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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Georgetown County
The Honorable Paul M. Burch, Post-Conviction Relief Court Judge
Court of Appeals Appellate Case No. 2018-001793
Supreme Court Appellate Case No. 2023-001630

DOMINIC A. LEGGETTE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Procedural History

Petitioner was indicted at the November 2008 term of the Georgetown County Grand Jury for murder and assault and battery with intent to kill (ABWIK), arising from a shooting incident on August 13, 2008, in Andrews, South Carolina, in which Petitioner shot and killed one man (Tisdale) and wounded another (Ingram). The matter was called for a jury trial on March 29, 2010, before the Honorable Benjamin H. Culbertson, Circuit Court Judge. Ronald W. Hazzard, Esq., (trial counsel) represented Petitioner. The jury found Petitioner guilty of the lesser-included offenses of voluntary manslaughter and assault and battery of a high and aggravated nature (ABHAN). Trial counsel moved for a new trial on the ground the verdicts were “inconsistent with regard to the evidence presented and would show passion, caprice or prejudice on the part of the jury.” Judge Culbertson denied the new trial motion and sentenced Petitioner to imprisonment for concurrent terms of thirty years for voluntary manslaughter, and ten years for ABHAN. (Appendix, pp. 484-496).

On direct appeal from his convictions and sentences, Petitioner challenged the denial of his directed verdict motion on the ground the State failed to disprove self-defense. (Appendix, pp. 501-526). By unpublished opinion filed March 28, 2012, the South Carolina Court of Appeals affirmed Petitioner’s convictions. State v. Leggette, Op. No. 2012-UP-203 (Appendix, pp. 527-529). Petitioner petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated May 7, 2014. (Appendix, pp. 540-566).

Petitioner filed a *pro se* application for post-conviction relief (PCR) on May 21, 2015, and the State submitted its return on or about February 23, 2016. (Appendix, pp. 567-579). The matter was called for an evidentiary hearing on May 9, 2016, before the Honorable Paul M. Burch, Circuit

Court Judge. Petitioner was present at the hearing and represented by Steven W. Fowler, Esq., and the South Carolina Attorney General's Office represented the State. Petitioner testified on his own behalf, and Petitioner's trial counsel testified. (Appendix, pp. 580-655).

Judge Burch filed an Order of Dismissal on September 24, 2018, concluding Petitioner failed to prove deficient performance on the part of trial counsel or any prejudice therefrom. (Appendix, pp. 656-673). Petitioner served his Petition for Writ of Certiorari on March 13, 2019, which was granted by the court of appeals on September 15, 2021. After briefing and oral argument, the court of appeals affirmed Judge Burch's findings and conclusions in a published opinion filed August 2, 2023, and denied Petitioner's Petition for Rehearing by Order filed September 21, 2023. (Supp. Appendix, pp. 1-23). Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals with this Court on October 18, 2023.

Trial

At trial, Ingram testified he was at a nightclub with Tisdale on August 13, 2008. The two left the nightclub but returned a short time later, and when they returned several people were exchanging words with Petitioner. (Appendix, pp. 201-204). Ingram explained Petitioner was from a different part of town and people from Ingram's neighborhood typically do not get along with people from Petitioner's neighborhood. (Appendix, pp. 204-205). Ingram testified that as he walked up to the bar, someone said "Al, there goes Dominic [Petitioner]," and his guys were trying to get him to fight Petitioner. (Appendix, pp. 205, 208, 229, 236).

Ingram further testified Petitioner walked away from the group toward the Super Chic convenience store, and a couple of minutes later, Ingram and Tisdale headed toward the store to purchase cigarettes. He stated Petitioner was walking approximately ten to fifteen feet in front of them, and he saw Petitioner start tying something around his face. Petitioner then turned around

and started shooting at Ingram and Tisdale. Neither Ingram nor Tisdale had any weapons. (Appendix, pp. 208-218).

Ingram acknowledged he was involved in a fight with Petitioner about a year prior to this incident, but stated it was only because Petitioner was helping other people Ingram had a dispute with at the time. He testified no weapons were involved in the prior dispute, the police were not called, and everyone went home when it was over. (Appendix, pp. 206-207).

