IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
Sep 25 2024
S.C. SUPREME COURT

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

The Honorable Robert J. Bonds, Circuit Court Judge

Appellate Case: 2024-001082
Common Pleas Case No. 2020-CP-03-257

LaParis Flowers, Petitioner,

vs.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

Elizabeth A. Franklin-Best
Bar No. 72555
Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Suite 113
Columbia, SC 29204
(803) 445-1333

Counsel for Petitioner

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

QUESTIONS PRESENTED

I. Whether the PCR Court erred in finding trial counsel was not ineffective for failing object to improper closing arguments by the State?

II. Whether the PCR Court erred in finding trial counsel was not ineffective for failing object to improper "truth seeking" language used by the Court and State at trial?

III. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to investigate and present an alibi defense at trial?

IV. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to introduce the audio and video recorded statements of the complaining witnesses identifying Petitioner in order to provide context and clarity regarding the improper and highly suggestive tactics used in obtaining the statements?

V. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to sufficiently object, on the record, to the use of the jury instruction containing language that permitted malice to be inferred from the use of a deadly weapon?

STATEMENT OF THE CASE

Petitioner, LaParis Flowers (SCDC ID No. 375098), is currently being held in the custody of the State of South Carolina Department of Corrections and housed at Kershaw Correctional Institution and Reentry Center located at 4848 Gold Mine Highway, Kershaw, South Carolina 29067, serving a 50-year term of incarceration.

In July 2015, Petitioner was indicted by an Allendale County Grand Jury for the murder of Russell Smart – S.C. Code § 16-3-10 (Indictment No. 2014-GS-03-229, the attempted murders of Tyquan Charlton, Jarrell Murray, and Brandon Lewis – S.C. Code § 16-3-29 (Indictment Nos. 2014-GS-03-231 through 2014-GS-03-233, respectively), and possession of a weapon during the commission of a violent crime – S.C. Code § 16-23-490 (Indictment No. 2014-GS-03-234). App. 650-659. On January 8, 2018, the matter proceeded to a jury trial before the Honorable Perry M. Buckner. Petitioner was represented by Joshua Kroger, Jr. Esq. at trial and prosecuted by Tameaka Legette and Brian Hollen of the Fourteenth Judicial Circuit Solicitor's Office. On January 11, 2018, the jury returned guilty verdicts as to all counts. App. 630-631. Judge Buckner sentenced Petitioner to a term of 45 years in state prison for the murder charge plus a consecutive term of 5 years for the possession of a firearm charge, in addition to concurrent terms of 30 years on each of the attempted murder charges, for an aggregate term of 50 years imprisonment. App. 647.

Petitioner timely directly appealed the judgment imposed upon him. The appeal was perfected by his appointed counsel, Appellate Defender Taylor D. Gilliam, Esq., who filed a brief pursuant to *Anders v. California,* 386 U.S. 738 (1967), raising one legal issue – that the court erred in its admission of three out-of-court identifications – but stated the appeal was without legal merit sufficient to warrant a new trial. Petitioner supplemented the argument raised on appeal in his March 18, 2019 *pro se* brief, arguing instructional errors pertaining to the out-of-court

identifications used by the prosecution in Petitioner's case. He additionally supplemented his *pro se* brief on November 12, 2019, arguing that this Supreme Court's then-recent ruling in *State v. Burdette,* 427 S.C. 490 (2019) rendered the inferred malice instruction given in his case erroneous. On July 1, 2020, his appeal was dismissed, and remittitur was issued on September 25, 2020. *State v. Flowers,* Unpublished Opinion No. 2020-UP-207 (S.C. Ct. App., filed Jul. 1, 2020), cert. denied (S.C. Supreme Ct. Sept. 24, 2020).[1]

Thereafter, on October 19, 2020, Petitioner filed a *pro se* application for post-conviction relief (PCR) in the Court of Common Pleas for the County of Allendale, assigned Case No. 2020-CP-03-257, alleging ineffective assistance of trial counsel, Joshua Kroger, Jr., Esq., and appellate counsel, Taylor D. Gilliam, Esq. On February 5, 2021, the State filed a return to Petitioner's PCR application, arguing Petitioner's PCR application failed to present a prima facie case for relief and requesting an evidentiary hearing on the matter. On November 10, 2022, Petitioner filed an amended application, further outlining his arguments. This amendment alleged trial counsel was ineffective based on his failure to: (1) obtain and introduce at trial evidence revealing the improper and highly suggestive identification procedures used in his case; (2) investigate and present an alibi defense; (3) request additional jury instructions on the limitations and inadequacy of the identification testimony presented at trial; (4) object to the charge that malice may be inferred from the use of a deadly weapon; (5) introduce into evidence audio and video recordings of the complaining witnesses' interviews; (6) object to improper arguments during the prosecution's closing; and (7) object to the unsealing of Petitioner's juvenile records without an order of a Family Court Judge. He relatedly averred that appellate counsel, who filed a brief pursuant to *Anders*

