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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Walton J. McLeod, IV, Circuit Court Judge

DIONDRAE E. JACKSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2024-000952

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR court err finding the trial court properly charged the jury with self-defense and mutual combat where there was insufficient evidence to support the charge of mutual combat and where trial counsel failed to object to the mutual combat charge being given as part of the charge on self-defense?

2. Did the PCR court err finding trial counsel was not ineffective for failing to object to the verdict form that read "guilty plea" rather than "guilty" because the inclusion of the word plea was confusing to the jury?

STATEMENT OF THE CASE

Petitioner was indicted by a Florence County grand jury for murder and attempted murder, and on April 15, 2019, he was tried before the Honorable William H. Seals and a jury. App. 1. Todd Tucker represented the State and William "Josh" Edgeworth represented petitioner. App. 1.

The jury acquitted petitioner of murder and attempted murder but convicted petitioner of voluntary manslaughter. App. 546, l. 16 – 547, l. 14. Judge Seals sentenced appellant to twenty-eight years' imprisonment. App. 553, l. 7 – 9; 753.

Thereafter, petitioner filed an application for post-conviction relief. App. 570-577. On June 2, 2023, an evidentiary hearing was held before the Honorable Walton J. McLeod. App. 605-702. Steven Fowler represented petitioner and D. Russell Barlow, II, was present on behalf of the state. App. 605.

On May 20, 2024, Judge McLeod signed an order denying PCR. App. 715-749. As to petitioner's allegation that trial counsel was ineffective for failure to object to ambiguous and confusing language on the verdict form, the PCR court found the allegation was without merit. Specifically the court found, "the inclusion of 'guilty plea' on the verdict form amounted to a scrivener's error," and petitioner failed to present credible evidence that the error affected the outcome of trial. The court stated petitioner presented "pure conjecture" in support of the allegation that the jury was confused and believed he pled guilty to voluntary manslaughter. The court found the trial court clearly instructed the jury on its duty. App. 739-741.

As to petitioner's allegation that trial counsel was ineffective for failure to object to the trial court's charge of mutual combat, the PCR court found the allegation was without merit. Specifically, the court found the trial court properly charged the jury with both self-defense and mutual combat where evidence was presented establishing "an altercation ensued between

[petitioner] and [decedent] prior to the shooting over a couple of quarters." Without citing the case the court stated, the Supreme Court has held mutual combat and self-defense may be charged alongside each other if the evidence presented at trial supports the charge. App. 741-744.

This petition follows.

STATEMENT OF FACTS

Trial Testimony

The shooting in this case occurred in the early morning of May 6, 2018, at the Downbeat Club in a rural Florence County. App. 113, l. 24 – 114, l. 12; 430, l. 9 – 18. Petitioner testified he fired a gun in self-defense when one of a group of Bloods gang members drew a pistol on him. App. 441, l. 20 – 443, l. 6. The gang member with the gun was decedent Malcolm Spates. App. 441, l. 20 – 443, l. 6. Spates fired at petitioner. R. 441, l. 20 – 443, l. 6. Spates dropped the gun after he was shot and when Ronald Oliver, another gang member present at Downbeat, reached for it, petitioner shot him, as well. R. 441, l. 20 – 443, l. 6.

The State charged petitioner with Spates' murder and attempted murder for the shooting of Oliver. The jury acquitted petitioner of attempted murder and murder, but convicted him of voluntary manslaughter for the shooting of Spates. App. 546, l. 17 – 547, l. 3. The trial court only charged the jury on voluntary manslaughter at the solicitor's request and over petitioner's objection. App. 482, l. 22 – 485, l. 7.

The day of the shooting, petitioner was driving to a friend's house when he saw another friend, Latesha Newton. App. 424, l. 6 – 17. Petitioner and Newton talked for a while and Newton eventually invited him to go with her and her friends to a club. App. 424, l. 18 – 426, l. 23. Newton drover her car, a black Dodge Charger, and they picked up her friends, Everett Frierson, Ernestine Mack, and Lawanda Johnson. App. 144, l. 3 – 145, l. 20.

Newton had her .9mm firearm in the glove box of her car. App. 146, l. 20 – 147, l. 8. Lawanda Johnson also had a gun in the car, but she had given it to her fiancé, Frierson. App. 187, l. 15 – 188, l. 2; 223, l. 12 – 224, l. 15. Johnson's gun eventually made it into the center console. App. 223, l. 12 – 224, l. 15.