On cross-examination, Ingram explained that the prior altercation involved four or five people with him against four or five people associated with Petitioner. (Appendix, pp. 233-234). Ingram also testified that several days before the shooting incident, he and three of his associates were involved in an altercation with eight or nine of Petitioner's associates, but Petitioner was not present. He stated all the previous altercations were just regular fistfights and no weapons were involved. (Appendix, pp. 233-237).

The State also presented testimony from Leron Gardner, who went to the bar with Petitioner on the night of the shooting. While he and Petitioner were walking toward the bar, Petitioner showed Gardner a gun Petitioner had stuck in his waistband. Gardner testified that when he and Petitioner arrived at the bar "a bunch of people just rushed up on us out of nowhere out of the blue". Gardner stated he "was scared," Petitioner "took off running and he left," and "Billy and Al [the victims] went running after him." Gardner further testified no one punched him or Petitioner, and he saw no weapons other than the gun Petitioner showed him earlier. (Appendix, pp. 274-276).

Craig Jackson testified he was standing outside the bar the night of the shooting, heard someone say "[t]hat's Dominic right there," and saw Petitioner walking toward the Super Chic convenience store. Jackson saw Ingram and Tisdale walk off in the same direction approximately

four to five feet behind Petitioner, and he continued to watch them because he believed there was going to be a fight. He saw Petitioner turn toward the victims, then saw “the flames coming from the gun,” and the victims “fell in the street.” Jackson testified he did not see anyone else with weapons. (Appendix, pp. 301-313).

Petitioner testified about the prior difficulty with Ingram approximately a year before the shooting, indicating that Ingram and several of his friends started “to holler at” Petitioner’s girlfriend, and the next day he let one of Ingram’s friends know he did not like the way Ingram approached him and his girlfriend. Two nights later, Ingram’s friend approached Petitioner at the back of a night club and told him Ingram wanted to fight. Petitioner stated they ended up in a fight in which ten to twelve individuals allied with Ingram fought with four people on Petitioner’s side. According to Petitioner, he and his people “got jumped.” (Appendix, pp. 332-334).

Petitioner also testified there were more confrontations with Ingram between that altercation and the night of the shooting, which he described as “lynchings” and “jumpings,” and fights occurred very often in Andrews because the groups saw each other often. (Appendix, p. 335). Petitioner stated that over the course of several days just prior to the shooting, Petitioner and Ingram had two more encounters, one of which led to a physical altercation. (Appendix, pp. 336-339).

The night of the shooting, Petitioner went to the bar even though he “had a messed up feeling that something was going to happen,” and he testified he was carrying a gun he had obtained illegally because he “was scared of Mr. Ingram.” When Petitioner arrived at the bar, he saw people from the other side of town, but testified he kept moving to try and avoid a confrontation. (Appendix, pp. 342-344).

Petitioner testified he was confronted by several individuals at the bar, and “as a result of that confrontation I was, I was scared because it was more than one person,” “[s]o, I already, I already knew I was going to get jumped” After the individuals formed a semi-circle around Petitioner, he saw “Mr. Tisdale and Mr. Ingram come riding by in their car,” and he heard someone tell them Petitioner was there. (Appendix, pp. 345-346).

Petitioner testified he walked away but heard someone running up behind him, and someone said “What’s up now? What’s up now?”. Petitioner stated he turned around, the victims were about three feet behind him, he was “already scared” and “didn’t know what to do.” (Appendix, p. 347). Petitioner testified he saw Ingram reaching for his waistband, and because Ingram “was known” to carry a gun, Petitioner pulled his gun and shot two or three times. Petitioner fled the scene and was apprehended by U.S. Marshals approximately a month later. (Appendix, pp. 346-348, 352).

On cross-examination, Petitioner admitted he initially told law enforcement he did not have a gun that night and never saw a gun, but he heard gunshots and he ran. He also told them:

I was like, nah, I ain’t going to run tonight because this ain’t me. I’m tired of running. I was like, forget that, I’m a grown man. I’m about to be to this year, this month on the 29th. I was like fuck that, I ain’t running. If I don’t make a stand now I ain’t never gonna’ make a stand for the rest of my life to these guys. So, I was like F it. I ain’t running. So I kept walking and kept walking, I kept walking. Then all I saw was knives, I saw a bat, I saw a knife.