[1] Certiorari was denied pursuant to *State v. Lyles,* 381 S.C. 422 (2009), holding the Court will not entertain petitions for writs of certiorari where the appeal has been dismissed following an *Anders* review.

arguing only that the court erred in its admission of three out-of-court identifications, was ineffective for failing to make an argument regarding the applicability of a Supreme Court ruling regarding the use of the inferred malice charge applied in his case, *State v. Burdette,* 427 S.C. 490 (2019).

Thereafter, a March 14, 2023 evidentiary hearing was convened before the Honorable Robert J. Bonds. Petitioner was represented by retained counsel, Tommy A. Thomas, Esq., and the State's interests were represented by Assistant Attorney General Danielle Dixon, Esq. On September 29, 2023, the PCR Court issued an Order dismissing Petitioner's application for relief, and on December 3, 2023, Petitioner, by and through Attorney E. Charles Grose, Jr., filed a Rule 59(e) motion requesting reconsideration of the Court's Order of Dismissal. The State filed a return on December 14, 2023, and on June 25, 2024, the Judge Bonds issued an order summarily denying the motion.

On June 27, 2024, by and through undersigned counsel, Petitioner timely filed a Notice of Appeal from the PCR Court's denial of his application for post-conviction relief and his Rule 59(e) motion. The instant petition for writ of certiorari now follows.

STATEMENT OF FACTS

In the early morning hours of December 6, 2014, at approximately 3:00 am, a shooting occurred at the Pinewood Apartments on Barton Road in Allendale, South Carolina. App. 184-185;,199. After leaving the Lobster House, a nearby local bar, Russell Smart, Tyquan Charlton, Brandon Lewis, and Jarrell Murray were at the apartment complex in a green Ford Crown Victoria when they were approached by a white sedan alleged at trial to have been an Oldsmobile Alero. App. 185, 201, 204, 217, 250-251, 257, 286-289, 304-306. After a brief exchange, the driver of the white sedan reportedly drew a gun and began firing into the Crown Victoria. App. 258-259, 288, 306-307. The driver of the Crown Victoria, Russell Smart, was shot in the left arm and the bullet continued, passing into his chest. App. 201-202, 336, 340. Two of Smart's passengers, Tyquan Charlton and Brandon Lewis, were also injured, with Charlton being struck in the left side of his jaw and Lewis being shot in the left arm, while the third, Jarrell Murray, fled and was unharmed. App. 204-205, 208, 215-217, 260, 307. Smart died as a result of the shooting; the injuries sustained by the vehicle's other occupants were nonfatal. App. 214. A verbal altercation reportedly occurred at the Lobster House shortly preceding the shooting, but it was not alleged to have directly involved either Petitioner or the occupants of the Crown Victoria, and those persons who were directly involved in the disagreement did not recall Petitioner even being present when the altercation occurred. App. 221-225, 240, 246.

Based on out-of-court identifications made by Lewis, Charlton, and Murray, the State proceeded under a theory that Petitioner was the driver of the white sedan, as well as the shooter. App. 258, 268, 289, 293. Petitioner denied any and all involvement with the shooting, providing a December 7, 2014 voluntary statement to law enforcement that he had been at the Lobster House earlier in the evening, but left in advance of the verbal disagreement and, by the time of the

shooting, he and his then-girlfriend, Kendall Nix, were on his way to North Augusta, South Carolina in her vehicle to tend to their child. App. 9, 75-77, 590, 646, 664-666. After he gave his statement, Petitioner was arrested in connection with the shooting. App. 9.

ARGUMENT

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). "The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." *State v. Sterling*, 377 S.C. 475, 479 (2008). In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. *Caprood v. State*, 338 S.C. 103, 109 (2000). "In order to prove counsel was ineffective, the [Petitioner] must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Lounds v. State*, 380 S.C. 454, 459 (2008), citing *Strickland*, 566 U.S. 668. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Id*. "Moreover, 'when a defendant's conviction is challenged, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" *Id*., quoting *Ard v. Catoe*, 372 S.C. 318, 331 (2007) (internal quotation marks and citations omitted).