Frierson said he asked Johnson if they could take the gun to the club "for self-defense purposes because of everything that has been going on in the news about shootings happening at nightclubs." App. 223, l. 12 – 224, l. 15. Frierson claimed to know about other shootings at the Downbeat Club, which was corroborated by the lead investigator for the police. App. 246, l. 7 – 12; 399, l. 1 – 11. Johnson denied taking the gun because of a fear of violence, but admitted that they always took a gun to the Downbeat Club because "that's just what we do." App. 204, l. 24 – 205, l. 14. The bartender denied knowing of any instances of violence and also denied that the Downbeat Club was a haven for the Bloods. App. 253, l. 19 – 256, l. 13.

Most of the witnesses, including petitioner, agreed petitioner got into a disagreement at the club over a game of pool. Newton was not sure what happened, but heard quarters being thrown at petitioner. App. 151, l. 1 – 152, l. 1. Johnson saw petitioner get into an argument with a man wearing a red shirt. App. 190, l. 1 – 15. Mack said she saw petitioner have some words at the pool table. App. 217, l. 12 – 17.

Frierson said petitioner played a game of pool with his cousin. App. 226, l. 22 – 227, l. 5. Petitioner lost the game and went to the bar to get more quarters to continue playing pool. App. 227, l. 6 – 230, l. 6. Petitioner placed his quarters on the table, left, and returned to find a man named Maurice Hickson playing pool. App. 227, l. 6 – 230, l. 6. Petitioner objected to Hickson cutting in line and Frierson described Hickson as "apologetic." App. 227, l. 6 – 230, l. 6. Petitioner was very angry and another man in a red shirt came over to try to make change. App. 227, l. 6 – 230, l. 6. The men continued to offer the quarters to petitioner, but he refused to take them and remained angry. App. 227, l. 6 – 230, l. 6. Hickson then told petitioner "F you" and threw the quarters at petitioner. App. 227, l. 6 – 230, l. 6. Newton separated the men and took petitioner outside. App. 227, l. 6 – 230, l. 6. Frierson told the police he was afraid because of threats made

after the shooting and asked them for protection. App. 245, l. 1 – 16.

Petitioner agreed that he played one game of pool and lost, then went to the bar to get change to play another game. App. 434, l. 4 – 437, l. 14. When he got back, someone else's quarters were on the table. App. 434, l. 4 – 437, l. 14. They waited on the owner of the quarters to return, but he did not show up, so petitioner began playing. App. 434, l. 4 – 437, l. 14. Once they began playing, a man wearing a red hat, red shirt, and red pants showed up, pushed the balls around on the pool table, and accused petitioner of using his "MF'ing quarters." App. 434, l. 4 – 437, l. 14.

Petitioner later learned this man in all red was Spates. App. 434, l. 4 – 437, l. 14. Petitioner offered to get Spates change and another person walked up to calm the situation, but Spates was "mooshing" appellant in his chest. App. 434, l. 4 – 437, l. 14. Spates flicked a quarter into petitioner's face. App. 434, l. 4 – 437, l. 14. At this point, Newton took petitioner outside. App. 434, l. 4 – 437, l. 14.

Before entering the club, Newton encouraged petitioner to take her gun for protection. App. 429, l. 10 – 431, l. 22. When petitioner left the club after the altercation over the pool game, he went back to the car with Newton and smoked a cigarette. App. 436, l. 17 – 439, l. 24. Petitioner saw a man wearing a black hoodie watching him. App. 436, l. 17 – 439, l. 24. Petitioner tried to convince Newton to leave, but she wanted to stay. App. 436, l. 17 – 439, l. 24. The club's bouncer came out to check on petitioner and petitioner told him, "I'm good." App. 436, l. 17 – 439, l. 24.

Petitioner went back into the club because he did not feel safe in the parking lot. App. 456, l. 6 – 457, l. 24. Despite withering cross-examination by the solicitor, petitioner explained that outside the club he could have been killed and nobody would know, but inside the club he felt at least people could see him. App. 456, l. 6 – 457, l. 24. Petitioner could not leave the club because

he did not know anyone to give him a ride and he could not just walk because he had no idea where he was. App. 456, l. 6 – 457, l. 24.