(Appendix, pp. 362-363).¹ Petitioner also admitted he told law enforcement he was “stabbed and poked and cut through” that night even though he was not touched at all. (Appendix, pp. 363-364).

¹Petitioner’s interviews with law enforcement were video and/or audio recorded, and the cited quote was from the audio recording of an interview on September 10, 2008.

Petitioner further admitted he was frustrated because he believed the people in Andrews did not give him the respect he deserved, and the people under him got more respect than he did. He told law enforcement the injuries he sustained in the previous confrontation with Ingram and Ingram's people a year before the shooting made him feel disgraced, and it was "real hard for me to come across that, come across forgiveness them at that point in time." (Appendix, pp. 365-366).

Judge Culbertson charged the jury on the law regarding murder, voluntary manslaughter, ABWIK, assault and battery of a high and aggravated nature (ABHAN), and self-defense. (Appendix, pp. 421-430). The jury deliberated over a two day period, during which it re-heard several portions of the testimony, including Ingram's and Petitioner's, and was re-charged on the law regarding self-defense and voluntary manslaughter. At approximately 4:25 p.m. on the second day, the jury indicated it was deadlocked.² Judge Culbertson gave the jury an Allen³ charge, and the jury continued deliberating. At 7:07 p.m., the jury returned guilty verdicts of voluntary manslaughter on the murder indictment, and ABHAN on the ABWIK indictment. (Appendix, pp. 439-459, 473-480).

The court of appeals affirmed Petitioner's convictions by unpublished opinion. State v. Leggette, Op. No. 2012-UP-203 (S.C. Ct. App., filed March 28, 2012). (Appendix, pp. 498-539). This Court denied Petitioner's Petition for Writ of Certiorari to the Court of Appeals by Order filed May 7, 2014. (Appendix, pp. 540-566).

Post-Conviction Relief

Petitioner filed a *pro se* Application for Post-Conviction Relief (PCR) on May 21, 2015, and the State filed a Return on February 23, 2016. (Appendix, pp. 574-579). The matter was

²The cited times are reflected in the trial transcript.

³Allen v. United States, 164 U.S. 492 (1896).

called for an evidentiary hearing on May 9, 2016, before the Honorable Paul M. Burch, Circuit Court Judge. Stephen W. Fowler, Esquire, represented Petitioner.

Petitioner testified he believed trial counsel was ineffective by failing to explain to him the difference between murder and voluntary manslaughter, which Petitioner described as “two different things.”⁴ He acknowledged trial counsel did explain the indicted offenses to him, but his own subsequent research made him feel “there was some discrepancies between” the initial charges and the jury’s verdict. Petitioner’s only specific testimony regarding the jury charges was his belief trial counsel “should have motioned for involuntary manslaughter when it came to [the deceased victim].” (Appendix, pp. 585-587, 616).

Trial counsel testified Petitioner’s case was assigned to him in 2009 in his capacity as a Horry County public defender. His records indicated he met with Petitioner at least four times and also had telephone conversations with Petitioner to discuss the case prior to the 2010 trial. He reviewed with Petitioner the elements and possible sentences upon conviction of each indicted charge, went over the trial procedures, and they discussed Petitioner’s version of the facts leading to the shooting, which served as the basis for the self-defense claim. He also discussed with Petitioner the possibility of convictions of lesser included offenses related to the indicted charges, and the possible sentences on such convictions. (Appendix, pp. 628-634, 640).

Trial counsel further testified he “never felt [the State] disproved self-defense,” or “truly proved any guilt of [Petitioner’s] beyond a reasonable doubt,” and stated he thought “the lesser included that the jury came back with as what [he] perceived to be somewhat of a compromise.”