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. We review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180-181 (2018) (citations omitted). "The Court will reverse the PCR court's decision when it is controlled by an error of law." *Pierce v. State*, 338 S.C. 139, 145 (2000).

I. Whether the PCR Court erred in finding trial counsel was not ineffective for failing object to improper closing arguments by the State.

At the start of the State's closing argument, the Solicitor proclaimed before the jury, "It is not my intent to prosecute an innocent man. Not so. We do not prosecute the innocent, only the guilty." App. 556. The State continued, later in its argument also arguing that State's witness Brandon Lewis, who had made an on-the-record recantation his earlier purported identification of Petitioner, was doing so to avoid being labeled a "snitch" now that he was incarcerated himself. App. 561-563. It is well settled that trial counsel has an obligation to object to improper closing arguments. *See*, e.g., *Vasquez v. State*, 388 S.C. 447, 458 (2010); *State v. Northcutt*, 372 S.C. 207, 222 (2007); *State v. Linder*, 276 S.C. 304, 312 (1981). Counsel failed to meet his obligation as to the statements at issue in this case as, for the reasons described below, each of these statements were improper to a degree sufficient to warrant a new trial.

In *Fortune v. State,* 428 S.C. 545 (2019), this Court found PCR relief was due and a new trial was necessary as a result of the same type of improper language being used by the prosecutor in that case. *Id.* at 562. There, the Solicitor argued that, if he *believed* "somebody else did the crime," then he must "dismiss it." "And [if] [he] know[s] the person has done something that [*he*] *think[s]* the facts show they're guilty of, then [he] can't [dismiss] it. [He] ha[s] to go forward with it." *Id.* at 547 (emphasis added). The language used in the instant case was even more inflammatory, as the prosecutor in Petitioner's case expressly stated, "[w]e do not prosecute the innocent, only the guilty[,]" conveying to the jury that she somehow *knew* Petitioner to be guilty, instead of merely insinuating she *believed* Petitioner to be guilty, as was the case in *Fortune.* Therefore, as in *Fortune*, the Solicitor's statement violated Petitioner's right to due process and when trial counsel failed to object to the Solicitor's comments, he provided Petitioner with deficient representation. Likewise, because this Court has concluded that this commentary as part

of the State's closing is sufficient to warrant a new trial, Petitioner was prejudiced by counsel's shortcomings, as he was deprived of a fair trial when his attorney declined to raise a proper objection. *Lounds*, 380 S.C. at 459.

The State's comments regarding Brandon Lewis were equally objectionable. The government may not improperly vouch for a witness during closing arguments in an attempt to bolster the credibility of the witness. "Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." *State v. Shuler*, 344 S.C. 604, 630 (2001). In the instant case, Lewis was initially unable to identify the shooter, but later purportedly identified Petitioner. App. 100-101, 105-107, 415-423. However, at trial, he denied ever making such identification and was not able to make an in-court identification. App. 308-311. However, no testimony was offered by Lewis or anyone else, and no other evidence was offered, that he was recanting his identification due to a "snitch code." Rather, Lewis testified only that he did not remember making an identification of Petitioner or anyone else at any time, and when directly asked if he knew who shot him, he unequivocally replied, "no." App. 308-311. The Solicitor never even inquired into why his statement differed from his earlier alleged identification. Yet, in closing, she presented her own supposition as to why he may have offered different testimony at trial, stating, "I couldn't hide from you that Brandon Lewis is in Federal prison. Brandon Lewis is an inmate, has been there since 2015…[.] He will be there until 2021. He is going back there to Federal prison. Yes, he is. [¶] Let's talk about the inmate, the snitching, the code. It's a code. It is a code, he is sitting in prison. He has to go back. […] And because he has to go back there, he can't sit here and identify a man and then he would have to go back and tell the boys. He has to go

back to prison. Surely they are going to ask him what he did. He had to know that. 'Man, I didn't do anything, man, I didn't, man, I –' that is what the inmate Brandon Lewis came in here and did. That is what he did." App. 561-562. Yet again, the Solicitor presented this argument as if it were fact-based, implicitly vouching for Lewis' veracity by "indicating information not presented to the jury" – i.e., his alleged operation under the "snitch code" – "support[ed] [his] testimony[,]" arguing it provided a reason for his recantation, when no such rationale had been entered into the evidence before the jury. *Shuler*, 344 S.C. at 630. This, too, violated Petitioner's right to a fair trial and it was both erroneous and prejudicial for counsel to fail to object to such comments.

