to draw specifics from the testimony at the evidentiary hearing." App. 657.

When ruling on Petitioner's allegation, the PCR judge cited to State v. Smith, 363 S.C. 111, 115, 609 S.E.2d 528, 530 (Ct. App. 2005), which recognized, "When the record contains no evidence to support it, a voluntary manslaughter charge should not be given." App. 660. Tellingly, in Smith, this Court held the trial judge erred by charging the jury on the law of voluntary manslaughter because, even assuming sufficient legal provocation existed, the evidence clearly did not establish Smith acted in the sudden heat of passion. Smith, 363 S.C. at 116, 609 S.E.2d at 530. After citing the relevant law as stated in Smith, the PCR judge then found that while trial counsel did not object to the jury instruction on voluntary manslaughter, a "review of the complete trial record shows that the voluntary manslaughter instruction was appropriate and supported by facts in the record." App. 660. Based on this finding, it is clear the PCR judge understood the nature of Petitioner's allegation and ruled accordingly. Therefore, this issue is preserved for appellate review. See State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595-596 (2010) ("Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue.") (internal citation marks omitted).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of

performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010) (citing State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d. 786, 788 (2009)). "To warrant the court eliminating the charge of manslaughter, there must be no evidence whatsoever tending to reduce the crime from murder to manslaughter." Id. (citing Wharton, 381 S.C. at 214, 672 S.E.2d. at 788). "If there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." Id. (citing Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005)). "Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge must be given." Id. at 597, 698 S.E.2d at 608.

In Starnes, 388 S.C. at 598-599, 698 S.E.2d at 609, the Supreme Court stated:

> We also have held that fear resulting from an attack can constitute a basis for voluntary manslaughter. See State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) ("[F]ear can constitute a basis for voluntary manslaughter."). Yet the presence of fear does not end the inquiry regarding the propriety of a voluntary manslaughter instruction. **We have consistently held that sudden heat of passion upon sufficient legal provocation is defined as an act or event that "must be**

> **such as would naturally disturb the sway of reason, and 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."** Pittman, 373 S.C. at 572, 647 S.E.2d at 167.[2] While the act or event "need not dethrone the reason entirely, or shut out knowledge and volition," **it must cause a person to lose control.** Id.
>
> We reaffirm the principle that a person's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion. However, **the mere fact that a person is afraid is not sufficient, by itself, to entitle a defendant to a voluntary manslaughter charge. Consistent with our law on voluntary manslaughter, in order to constitute "sudden heat of passion upon sufficient legal provocation," the fear must be the result of sufficient legal provocation and *cause the defendant to lose control and create an uncontrollable impulse to do violence*.** Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence.
>
> **A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear.** Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not. Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter—it will not justify it. This is the distinction between voluntary manslaughter and self-defense.

Id. (emphasis added).

"In determining whether the act [that] caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011).

In Cook v. State, 415 S.C. 551, 555, 784 S.E.2d 665, 667 (2015), Cook objected to the state's request for a voluntary manslaughter instruction. The trial judge relied on the following facts in determining that a charge on voluntary manslaughter was supported by the evidence: (1) the defendant was in fear, (2) he shot the decedent twice, and (3) he stated "before I knew it, I fired

[2] State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

a shot." Id. at 557, 784 S.E.2d at 668. However, our Supreme Court held Cook's actions did not suggest he was acting in the sudden heat of passion. Id. at 559, 784 S.E.2d at 669. The Court explained, "We do not believe the fact that Cook shot Victim twice or his statement 'before I knew it, I fired a shot' is evidence that Cook's fear manifested in an uncontrollable impulse to do violence." Id. at 558, 784 S.E.2d at 668. The Court further stated:

> Here, Cook stated he tried to walk away from Victim, but Victim kept cutting him off. The fact that Cook was trying to walk away from the conflict does not suggest Cook was incapable of cooling off. In addition, Bridges testified that Cook and Victim were talking softly and that he could hardly tell they were arguing. This too does not suggest that Cook was acting under an uncontrollable impulse to do violence as surely if one was so enraged to kill, one would not be talking softly with the victim right before the act. Further, at no point during Cook's statement does he indicate he lacked control over his actions. Accordingly, we believe the facts of this case suggest Cook shot Victim either with malice or in self-defense.

Id. at 557, 784 S.E.2d at 668. The Court also emphasized that there was no physical altercation involved. Id. at 559, 784 S.E.2d at 669.

Likewise, the Supreme Court concluded there was no evidence of sudden heat of passion in Starnes and, therefore, upheld the trial court's refusal to charge the jury on voluntary manslaughter. Starnes, 388 S.C. at 599-600, 698 S.E.2d at 609. Starnes and the two decedents, Bill and Jared, were engaged in a drug purchase with a fourth individual, Jody, at Starnes' home when Jared "pulled a gun on" Jody. Id. at 595, 698 S.E.2d at 607. Starnes testified Jared's action "scared" him, and he went into his bedroom to retrieve his gun. Id. at 595, 698 S.E.2d at 607. As Starnes exited his bedroom, "Bill said 'whoa' and was pointing a gun at him." Id. at 595, 698 S.E.2d at 607. Starnes then shot Bill and Jared. Id. On appeal, the Court acknowledged the evidence of Starnes' fear, but concluded there was no evidence Starnes was "out of control as a result of his fear or was acting under an uncontrollable impulse to do violence." Id. at 599, 698 S.E.2d at 609. The Court also held the evidence showed Starnes

"deliberately and intentionally shot Jared and Bill and that he either shot the men with malice aforethought or in self-defense." Id.