⁴ Petitioner’s PCR application set forth very general allegations of ineffective assistance of counsel and constitutional violations. At the hearing, Petitioner testified about some specific claims, such as failure to call character witnesses and failure to object to a reference to the shooting as “an ambush killing,” none of which are relevant to this appeal. The only issue raised on appeal is ineffective assistance of counsel by failing to object to the voluntary manslaughter jury charge.

He stated he believed he “did everything [he] was capable of doing at the time,” but in hindsight he wondered, without specifically recalling, whether he did “as good a job as should have been done in casting the Defense’s request for jury charge, specifically with regard to the Defendant’s right to act on appearances.” He stated he did not “recall whether [he] did as good a job as I would do now, for instance, with the requested jury charges,” and that was “the one thing that [he had] definitely questioned, whether [he] did a good enough job with the jury charges.” (Appendix, pp. 636-637).

On cross-examination, trial counsel testified that based on his “vague recollection” when compared to his current practices, he could not “believe that the jury charges were as strong as in present day I would definitely push for,” “maybe they were,” but he could not believe “that they weren’t.” Again, based on his “vague recollection,” trial counsel testified he “would have to say [he] would think” his jury charge “was lacking or deficient in its presentation,” or “not as strong then as it is now,” and whether it was not “as well done then” was an issue for him personally, but it was not for him to say whether it would be considered “lacking or deficient.” (Appendix, pp. 648-649).

In the Order dismissing the PCR petition, Judge Burch analyzed Petitioner’s voluntary manslaughter claim under the heading – “Failure to Object to Conviction for Voluntary Manslaughter.” The Order cited the case law regarding murder and voluntary manslaughter as a lesser included offense of murder and found Judge Culbertson instructed the jury on voluntary manslaughter without objection by trial counsel. Judge Burch further found trial counsel “testified he explained the indictment and the elements of each offense.” (Appendix, pp. 659-660).

Judge Burch concluded Petitioner “failed to meet his burden of showing either a deficiency on the part of counsel, or prejudice therefrom.” Judge Burch found Petitioner “offered no reason

why voluntary manslaughter should not have been charged, and appears to not recognize it as a lesser-included offense of murder.” Based on a review of the complete trial record, Judge Burch found “the voluntary manslaughter charge was appropriate and supported by facts in the record.” (Appendix, p. 660).⁵

The court of appeals granted Petitioner’s Petition for Writ of Certiorari, ordered briefing of the voluntary manslaughter related issue, held oral arguments, and by opinion filed August 2, 2023, affirmed the Order denying relief and dismissing Petitioner’s PCR application. (Supp. Appendix, pp. 1-11). By Order filed September 21, 2023, the court of appeals denied Petitioner’s Petition for Rehearing. (Appendix, pp. 12-23). Petitioner now seeks this Court’s review of the court of appeals decision.

⁵As noted above, Petitioner testified about multiple other issues he contended were ineffective assistance of counsel. Judge Burch addressed and denied each of those issues individually in the Order. None of those rulings are at issue in this appeal.

ARGUMENT

Assuming the voluntary jury charge issue is preserved for appellate review and a proper consideration in this PCR action, the court of appeals properly affirmed Judge Burch's finding that Petitioner failed to meet his burden of establishing counsel was ineffective in failing to object to the voluntary manslaughter charge.

The court of appeals held Judge Burch correctly found the evidence at trial supported submitting the lesser included offense of voluntary manslaughter to the jury. The State submits the issue presented on appeal – ineffective assistance of counsel in failing to object to the voluntary manslaughter charge – is not preserved for appeal. Even if the issue is preserved and properly presented in this PCR action, however, Petitioner failed to meet his burden to overcome the presumption that trial counsel provided effective representation.

STANDARD OF REVIEW

The appellate courts defer to the post-conviction relief court's factual findings and will uphold them if supported by any evidence in the record. Smalls v. State, 422 S.C. 174, 179–181, 810 S.E.2d 836, 839 (2018). Further, the appellate courts afford great deference to the post-conviction relief court's credibility findings. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). Questions of law are reviewed *de novo*, and the appellate courts will reverse the post-conviction relief court if its decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

A. Preservation

The State submits it is highly questionable that the issue as raised by Petitioner in his Petition for Writ of Certiorari is preserved for review on appeal. At the PCR hearing, Petitioner maintained counsel was ineffective for failing to object to his **conviction** for voluntary

manslaughter because he was only indicted for murder, and Petitioner did not recognize voluntary manslaughter as a lesser included offense.⁶ (Appendix, pp. 585-587, 615-616).