Finally, Petitioner recognizes that, "[w]here counsel articulates a *valid* reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Stokes v. State*, 308 S.C. 546 (1992) (emphasis added). Although counsel in the instant case claimed his failure to object to the above statements was based in strategy, arguing that, although he had no specific memory of doing so, he was "sure that [he] clean[ed] [the issues with the State's closing] up on [his own] closing," App. 810-814, because such "error[s] go[] to the fundamental fairness of a criminal trial, guaranteed by the constitution, counsel can never have a valid trial strategy for failing to object to such … error[s][.]" *Solomon v. State,* 347 S.C. 635, 642 (2001) (Toal, J., dissenting). Therefore, counsel's shortcomings with regard to the State's closing argument were erroneous, cannot be supported by strategy, and were prejudicial, meaning Petitioner's attorney was ineffective in failing to object to the State's improper closing arguments. The PCR Court erred in holding otherwise.

II. Whether the PCR Court erred in finding trial counsel was not ineffective for failing object to improper "truth seeking" language used by the Court and State at trial.

The Court and State also utilized erroneous "truth-seeking" language at Petitioner's trial. Specifically, the trial court admonished the jury before the trial that, "An actual trial is a fundamental part of our democracy. It is a *search for the truth* in an effort to make sure that *justice is done* between parties before the court. *Searching for the truth* and trying to make sure that *justice is done* is often slow. It is often very deliberate. It is often repetitive. It is the exact opposite of what you may have seen on television or seen in a movie or read a book." App. 144. In the State's opening, the Solicitor then similarly argued, "Our job is to *find the truth* in this case. That is what we are going to give you. We are not hiding anything. We are going to tell you what happened, and you are going to know what happened. At the end of this case, *the truth will come out*. The *truth* is that on the morning of December 6th, LaParis Flowers killed Russell Smart. He shot Tyquan Charlton, he shot Brandon Lewis, and he almost shot Jarrell Murray." App. 172. The prosecution's closing mirrored this language, stating, that deliberation day was the "day when you get the *truth*." App. 557. The Solicitor continued, "LaParis Flowers, ladies and gentlemen, is a wicked and evil man. He is a killer. It's time to *speak the truth*. December 6th, 2014 was a time to kill for LaParis Flowers. He went to Pinewood Apartments to kill, murder, and destroy. He did that. And now it's time to *speak the truth*. *A verdict of guilty will speak the truth*. I have insulted you today, and for that I do apologize. But I want you to leave out of this courtroom without any doubt, beyond any reasonable doubt. LaParis Flowers, the robe of righteousness is in the garbage. Incinerated. On fire. It is over. *Speak the truth* this day. Find LaParis Flowers guilty of murder, of attempted murder of Tyquan Charlton, of attempted murder of Brandon Lewis, of attempted

murder of Jarrell Murray, and the weapon, because he had to use a firearm to kill. He is a killer." App. 577.[2]

The State even admits that this language was improper and there existed "a directive from our courts at that time [i.e., the time of Petitioner's trial] to stop using this truth-seeking language[,]" i.e., *State v. Beaty,* 423 S.C. 26, 34 (2018).[3] (PCR Tr. at 150.) In *Beaty* this Court held, "a trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice. We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt." Despite the State's acknowledgment and the law which unequivocally existed at the time of trial, the PCR court nonetheless found that Petitioner had "not provided any law at the time of [his] trial that prohibited attorneys from arguing truth-seeking language." App. 896-897. This was an objectively erroneous conclusion.

Further, although trial counsel attempted to excuse his failure to object to the undoubtedly erroneous language by explaining, "I think a number of solicitors use that [language]," he also admitted he was not aware of the holding in *Beaty* rendering it improper. App. 806-808. Any posited strategic basis for his failure to object because he found the language to be commonplace

[2] Emphasis added throughout.

[3] The original decision in *Beaty* was issued on December 29, 2016 and Petitioner's trial was conducted in January 2018.

at the time cannot excuse such shortcoming, as "[n]o supposed strategic decision passes Sixth Amendment scrutiny when it is based on such an obvious misunderstanding of the law." *Abney v. State,* 408 S.C. 41, 55 (2014) (Few, C.J., dissenting), citing *State v. Watson,* 370 S.C. 68, 74 (2006) (Pleicones, J., dissenting) and *Gallman v. State,* 307 S.C. 273, 277 (1992) . Trial counsel's failure to object to the Court's and State's comments therefore amounted to ineffectiveness.