Once back in the club, Newton said she was watching petitioner's facial expressions and could see him becoming upset. App. 155, l. 2 – 17. She decided to try to get petitioner to leave and took him by the arm. App. 155, l. 13 – 157, l. 10. Petitioner then pushed Newton out of the way and started shooting in the direction of the pool table. App. 155, l. 13 – 157, l. 10. Newton and the rest of their group claimed not to see anyone else with a gun. App. 158, l. 4 – 11; 190, l. 19 – 22; 214, l. 21 – 23; 233, l. 2 – 5. Frierson said he had "never seen a man" have a look on his face like petitioner before the shooting, describing it as a "dark stare." App. 232, l. 3 – 17. Frierson saw the group of men in the back of the club making gang signs at petitioner. R. 232, l. 3 – 234, l. 11.

Petitioner testified he was in the bar watching "about eight" guys make gang signs at him and he was scared. App. 440, l. 5 – 441, l. 3. Petitioner said he saw the man in the black hoodie from the parking lot enter and hand a pistol to Spates. App. 441, l. 21 – 443, l. 6. Spates drew the gun and petitioner pushed Newton out of the way. App. 441, l. 21 – 443, l. 6. Petitioner fired and Spates fired. App. 441, l. 21 – 443, l. 6. Spates dropped the gun and ran for the bathroom. App. 441, l. 21 – 443, l. 6. Oliver reached for the gun and petitioner shot Oliver in the hip. App. 441, l. 21 – 443, l. 6. Then, like everyone else in the club, petitioner ran to the parking lot. R. 441, l. 21 – 443, l. 6.

Oliver denied being a member of the Bloods and had a prior conviction for accessory after the fact to a felony. App. 262, l. 4 – 25. Oliver claimed he had no idea about an earlier argument about a pool game and that he was walking out of the bathroom when the shooting began. App. 270, l. 21 – 25. R. 266, l. 13 – 24. Oliver heard gunshots and saw petitioner's hand in the air, so

he ran back into the bathroom with several other people. App. 266, l. 13 – 24. Petitioner first fired through the door, then kicked it in and continued to fire. App. 266, l. 13 – 24. Oliver said he was shot in the bathroom. App. 266, l. 13 – 24. According to the police, the bathroom was "pretty small." App. 139, l. 2 – 9. More than three other people were in the bathroom with Oliver. App. 274, l. 18 – 276, l. 5. Frierson said petitioner was "unloading the clip." App.. 234, l. 1 – 8. Oliver was the only person in the bathroom who was shot and the police only found three shell casings at the club. App. 274, l. 18 – 276, l. 5; 319, l. 8 – 320, l. 10.

The group got into Newton's car and left the club. App. 443, l. 7 – 23. A police officer responding to the call turned around after seeing Newton's car and when he activated his blue lights, petitioner threw the gun out of the window. App. 443, l. 7 – 23. The police never recovered the gun. App. 386, l. 18 – 387, l. 3. The toxicology report from decedent's autopsy revealed his blood alcohol level was 0.185. App. 360, l. 19 – 361, l. 2.

The police denied taking a gun from decedent, but evidence forms indicated the opposite. App. 311, l. 16 – 313, l. 16; 373, l. 9 – 374, l. 25. The lead investigator claimed the forms were in error and the only gun recovered was Lawanda Johnson's gun from Newton's Charger. App. 373, l. 9 – 374, l. 25. The lead investigator maintained the forms showing a gun, 11 bullets, specific brands of ammunition, and a black suede holster recovered from decedent were all inaccurate. App. 392, l. 3 – 394, l. 25.

After the state rested, the solicitor asked whether the court intended to charge voluntary manslaughter. R. 413, l. 11 – 414, l. 15. The solicitor said "there's enough evidence to support a voluntary manslaughter lesser-included." App. 413, l. 11 – 414, l. 15. Defense counsel argued he did not "see the facts that way at this time, but the solicitor, citing Frierson's testimony about the gang signs said it could be a "re-provocation." App. 413, l. 11 – 414, l. 15.

After petitioner testified and the defense rested, the court returned to the question of whether to charge voluntary manslaughter. App. 482, l. 22 – 485, l. 8. Petitioner argued that the elements of voluntary manslaughter were not shown by the evidence and objected to the charge. App. 482, l. 22 – 485, l. 8. The trial court disagreed and said that the gang signs were "overt signs of provocation made to [petitioner]." App. 482, l. 22 – 485, l. 8.

Prior to closing arguments trial counsel and the solicitor both agreed they had no objections to the verdict form. App. 484, ll. 7-20.