This interpretation of the issue as presented to, and understood by, Judge Burch is evidenced by the issue caption in Judge Burch's Order of Dismissal: "Failure to Object to **Conviction** for Voluntary Manslaughter." (emphasis added). Judge Burch noted: "Applicant attested that murder and voluntary manslaughter are different things, and took issue with being convicted of voluntary manslaughter when he was indicted for murder." Additionally, the Judge Burch explained: "Applicant offered no reason why voluntary manslaughter should not have been charged, and appears to not recognize it as a lesser-included offense of murder."⁷ Judge Burch concluded the evidence at trial supported a voluntary manslaughter jury charge, but did not reference any specific evidence on the issue. (Appendix, pp. 659-660).

In connection with the State's preservation argument, the court of appeals noted neither Petitioner nor the State asked trial counsel about strategy in connection with the voluntary manslaughter jury charge. The court of appeals then astutely observed that requesting a voluntary manslaughter charge "would have been a legitimate strategic attempt to mitigate the consequences of the sentence Petitioner faced on the murder charge if the jury were to reject his theory of self-

⁶Petitioner testified he felt trial counsel "should have asked for voluntary manslaughter charge," and "should have motioned for involuntary manslaughter when it came to Tisdale." (Appendix, pp. 615-615). Petitioner's testimony contradicts any implication Petitioner alleged trial counsel was ineffective for **not** objecting to the voluntary manslaughter jury charge.

⁷Petitioner emphasizes that Judge Burch found Petitioner proceeded on "broad allegations of ineffective assistance of counsel without objection by the State" as evidence the issue he raises on appeal is preserved. (Petition, p. 13). Judge Burch's finding must be viewed in light of what "broad" issues Petitioner actually raised at the PCR hearing rather than affording Petitioner *carte blanche* to raise any issue on appeal. Petitioner raised specific issues in his testimony that were "broad" only in the way Petitioner testified about them. Judge Burch addressed each of those issues individually, including the failure to object to Petitioner's conviction of voluntary manslaughter.

defense, as it ultimately did,” and challenging the charge “would have been a huge risk in light of Petitioner’s very contradictory statements to law enforcement and his decision to obtain an illegal firearm and go out that night - armed - despite his escalating beef with Ingram and his anticipation that ‘something was going to happen.’” (Supp. Appendix, pp. 7-8, n. 5). As discussed below, this strategy discussion is very significant to the analysis of an ineffective assistance of counsel determination, which is the only appropriate analysis applicable to this case.

On appeal from Judge Burch’s Order, Petitioner solely challenged the sufficiency of the evidence to support a voluntary manslaughter jury charge —a different issue than raised at the hearing as evidenced by Judge Burch’s framing of the issue before him. As a result, the issue Petitioner raised is not properly preserved for review. See, e.g., State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue not preserved when one ground is raised to the trial court and another ground is raised on appeal); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

B. Merits

Even if preserved and properly presented in this PCR action, Petitioner’s contentions regarding the voluntary manslaughter jury charge fail on the merits when viewed in light of the applicable PCR framework and law. In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

1. Burden of Proof

When an applicant alleges ineffective assistance of counsel as a ground for relief, he must prove “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.” Butler at 815-816. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. *Id.*

The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is **strongly presumed** to have rendered adequate assistance and **made all significant decisions in the exercise of reasonable professional judgment**.

Strickland v. Washington, 466 U.S. 668, 690 (emphasis added); *see also* Butler at 815-816 (same).

A PCR applicant must overcome the **presumption** of adequate assistance to receive relief. Strickland, 466 U.S. at 689; Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; *see also* Edwards v. State, 392 S.C. 449, 710 S.E.2d 60, 64 (2011).