Moreover, as was feared by this Court, the language used by Petitioner's trial court and echoed by the State "could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice." *Beaty,* 423 S.C. at 34. The language used in the instant case was not a one-off comment or a singular reference to truth-seeking made by the judge alone. Rather, it was intertwined throughout the very fabric of the trial, infused in the jury's minds by both the Court and then by the State, who wrapped it around emotionally triggering and harsh phrases labeling Petitioner destructive, murderous, wicked, evil, and a killer. Had Petitioner's jury instead been properly admonished of their duties and burdens, there is a reasonable probability the outcome of Petitioner's trial would have differed. *Lounds,* 380 S.C. at 459.

Accordingly, it was error for the PCR court to find trial counsel was not ineffective in failing to object to the improper "truth-seeking" language used at trial.

III. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to investigate and present an alibi defense at trial.

At the evidentiary hearing on Petitioner's PCR application, Petitioner testified that he maintains his innocence regarding the charges for which he is presently incarcerated. App. 729. He reported that, while he was at the Lobster House in the early morning hours of December 6, 2014, he left in his mother's white 1999 Oldsmobile Alero sometime between 2:00 am and 2:42

am. App. 731-732, 742-743. He unequivocally denied being present during any altercation. App. 731, 744. Petitioner further testified that he left the bar with his brother, Antron Williams, and they followed a car occupied by his then-girlfriend, Kendall Nix, and her cousin, Ashley, as well as Ashley's stepsister, to Ashley's nearby home. When they arrived at Ashley's home, Petitioner promptly turned over his car keys and possession of his vehicle to his brother before getting in Nix's car and proceeding with her, sometime between 2:05 am and 2:47 am, to North Augusta, South Carolina to check on the welfare of their child. App. 732-734, 745-747. They arrived at their destination between 3:20 am and 4:00 am. App. 748. Petitioner denied ever being present at Pinewood Apartments during the early morning hours of December 6, 2014. App. 734. This testimony was consistent with the voluntary statement he gave to law enforcement the day after the shooting. App. 664-666; 735. Accordingly, Petitioner's defense to the charges brought against him was an alibi defense. App. 734.

In further support of this alibi, Petitioner presented evidence that he was, at the time of trial, able to offer the statements and testimony of Kendall Nix, as well as his cousins who had been at the bar with them, Kimberly and Jaqwavian Williams. App. 736-737. Each of them also testified at the evidentiary hearing. They each confirmed Petitioner was at the Lobster House on the night in question but left prior to the altercation that preceded the shooting. App. 758-760, 765, 770, 772-774, 781-787. Nix confirmed the group left the bar for Ashley's house, and that, from there, she and Petitioner drove to North Augusta in her vehicle to check on their son who was recovering from a recent surgery. App. 760-761, 767, 770-771. Nix likewise testified that she and Flowers never went by the Pinewoods Apartments at any time on December 6, 2014. App. 761, 770. Jaqwavian Williams, who was one of the parties personally involved in the altercation at the bar, testified to the circumstances surrounding the argument, and unequivocally confirmed that

Petitioner had already left by the time it occurred. App. 774-775, 778, 780. Kimberly Williams, who was a direct witness to the altercation, also testified that Petitioner had left before it occurred. App. 785-787. Each of these statements were consistent with their statements to law enforcement taken following the shooting. App. 762, 776-777, 787-788.

However, neither Petitioner's statement nor his testimony, nor the testimony of his alibi witnesses, was presented at trial. Therefore, the jury did not hear anything about Petitioner's alibi at trial, counsel did not make any arguments regarding his alibi, and no jury instruction was given regarding the impact of his alibi. App. 737-739, 801, 818. In fact, his counsel never entertained presenting an alibi defense and did not even attempt to contact Petitioner's alibi witnesses for the purpose of obtaining their statements, although he had ready access to them. App. 739-740, 762-763, 767-769, 788-789, 801, 804-806. This was even though Petitioner repeatedly advised his attorney he wished to proceed with an alibi defense. App. 739. Counsel nonetheless decided not to pursue this defense without ever even investigating even a single alibi witness. App. 820. When he testified, trial counsel even acknowledged that the Alero – which Petitioner testified he had given custody of to his brother prior to the time of the shooting – contained incriminating evidence by way of gunshot residue (GSR). App. 793; *see also* App. 378, 480-483. Despite being aware of as much, counsel declined to present evidence supportive of an alibi defense which countered the State's claim that Petitioner was in Allendale and had control over the GSR-positive Alero at the time of the shooting. At the time of the evidentiary hearing, counsel admitted he had no notes from the time of his representation of Petitioner, and that he could not recall whether an alibi defense existed, or whether Petitioner asked him to speak with Kendall Nix, Jaqwavian Williams, and/or Kimberly Williams. App. 794-795, 798-799. However, he also acknowledged that he was provided with Petitioner's statement containing his alibi defense, as well as the statements of Kendall Nix,