The trial court instructed the jury on self-defense and included mutual combat as follows:

> If the defendant voluntarily participated in mutual conduct for purposes other than protection, the killing of the victim would not be self-defense. This is true even if during the combat the defendant feared death or serious bodily injury. However, if before the killing is committed the defendant withdraws and tried in good faith to avoid further conflict and either by word or act makes the fact known to the victim, he would be without fault in bringing on the difficulty. For mutual combat, there must be a mutual intent and willingness to fight. This intent may be shown by acts and conduct of the parties and the circumstances surrounding the combat. In addition, it must be shown that both parties were armed with a deadly weapon.

App. 530-534; 531, ll. 10-23.

The jury acquitted petitioner attempted murder as related to Oliver and the murder charge related to decedent, but convicted petitioner of voluntary manslaughter.

PCR Testimony

At petitioner's evidentiary hearing, trial counsel acknowledged that he reviewed the verdict form and that it had the option of "not guilty" and "guilty plea" for voluntary manslaughter and attempted murder. Counsel agreed he did not object to the verdict form. App. 693, ll. 5-13. Counsel did not think it prejudiced petitioner "based on the totality of the verdict itself," but otherwise articulated no reasoning. App. 693, l. 25—694, l. 3.

Regarding the court's jury instruction on mutual combat, counsel stated without explanation that he did not believe it confused the jury and that it was consistent with the testimony at trial. App. 694, ll. 4-16.

ARGUMENTS

1. The PCR court erred finding the trial court properly charged the jury with self-defense and mutual combat where there was insufficient evidence to support the charge of mutual combat and where counsel failed to object to the mutual combat charge being given as part of the charge on self-defense.

Discussion

Initially, there was insufficient evidence to support the charge of mutual combat in petitioner's case. Trial counsel was deficient for failing to object to the mutual combat charge because there was no evidence in the record of an antecedent agreement to fight or of any pre-existing ill will or dispute between petitioner and decedent before the incident at the club. It is uncontroverted that petitioner had never been to the club prior to the night of the incident. The evidence in the record was insufficient to support the charge. Accordingly, petitioner was prejudiced by the erroneous jury charge because it acted as a limitation on his ability to claim self-defense and transferred the state's burden to disprove self-defense onto petitioner. *See State v. Taylor*, 356 S.C. 227, 235, 589 S.E.2d 1, 5 (2003).

In general, the trial court is required to charge only the current and correct law of South Carolina, *Cohens v. Atkins*, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998), and the law to be charged to the jury is determined by the evidence at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). To warrant reversal, the charge must be both erroneous and prejudicial. *Ellison v. Parts Distributors, Inc.*, 302 S.C. 299, 395 S.E.2d 740 (Ct. App. 1990).

In *Taylor*, *supra*, this Court reviewed the law of mutual combat as it had developed in South Carolina. The Court noted that mutual combat had existed in South Carolina since "at least 1843, but [had] fallen out of common use in recent years." *Taylor*, at 231, 589 S.E.2d at 3. Reviewing case law, the Court stated that it was established "there must be 'mutual intent and willingness to fight' to constitute mutual combat." *Id.* (citing *State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973)). "Mutual intent is 'manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.'" *Id.* at 232, 589 S.E.2d 3. "Whether or not mutual combat exists is significant because 'the plea of self-defense is not available to one who kills another in mutual combat.'" *Id.* (citing *State v. Jones*, 113 S.C. 134, 101 S.E. 647 (1919)).

Notably, this Supreme Court wrote that "the doctrine has most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed occurs." *Taylor*, at 232, 589 S.E.2d at 4.[1] While South Carolina had not "explicitly required that the fight arise out of a pre-existing dispute" our Court explained that other states had made a pre-existing dispute an explicit prerequisite to mutual combat. Citing to authority in Colorado, Texas, and Georgia,[2] this Court found "the restrictions placed on the applicability of mutual combat by the courts in Georgia, Colorado, and Texas [were] warranted. These limitations are consistent

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1 Citing *State v. Porter*, 269 S.C. 618, 239 S.E.2d 641 (1977) (holding mutual combat precluded a plea of self-defense where Appellant returned to injured party's property at least twice with a gun despite prior verbal warnings not to return and accompanying gunshots); *State v. Graham*, 260 S.C. 449, 451, 196 S.E.2d 495, 496 (finding mutual combat charge proper where appellant and deceased had quarreled prior to the killing, each knew that the other was armed with a pistol, and each fired his gun at the other); *State v. Mathis*, 174 S.C. 344, 177 S.E. 318 (1934) (finding mutual combat charge proper based on testimony that appellant and deceased were on the lookout for each other, that each was armed in anticipation of meeting the other, and that each drew and fired his pistol at the other).