In this case, Petitioner bears the burden to establish ineffective assistance of counsel and overcome the presumption that trial counsel provided adequate assistance and exercised reasonable professional judgment in making all significant decisions, including decisions regarding whether to request or oppose a voluntary manslaughter jury charge. In the face of that burden, Petitioner presented **no** evidence indicating who even requested the voluntary manslaughter jury charge, much less that trial counsel failed to exercise reasonable professional judgment regarding the jury

charge.⁸ “[T]he absence of evidence cannot overcome the strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance.” Burt v. Titlow, 571 U.S. 12, 23 (2013) (internal quotation marks and brackets omitted).

The court of appeals’ strategy discussion in n. 5 of its opinion bears directly on the merits of Petitioner’s purported claim as to the voluntary manslaughter jury charge. The court outlined how either requesting the voluntary manslaughter charge, or not objecting to one proposed by the State, would have been a legitimate strategy to mitigate the consequences of a murder conviction if the jury rejected the self-defense theory (which it ultimately did). Given the **presumption** of effective assistance required in PCR cases, absent evidence to the contrary, the court of appeals’ strategy analysis conclusively requires affirmance of Judge Burch’s finding that Petitioner failed to meet his burden to show ineffective assistance of counsel or prejudice relating to the voluntary manslaughter conviction.⁹ See Strickland, 466 U.S. at 689 (“defendant must overcome the presumption that under the circumstances, the challenged action ‘might be considered sound trial strategy.’”).

⁸The court of appeals noted that neither Petitioner nor the State asked trial counsel about the voluntary manslaughter jury charge, so trial counsel was “not able to explain why he failed to object to the instruction – if it was a failure at all.” (Supp. Appendix, p. 7, n. 5). Since Petitioner, not the State, has the burden to overcome the presumption of effective assistance, his failure to even question trial counsel about the jury charge clearly indicates the jury charge was not the focus of Petitioner’s allegations.

⁹Petitioner attempts to bootstrap a single comment trial counsel made during sentencing about recklessness into evidence that trial counsel “misunderstood the law of voluntary manslaughter,” and therefore, failure to object to the voluntary manslaughter jury charge “could not have been based on a valid strategic decision.” (Pet, p. 10, n. 2). When read in context, however, trial counsel’s recklessness comment was an effort to mitigate the sentence by differentiating the facts of the case from other cases of voluntary manslaughter. (Appendix, p. 486). Even if the comment was inartful mitigation argument, it does not lead to the conclusion trial counsel misunderstood the law and could not have made trial decisions based on a valid strategy.

2. Sufficiency of the Evidence

If sufficiency of the evidence to support the voluntary manslaughter jury charge is relevant in light of Petitioner's complete failure to present any evidence trial counsel was deficient, Judge Burch found there was evidence in the trial record supporting a jury charge of voluntary manslaughter. (Appendix, pp. 659-660). In affirming Judge Burch's finding, the court of appeals detailed the trial evidence supporting submission of the lesser-included voluntary manslaughter offense to the jury.¹⁰ (Supp. Appendix, pp. 10-11).

"The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). The offense of manslaughter should be eliminated only when it very clearly appears "there is **no** evidence whatever tending to reduce the crime from murder to manslaughter." Casey v. State, 305 S.C. 445, 409 S.E.2d 391, 392 (1991) (quoting State v. Norris, 253 S.C. 31, 168 S.E.2d 564, 565 (1969)) (emphasis added). The manslaughter charge is warranted if "there is **any evidence** from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Starnes, 388 S.C. 590, 698 S.E.2d 604, 608 (2010) (emphasis added).