Jaqwavian Williams, and Kimberly Williams, each confirming such alibi, as part of the discovery Petitioner's case. App. 794, 799, 802-803.

In its Order dismissing Petitioner's PCR application, Judge Bonds found trial counsel's testimony that Petitioner "never raised to him a defense of alibi" to be credible, while the Court found Petitioner's "testimony that he told counsel he had an alibi" to be "not credible." App. 885-886. This was although counsel, in fact, testified not that Petitioner "never raised" an alibi defense to him, but that he had no recollection of whether any such defense was raised. App.794-795, 798-799. The PCR Court further found that the testimony of Jaqwavian Williams and Kimberly Williams "did not create an alibi defense." App. 886. Though the statements of Petitioner and Nix undoubtedly form the basis of an alibi defense, the Court found the substance of their testimony to be "not credible." App. 886. On this basis Judge Bonds found that "it is not reasonably likely the outcome would have been different had [Petitioner] presented the alibi defense," and, therefore, had failed to demonstrate prejudice. App 886.

As noted above, only "[w]here counsel articulates a *valid* reason for employing certain strategy" will his conduct be saved from being deemed ineffective. *Stokes*, 308 S.C. 546 (emphasis added). Further, in crafting a strategy, counsel is not required to investigate "every conceivable" defense before landing on a course of action. *Von Dohlen v. State,* 360 S.C. 598, 607 (2004). However, "strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" *McKnight v. State,* 378 S.C. 33, 45 (2008), citing *Von Dohlen,* 360 S.C. at 607, quoting *Wiggins v. Smith,* 539 U.S. 510, 533 (2003). "'A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances.'" *Von Dohlen,* 360 S.C. at 607, quoting *Wiggins,* 539 U.S. at 533. In determining whether a failure to investigate is reasonable

under professional norms, this Court has considered factors such as counsel's familiarity with and access to the evidence at issue. *Id.* Here, counsel not only admits he received the exculpatory statements of Petitioner, Kendall Nix, Jaqwavian Williams, and Kimberly Williams as part of the discovery in this case, App. 794, 799, 802-803, but he also had access to these individuals, and even met with Nix on at least one occasion for the purpose of collecting payment, throughout the course of Petitioner's case. App. 767, 788, 804. Both the statements in discovery and Petitioner's communications with counsel put Attorney Kroger on notice that an alibi defense potentially existed in this case. Attorney Kroger does not deny that he may have been aware of the existence of such defense and admits that he never investigated a single alibi witness prior to deciding how to proceed, App. 820, but instead only argues he did not pursue the defense because Petitioner never told him he wanted to testify. App. 819. However, this alone does not explain his failure to introduce any other aspect of the alibi defense, such as Petitioner's statement to officers and the testimony of his identified witnesses. Counsel's failure to investigate cannot possibly be deemed reasonable under these circumstances and, therefore, his performance was deficient in this regard.

Further, counsel's failure to investigate and present an alibi defense was equally prejudicial. As a direct result of counsel's failure to investigate and present an alibi defense, the jury was not even aware any alibi defense existed. They were not presented with any information that would have countered the State's position that Petitioner was in Allendale at the time of the offense and had possession of the Alero which tested positive for GSR – information counsel admits was damning in Petitioner's case – although there existed evidence Petitioner was headed to North Augusta in an entirely different vehicle at the time of the shooting. App. 737-739, 760-761, 767, 770-771, 793, 801, 818. This information also countered the prosecution's purported motive for the shooting – knowledge of the altercation at the bar. Petitioner's statement and the

testimony of each of the witnesses presented at the PCR hearing each confirm that Petitioner was *not* present at the time of the incident the State claims preceded the shooting. App. 758-760, 765, 770, 772-775, 778, 780-787. Had the jury been presented with the alibi evidence, there is a reasonable probability they at least one juror would have had a reasonable doubt regarding Petitioner's guilt. *Lounds*, 380 S.C. at 459.