2 *Eckhardt v. People*, 126 Colo. 18, 247 P.2d 673 (1952); *People v. Cuevas*, 740 P.2d 25 (Colo.App.1987); *Lujan v. State*, 430 S.W.2d 513, 514 (Tex.Crim.App.1968); *Carson v. State*, 89 Tex.Crim. 342, 230 S.W. 997 (1921); *Flowers v. State*, 146 Ga.App. 692, 247 S.E.2d 217, 218 (1978); *Grant v. State*, 120 Ga.App. 244, 170 S.E.2d 55, 56 (1969).

with the South Carolina case in which the mutual combat charges given were deemed proper." *Taylor*, at 233-234, 589 S.E.2d at 4. The Court adopted and clarified the limiting requirements for mutual combat that had been recognized by other jurisdictions. First, "the fight [must] arise out of a pre-existing dispute." *Id.* at 233, 589 S.E.2d at 4 (internal citations omitted). Second, "an antecedent agreement to fight must exist for the court to charge mutual combat." *Id.* at 233, 589 S.E.2d at 4 (internal citations omitted). Lastly, "mutual combat does not arise from a mere fist fight or scuffle, rather it arises only when the parties are armed with deadly weapons." *Id.* at 233, 589 S.E.2d at 4 (internal citations omitted).

Applying the limiting requirements to the facts in *Taylor* our Supreme Court found there was insufficient evidence of a mutual intent and willingness to fight to submit the issue of mutual combat to the jury where there was no evidence the decedent was willing to engage in an armed encounter with Taylor or that the decedent even knew Taylor was armed with a knife. This Court further found the mutual combat charge was prejudicial as well as erroneous because Taylor admitted to killing the decedent and relied entirely on self-defense at trial. *Id.* at 234-235, 589 S.E.2d at 5. This Court stated, "[the self-defense] charge was negated by the [trial] court's unwarranted charge on mutual combat. We find that the court's mutual combat charge acted as limitation on [Taylor's] ability to claim self-defense, and prejudiced him by transferring the *State's burden* to disprove self-defense onto [Taylor], forcing him to prove self-defense . . ." *Id.* at 235, 589 S.E.2d at 5 (emphasis in original).

Under the law of mutual combat, the evidence in petitioner's case was insufficient to support a jury charge on mutual combat. There was no evidence at trial of a prior existing dispute or prior ill will between petitioner and decedent. The uncontroverted testimony at trial was that petitioner had not been to this club before and was unknown to decedent and they had a disagreement over a game of pool.

Additionally, there was no antecedent agreement to fight between petitioner and decedent. There is no testimony in the record that either petitioner or decedent knew they would see each other that evening nor that they had planned to see each other that evening to fight or settle a nonexistent dispute. The two men were not on the lookout for each other, they had not armed themselves in anticipation of meeting, and they had not previously argued. Testimony at trial revealed that the incident was an encounter between two strangers where tempers flared, not a preplanned duel or agreement to fight with deadly weapons over some past dispute.

Testimony is at best contradictory that decedent and petitioner knew the other was armed at the time of the fight. Petitioner testified decedent pulled a gun and petitioner was a quicker draw not that he knew decedent was armed prior to that moment.

The testimony elicited during petitioner's trial did not support the charge of mutual combat. Trial counsel's testimony at the evidentiary hearing was that mutual combat was consistent with the testimony which is simply incorrect. Counsel's belief that mutual combat was appropriate was not reasonable and counsel offered no valid reason for failing to object. Petitioner was prejudiced because, like in *Taylor*, *supra*, the mutual combat charge negated his claim of self-defense and shifted the burden of proof from the state to petitioner. This was ineffective assistance of counsel under the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

Moreover, trial counsel was ineffective for failure to object to the charge being given as part of the self-defense charge. Including mutual combat as an element of self-defense was misleading and confusing to the jury and was prejudicial to petitioner.