Petitioner's discussion of case law on the issue of whether a voluntary manslaughter jury charge was appropriate in this case engages in the same type of factual comparison analysis this Court addressed in Starnes, stating such an analysis "takes our case law and turns primarily fact-driven holdings into broad statements of law." Starnes, 698 S.E.2d at 608. Notably, all the cited cases arose from direct appeal issues regarding the sufficiency of the evidence to support giving

¹⁰ The court of appeals stated: "We acknowledge the question of whether Petitioner acted in a sudden heat of passion is a close one." If the question was indeed a "close one," it was a question for jury determination, and not indicative of ineffective assistance of counsel.

or denying a voluntary manslaughter jury charge request, not ineffective assistance of counsel.¹¹

To the extent discussion of the evidence to support a voluntary manslaughter jury charge and Petitioner's conviction on that charge is necessary in this PCR context, there was evidence at trial to support it.¹² The trial testimony established there was an ongoing feud between rival groups with Petitioner on one side and the victims on the other. There were prior physical confrontations between Petitioner and Ingram, including one occurring mere days before the shooting. Petitioner himself testified he was sufficiently concerned about the possibility of trouble at the bar the night of the shooting that he armed himself with a gun he had illegally obtained.

When Petitioner and Gardner arrived at the bar, they were confronted by numerous individuals, and Petitioner indicated the group of men formed a semi-circle in front of him and he already knew he was going to get "jumped." (Appendix, p. 345). See State v. Pittman, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2007) (recognizing "an overt, threatening act or physical encounter may constitute sufficient legal provocation") (emphasis added). Petitioner and other witnesses testified that when Ingram and Tisdale arrived at the bar someone told them Petitioner was there. Petitioner walked away and both victims followed him.¹³ One witness testified he continued watching as they walked down the street because he believed there was going to be a fight.

¹¹Even in Cook v. State, 415 S.C. 551, 784 S.E.2d 665 (2015), the voluntary manslaughter issue was addressed in the context of a direct appeal granted in a PCR proceeding pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Cook, 784 S.E.2d at 666.

¹² Petitioner's claim that the State failed "to identify any evidence of legal provocation," but "merely made conclusory statements that sufficient legal provocations existed" ignores the State's specific references to the record and discussion of the circumstances surrounding the shooting. The fact Petitioner disagrees with the State's assessment of the evidence does not negate the State's argument.

¹³The testimony differed on when Ingram and Tisdale started in the same direction as Petitioner and how far behind Petitioner they were at the time of the shooting.

Petitioner's fear of being "jumped" again led him to leave the bar. He heard "running" footsteps coming up behind him, which caused him to be "frightened and fearful." Petitioner testified at trial that he heard one of the people running behind him call out, he turned and saw they were approximately three feet behind him. He claimed he saw Ingram reach toward his waistband and because Ingram was "known for carrying guns," Petitioner immediately pulled his gun and fired the fatal and wounding shots. Petitioner testified: "In that course of time I was already scared. I didn't know what to do." (Appendix, pp. 342-347, 351) (emphasis added).

Sudden heat of passion resulting from sufficient legal provocation in the context of voluntary manslaughter "need not dethrone reason entirely, or shut out knowledge and volition[.]" State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011). The sudden heat of passion, upon sufficient legal provocation, while it need not dethrone reason entirely, or shut out knowledge and volition, it 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. State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). "In determining whether the act which caused death was impelled by heat of passion . . . , **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.**" Norris, 253 S.C. at 35, 168 S.E.2d at 566 (emphasis added). "[F]ear resulting from an attack can constitute a basis for voluntary manslaughter." Starnes, 388 S.C. at 598, 698 S.E.2d at 609. "[A] person's fear immediately following an attack **or threatening act** may cause the person to act in a sudden heat of passion." *Id.*

Petitioner's own trial testimony revealed several significant facts that support the conclusion he fired his gun due to an uncontrollable impulse to do violence. First, previous

confrontations with Ingram and his people made Petitioner feel disgraced and disrespected, and Petitioner had already decided he was going to “make a stand” rather than run away. Second, Petitioner perceived the actions of the crowd at the bar, including pointing Petitioner out to Ingram and Tisdale, and them running after him, as “threatening acts.” Third, Petitioner had already decided he simply was not going to stand for another “lynching” or “jumping,” and the act of pulling and firing his gun was not the exercise of rational thought after cool reflection, but an uncontrollable impulse to do violence based on his state of mind when he came to the bar expecting trouble, brought an illegal gun with him, and was going to “make a stand.” Fourth, Petitioner’s initial denial to law enforcement that he even had a gun that night and claim that he ran away after hearing gunshots are contrary to his subsequent claim that he only fired the gun because of his fear.