In this case, trial counsel was ineffective for failing to object to the jury instruction on voluntary manslaughter where there was absolutely no evidence Petitioner acted in the sudden heat of passion upon sufficient legal provocation when he shot Tisdale, the decedent. While Petitioner testified that he was scared, 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." See Starnes, 388 S.C. at 599, 698 S.E.2d at 609. At no point during Petitioner's testimony or previous statements to law enforcement did he state that he lacked control over his actions when he fired the fatal shot. All of the witnesses who testified consistently maintained there was no argument, no altercation, and no words exchanged between Petitioner and Tisdale. Consequently, there was no evidence of sudden heat of passion to support the charge on voluntary manslaughter.

Moreover, there was no evidence of sufficient legal provocation. "Where death is caused by use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation." State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (citing State v. Gardner, 219 S.C. 97, 104, 64 S.E.2d 130, 134 (1951)). "Words accompanied by hostile acts may, according to the circumstances, reduce a charge from murder to voluntary manslaughter." State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996) (citing State v. Mason, 115 S.C. 214, 105 S.E. 286 (1920)). "Provocation necessary to support a voluntary manslaughter charge must come from some act *of or related to the victim* in order to constitute sufficient legal provocation." State v. Locklair, 341 S.C. 352, 362, 535 S.E.2d 420, 425 (2000) (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)) (emphasis added). "The provocation *of the deceased* must be such as naturally and instantly produces in the mind of

a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror, rendering the mind incapable of cool reflection." Id. (emphasis in original) (internal citation omitted).

In this case, there was no evidence of sufficient legal provocation to support a charge on voluntary manslaughter. While Petitioner testified that he thought Ingram was reaching for a gun when Petitioner began shooting, there was no evidence of any overt act on the part of Tisdale, the decedent. The provocation necessary to support a charge on voluntary manslaughter must come from the decedent, not a third party. See State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000). There is simply no evidence Tisdale provoked Petitioner into shooting.

Significantly, in its return, the state did not identify any evidence of legal provocation. Instead, within its argument that there was evidence of sudden heat of passion, the state merely made conclusory statements that sufficient legal provocation existed. See Ret. at 11-12. For example, the state asserted, "Being followed by someone with whom you have had prior physical altercations immediately after almost being jumped by a group of his friends who were then encouraging him to . . . fight resulted in Petitioner's uncontrollable impulse to do violence that resulted from the sufficient legal provocation" without ever identifying what the legal provocation was. Ret. at 12.

Citing to State v. Pittman, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2007), which recognized "an overt, threatening act or physical encounter may constitute sufficient legal provocation," the state suggested there was evidence of sufficient legal provocation based on Petitioner's testimony that before the shooting "a group of men formed a semicircle in front of him and were going to jump him." Ret. at 11. The state's argument wholly ignores the fact that Tisdale, the decedent, played no part in this prior confrontation. Therefore, there was no provocation on

Tisdale's part to support a voluntary manslaughter instruction. See Pittman, 373 S.C. at 573-574, 647 S.E.2d at 168 (even assuming Pittman was entitled to a finding of sufficient legal provocation as related to the death of his grandfather who allegedly struck Pittman with a paddle, the Court held Pittman failed to show any sufficient legal provocation which would entitle him to a voluntary manslaughter instruction as applied to the death of his grandmother because there was no evidence his grandmother used the paddle on him and therefore there could be no adequate provocation on her part).

Petitioner was prejudiced by counsel's deficient performance because, after deliberating for nearly twelve hours and receiving an Allen charge, the jury compromised and found Petitioner guilty of voluntary manslaughter. If trial counsel had properly objected, there is a reasonable probability the trial judge would have refused to instruct the jury on this lesser included offense, and the jury would have found Petitioner fired the fatal shot in self-defense. In the alternative, if the trial judge had charged voluntary manslaughter over counsel's proper objection, there is a reasonable probability the appellate court would have reversed Petitioner's conviction based on this error.

Consequently, the PCR judge erred by finding counsel was not deficient when he failed to object to the jury charge on voluntary manslaughter since there was no evidence Petitioner acted in the sudden heat of passion upon sufficient legal provocation when he shot Tisdale, the decedent. The judge further erred by finding Petitioner was not prejudiced by counsel's deficient performance since there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had properly objected to the charge, particularly where the jury reached a compromised verdict after nearly twelve hours of deliberations. Petitioner respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

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This 15th day of October, 2021.