A jury instruction must be viewed in the context of the overall charge. *See State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). While a court is not required to give any particular verbiage, instructions may not confuse or mislead the jury. *State v. Leonard*, 292 S.C. 133, 137,

355 S.E.2d 270, 273 (1987). "The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury." *Id.*

The issue at petitioner's trial was not who shot decedent but why. The state contended that petitioner acted with malice and murdered decedent over four quarters. Petitioner asserted he acted in self-defense. The jury was tasked with determining which of these legal theories the state had proven or disproven beyond a reasonable doubt. When the trial court instructed the jury on self-defense, it began by stating "the following elements are required to establish self-defense." App. 530, ll. 23-24. The trial court proceeded to charge that the defendant could not be at fault in bringing on the difficulty and then immediately the court charged the jury on mutual combat, before turning to the other elements of self-defense.

The jury charge improperly conflated mutual combat as an element of self-defense. By comingled two separate and distinct principles of law, the trial court effectively shifted the burden of disproving self-defense from the state to petitioner to disprove mutual combat. The jury should have been instructed to consider the elements of self-defense first and separately before considering whether there was evidence of mutual combat.

Trial counsel was defective for failing to object to the defective and confusing jury charge. *See Taylor v. State*, 312 S.C. 179, 439 S.E.2d 820 (1993) (where trial judge gave erroneous instruction on critical issue of intent, PCR applicant was prejudiced by counsel's failure to object); *High v. State*, 300 S.C. 88, 386 S.E.2d 463 (1989) (holding counsel ineffective for failing to object to defective charge on intent that shifted burden from State to petitioner).

This failure greatly prejudiced petitioner because his entire defense at trial was self-defense and the comingling of the legal principles lessened the state's burden to disprove self-defense.

2. The PCR court erred finding trial counsel was not ineffective for failing to object to the verdict form that read "guilty plea" rather than "guilty" because the inclusion of the word plea was confusing to the jury.

Discussion

In *Wertz v. State*, 349 S.C. 291, 562 S.E.2d 654 (2002), this Court stated:

> A verdict should be certain and import a definite meaning free from ambiguity.
> If a party believes there is confusion in the wording of a jury's verdict, that party should call it to the attention of the trial court at the time the verdict is rendered so that any confusion in the verdict's language can be easily cleared up. It is the duty of the trial judge to decide what the verdict meant, and, in reaching his conclusion thereabout, it [is] his duty to take into consideration not only the language of the verdict, but all the matters that occurred in the course of the trial....
> A verdict of a jury should be upheld when it is possible to do so, and carry into effect what was clearly the intention of the jury. When a verdict is so confused, however, that it is not absolutely clear what the jury intended to do, the safest and best course for the court to pursue is to order a new trial. Judges and parties should not be required to guess as to what verdict a jury sought to render.

Id. at 296, 562 S.E.2d at 657 (citations and quotation marks omitted) (emphasis added). In that case, this Court found counsel was deficient for failing to get clarification on which degree of burglary the jury was finding Wertz was guilty. *Id.* at 297, 562 S.E.2d at 658. This Court found counsel should have called it to the court's attention and further found there was a reasonable probability but for this error the result of trial would have been different. *Id.*

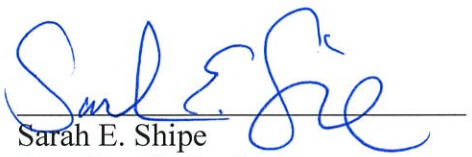
Here, counsel admittedly did not even notice the error on the form and thus failed to object. Petitioner was prejudiced where the jury had had before it the option to select "not guilty" or "guilty plea" as to voluntary manslaughter and as to attempted murder. The jury selected not guilty for murder and there they had the options of not guilty or guilty. The jury was instructed to select not guilty or guilty but did not have those options for voluntary manslaughter as they did with

murder. Before deliberations the judge instructed the jury, "if the state has failed to prove the guilt of the defendant beyond a reasonable doubt your verdict would be two words not guilty. However, should the state have proved their case against the defendant beyond a reasonable doubt, then your verdict would be *one* word, guilty." App. 535, ll. 17-22 (emphasis added). This jury was unclear on what this new choice of "guilty plea" meant when deliberating in petitioner's case.

The PCR court erred by not granting petitioner a new trial on this ground. *See Lorick & Lowrance,* 153 S.C. 309, 150 S.E. 789, 793 (1929) (when verdict is so confused, safest and best course for court is to order new trial).

CONCLUSION

Based on the foregoing argument, petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of March, 2025.