Petitioner was no doubt afraid due to an escalating dangerous situation in which he believed he was going to be “jumped” again, and then he heard people running closely behind him. Given the history between Petitioner and Ingram and Ingram’s people, when Petitioner turned around and saw Ingram and Tisdale three feet away from him, he was already scared from the situation, he reacted without cool reflection because he had decided to take a stand, he “didn’t know what to do,” and he rapidly fired two or three shots. See Starnes, 388 S.C. at 599, 698 S.E.2d at 609 (“a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear”).¹⁴

¹⁴Petitioner asserts the court of appeals “never found Petitioner’s fear caused him to lose control and created an uncontrollable impulse to do violence,” which is required to find a defendant acted in a sudden heat of passion. While it is true the court of appeals did not use the magic words “lose control” and “uncontrollable impulse to do violence,” the case law cited in the opinion, including Starnes, and the court’s finding there was sufficient evidence Petitioner acted in a sudden heat of passion upon sufficient legal provocation implicitly includes the loss of control and uncontrollable impulse to do violence elements.

Petitioner attempts to avoid criminal responsibility as to Tisdale by claiming there was no evidence of any overt act or legal provocation by Tisdale. Not so.

Both Ingram and Tisdale were associated with the group that initially confronted and surrounded Petitioner outside the bar. Petitioner testified he saw both men drive up in their car, someone in the group pointed Petitioner out to them, and both men were “running” up behind him after the confrontation.¹⁵ Further, as noted above, Petitioner testified he was not going to allow that group to disrespect him again. Under the circumstances leading up to and surrounding the shooting, Ingram and Tisdale were acting in concert as part of the group Petitioner thought was going to “jump” him that night. Thus, Tisdale was part of the legal provocation leading to the shooting.

Finally, Petitioner’s assertion the jury compromised and found him guilty of voluntary manslaughter is pure speculation. He presented no evidence that members of the jury chose voluntary manslaughter as a compromise, and the record shows that when individually polled after rendering the verdict, all members of the jury indicated voluntary manslaughter was their verdict. See State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869, 873 (1997) (appellant presented no evidence members of the jury panel thought guilty but mentally ill was a lesser verdict than guilty or that the guilty but mentally ill verdict was chosen as a compromise, and all jurors indicated guilty but mentally ill was their verdict). Rather than evidencing a compromise verdict, the fact the jury deliberated for a long time, re-heard testimony, requested to be re-charged on voluntary manslaughter and self-defense, and then deliberated for two more hours after the Allen charge,

¹⁵Petitioner knew Tisdale was part of Ingram’s group and was with Ingram coming up behind Petitioner because Petitioner testified at the PCR hearing that Tisdale was behind Ingram when Petitioner turned around. (Appendix, pp. 615-616).

clearly indicates the jurors took their oath to carefully consider all the evidence very seriously and rendered a verdict they believed was appropriate based on the evidence.

The testimony at trial could have supported a conviction for murder, but it did not eliminate the conclusion Petitioner acted in the heat of passion based on a sufficient legal provocation of the threatening acts by Ingram's people and almost being "jumped" by that group, then being closely followed by people associated with that group, including someone with whom he had prior physical altercations. As a result, counsel was not deficient in failing to object to the voluntary manslaughter charge given because it was properly presented to the jury based on the evidence in the record, and the court of appeals properly affirmed Judge Burch's findings and dismissal of Petitioner's PCR petition.

CONCLUSION

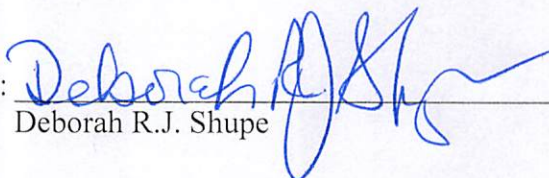
Based on the foregoing and the Brief of Respondent before the court of appeals, the State submits the court of appeals properly affirmed Judge Burch's dismissal of Petitioner's PCR petition, and the Petition for Writ of Certiorari to the Court of Appeals should be denied.

Respectfully submitted,

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