Therefore, trial counsel was also ineffective in failing to investigate and introduce an alibi defense and the PCR Court erred in ruling otherwise. Petitioner's Sixth Amendment right to counsel was violated by counsel's ineffective assistance.

IV. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to introduce the audio and video recorded statements of the complaining witnesses identifying Petitioner in order to provide context and clarity regarding the improper and highly suggestive tactics used in obtaining the statements.

As described above, Petitioner was arrested as a direct result of the out-of-court identifications made by Brandon Lewis, Jarrell Murray, and Tyquan Charlton. These statements were also crucial to the State's case against him at trial.

In his first statement, taken on the day of the shooting, Brandon Lewis informed officers that he was not able to identify the shooter, car, or weapon involved. App. 105-107. However, on December 7, 2014, Lewis was re-interviewed by officers and agents from Allendale Police Department and SLED after he contacted them to inform them that he wanted to give a statement identifying the shooter. In this second statement, he alleged Petitioner was the shooter. When administered a photo line-up, he also identified Petitioner, with whom he had been personally familiar prior to the shooting. App. 415-423. Later, at trial, Lewis adamantly denied ever making any such identification, and he did not identify Petitioner in court. App. 308-311. Lewis' only

statement identifying Petitioner was recorded, yet it was not submitted into evidence in full by the defense, and instead its contents merely testified to by law enforcement. App. 818-819.

Jarrell Murray was also interviewed by the officers and agents on December 7, 2014. In this interview he identified Petitioner, first by name and then in a photo array, although he admitted he had been in Smart's vehicle only very briefly before fleeing. During this interview he also identified the make and model of the vehicle involved in the shooting as a Pontiac Grand Prix. App. 98-100, 289-300, 423-433. This statement was also recorded but, again, excluded from the evidence before the jury as a result of the defense's failure to introduce it. App. 816-819.

A few days later, on December 10, 2014, Tyquan Charlton, while hospitalized and under the influence of drugs and having an admitted past of lying to law enforcement, was also interviewed. He, too, identified Petitioner by name and in an array. However, in the same statement, he also told law enforcement that he had no other memory of the night, including recollection of how he got into Smart's vehicle in the first place or how he got to the location of the shooting. He similarly did not remember anything that occurred after the shooting, as he "fell asleep." When asked about the vehicle involved in the shooting, he described it as a Chevrolet Cavalier. App. 100-103, 263-276, 433-439. Charlton's statement was also recorded but not played for the jury, as counsel never sought its introduction. App. 816-819.

The PCR Court's Order of Dismissal indicated that the Court found counsel's "strategy" of cross-examining these witnesses to be "effective" and "reasonable within prevailing professional norms," and therefore Petitioner had neither proven deficiency nor prejudice. App. 891-892. However, although Judge Bonds reached this conclusion based on counsel's attempt to claim his failure to introduce the audio and video evidence of the complainants' statements was rooted in strategy or tactics, App. 817-818, counsel failed to present "a *valid* reason for employing

[such] strategy." *Stokes*, 308 S.C. 546 (emphasis added). Rather, under his purported "strategy," instead of seeking introduction of these statements to show how improper and highly suggestive they were, in his closing, trial counsel instead attempted to merely imply the fact that they were not played in full by the State tended to indicate there were somehow wrongful. However, the State quickly shut this tactic down, objecting to counsel's mention of the recordings due to his failure to introduce them. The trial court sustained the objection. App. 593; 821. Therefore, the jury was precluded from considering both the recordings themselves and any argument regarding the recordings.

Trial counsel's flat claims of strategic support for his actions – or, in this case, inactions – cannot save his him from a finding of deficiency. But moreover, they also cannot save him from a finding of prejudice, meaning both prongs of *Strickland* are satisfied in the instant case. *See also Lounds*, 380 S.C. at 459. Had counsel introduced the recordings, not only would the jury have heard their suggestive contents, but trial counsel also admitted he would have been able to make argument based thereon as part of his closing. App. 816-819, 822. Had the prosecution's *key* evidence against Petitioner been impeached by these recordings, which reflected just how suggestive the procedures used by law enforcement were, there is a reasonable probability that a doubt would have been raised in the jury's mind regarding Petitioner's guilt. *Id.*

Accordingly, trial counsel was likewise ineffective in failing to introduce the recorded statements of Lewis, Charlton, and Murray, which would have given context to the statements, demonstrating their highly suggestive and improper nature. Counsel's failure resulted in violation of Petitioner's constitutional right to counsel, and the PCR Court erred in holding otherwise.

V. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to sufficiently object, on the record, to the use of the jury instruction containing language that permitted malice to be inferred from the use of a deadly weapon.

At trial, an inarguably now erroneous instruction regarding inferred malice was read to the jury. Specifically, the instruction stated, in pertinent part, that "malice may … arise when the deed is done with a deadly weapon." App. 612. Counsel failed to object to the instruction. App. 626.

At the time of Petitioner's January 2019 trial, the law provided that the instruction was problematic and, in fact, improper when applied in certain circumstances, including when "evidence is presented that would reduce, mitigate, excuse, or justify a homicide." *State v. Belcher,* 385 S.C. 597, 612 (2009). However, at that time, this Supreme Court was also considering the *Burdette* case, in which it ultimately concluded, in July 2019, the very instruction given in Petitioner's case amounted to improper burden shifting to the defense, rendering it improper in all cases.[4] *See* 427 S.C. at 503.

When the *Burdette* case was decided, Petitioner's case was still pending on appeal. However, but appellate counsel was unable to raise the issue due to trial counsel's failure to preserve it in the record. Further, although Petitioner raised it in his supplemental *pro se* brief, the Court of Appeals presumably[5] could not consider it for the same reason. App. 836-839, 846-848.

In its Order of Dismissal, the PCR Court found that, "[b]ecause th[e] charge was proper at the time of trial, counsel was not deficient for failing to object." App. 890. However, as part of his affording his client effective assistance, counsel has a duty to remain apprised of significant developments in the law. Cmt. [8] to S.C. App. Ct. R. 1.1 (to comply with his duty of competence,

[4] Burdette's petition for writ of certiorari on the issue was granted on March 7, 2018, nearly a year prior to Petitioner's trial, was fully briefed as of May 2018, and oral argument was set to be held on February 21, 2019.

[5] The Court's dismissal was summary in nature.

"a lawyer should keep abreast of changes in the law and its practice"). While attorneys are not required to be "clairvoyant or anticipate changes in the law which were not in existence at the time of trial" (*Gilmore v. State,* 314 S.C. 453, 457 (1994), overruled on other grounds in *Brightman v. State,* 336 S.C. 348 (1999); *Robinson v. State,* 308 S.C. 74, 77-78 (1992)), this obligation must necessarily encompass a duty to remain aware of cases presently pending before this Court which raise issues relevant to the attorney's practice area. At the time of Petitioner's trial, case law existed suggesting the instruction read to his jury was problematic in many instances (*Belcher*), and this Court was considering a case directly challenging the use of the very instruction read to his jury (*Burdette*), yet trial counsel never objected to the use of the instruction. App. 626. Appellate counsel confirmed this was an issue he would have "loved" to pursue, indicating its strength, but he could not do so as a direct result of trial counsel's failure to preserve the issue. App. 836-839, 846-848. Had counsel been able to raise this issue, there is a reasonable likelihood he would have been successful thereon, as there was little evidence of malice or state of mind presented by the prosecution at trial. In fact, the evidence presented seemed to raise substantial questions regarding why Petitioner would have been provoked enough by the pre-shooting altercation to have taken any action, as he was not involved in the altercation even in a peripheral manner. App. 221-225, 240, 246. However, trial counsel's failure to remain apprised of the evolving status of the law in his field of practice directly precluded the Court of Appeals from considering the inferred malice instructional error, and Petitioner additionally remains precluded from having the issue corrected in a later PCR action, App. 850, citing *Griffith v. Kentucky,* 478 U.S. 314 (1987); *see also Burdette,* 427 S.C. at 505, meaning counsel not only deviated from his duties, but also prejudiced Petitioner by failing to raise an objection to the instruction.

Accordingly, counsel's actions with regard to the inferred malice instruction amounted to ineffectiveness violative of Petitioner's Sixth Amendment right and it was also error for the PCR Court to conclude otherwise.

CONCLUSION

Petitioner therefore requests that the Court grant the writ of certiorari and allow appellate review of the order of dismissal signed by the Honorable Robert J. Bonds.

Respectfully submitted,

/s/ Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Suite 113
Columbia, SC 29204
(803) 445-1333
elizabeth@franklinbestlaw.com

Counsel for Petitioner