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**Aug 27 2025**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas  
Post Conviction Relief

Honorable Jocelyn Newman, Circuit Court Judge

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App. Case No.: 2025-000560

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Terry Catoe, 216913,

Petitioner,

vs.

State of South Carolina,

Respondent.

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PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE ISSUES

- A. The lower court erred by not finding counsel provided prejudicial ineffective assistance when he failed to ensure that Petitioner understood the defense strategy prior to the rejection of the plea offer
- B. The lower court erred in failing to find that counsel was ineffective in matters related to his preparation and utilization of Petitioner as a trial witness that resulted in prejudice.
- C. The lower court erred in failing to find deficiency and resulting prejudice from counsel's failure to further question Dr. Janice Ross and utilize an expert pathologist for the defense.
- D. The lower court's finding of deficiency for counsel's failure to request an accident charge should be upheld, but the lower court should be reversed for failing to find resulting prejudice.
- E. The lower court should be upheld for finding that counsel failed to request proper instructions on malice and enter objections and/or exceptions when such instructions were not given, but the lower court erred in failing to find resulting prejudice.
- F. The lower court erred by not making a finding of ineffective assistance of counsel when counsel failed to request a proper instruction on voluntary manslaughter and enter an objection or exception when the trial court failed to instruct the jury that malice is not an element of voluntary manslaughter and for finding no resulting prejudice.

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lancaster County Clerk of Court. App. p. 569. Petitioner was indicted at the June 2012 term of the Lancaster County Grand Jury for murder (2012-GS-23-612). App. p. 536. On January 4-6, 2016, Petitioner proceeded to trial in front of the Honorable Brian M. Gibbons and a jury. App. p. 1. Petitioner was present and represented by Tyree D. Lee, Jr., Esquire, and Justin W. Jones, Esquire. Deputy Solicitor Lisa Collins represented the State. The jury found Petitioner guilty as indicted, and Petitioner was sentenced to life. App. p. 518.

A timely notice of appeal was filed on Petitioner's behalf and David Alexander, Esquire, perfected the appeal. App. p. 551. An *Anders* Brief was submitted and addressed the following issue: The trial court erred in admitting appellant's statements into evidence because the police violated appellant's Fifth and Sixth Amendment rights by using the "question first" strategy condemned in *Missouri v. Siebert*, 542 U.S. 600 (2004). App. p. 554.

On June 28, 2017, the South Carolina Court of Appeals dismissed Petitioner's appeal. *State v. Catoe*, 2017-UP-256 (S.C. Ct. App. filed June 28, 2017). App. p. 566. The Remittitur was issued on August 8, 2017. App. p. 568.

On March 27, 2018, Petitioner filed an Application for Post Conviction Relief. App. 579. The State submitted a Return on July 31, 2019. App. 587. On July 7, 2021 Petitioner, through counsel, filed an Amendment, which alleged the following:

In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial. Applicant would further amend his Application for Post Conviction Relief to contain the following specific allegations of ineffective assistance of counsel:

1. Ineffective assistance of trial counsel for failure to properly prepare and present a viable defense. Specifically, but not limited to the following:
  - a. Failure to ensure that Applicant understood the defense strategy prior to the rejection of the plea offer and prior to trial.
  - b. Failure to prepare and utilize Applicant as a witness.
  - c. Failure to effectively address Applicant's statements and the summary of his interaction with law enforcement admitted by the State at trial.
  - d. Failure to further question the State's expert witnesses (i.e. Dr. Janice Ross) and/or utilize an expert pathologist.
  - e. Failure to provide the jury a basis for finding Applicant guilty of a lesser included offense and/or not guilty.
2. Ineffective assistance of trial counsel for failure to request an accident charge.
3. Ineffective assistance of trial counsel for failure to request proper instructions on murder and manslaughter and enter objections and/or exceptions when such instructions were not given. Specifically, but not limited to the following:
  - a. The inference of malice instruction when evidence was presented that could reduce, excuse, justify or mitigate the homicide;
  - b. The improper and incomplete inference of malice instruction, which lacked the general permissive inference instruction;
  - c. The inference of malice instruction amounting to a comment on the facts; and
  - d. The absence of an instruction that malice is not an element of voluntary manslaughter.

*See State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016), *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), *State v. Jackson*, 377 S.C. 523, 377 S.E.2d 570 (1989), *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985), *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983).

App. p. 598-599.

On August 3, 2021, an evidentiary hearing was held in front of the Honorable Jocelyn Newman at the Lancaster County Courthouse. App. p. 601. Petitioner was present and

represented by Tricia A. Blanchette, Esquire. Respondent was represented by Lindsey McCallister, Assistant Deputy Attorney General, and Michael Davidson, Assistant Attorney General. Petitioner admitted two exhibits and called the following witnesses: Tyree D. Lee, Jr., Esquire, Dr. John Wren, and Petitioner. Respondent called the following witnesses: Justin Jones, Esquire and Lisa Collins, Esquire.

At the close of the evidentiary hearing, the allowed time for the parties to obtain the evidentiary hearing transcript and requested that proposed Orders be submitted after receipt of the transcript. App. pp. 764-766. Following the submission of proposed Orders by both parties, the Honorable Jocelyn Newman issued an Order of Dismissal on January 15, 2025, from which this appeal follows. App. p. 768.

## STANDARD OF REVIEW

On appeal, great deference is given to the lower court's findings of fact, but deference is not given to conclusions of law. *Smalls v. State*, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold findings of fact. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Where an application for post conviction relief alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "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." *Id.* 466 U.S. at 686; see *Butler v. State*, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State*, 321 S.C. 238 (1996); see also *Cherry v. State*, 300 S.C. 238 (1989); Rule 71.1(e), SCRPC.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's

performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18.

I. Issues Presented

- A. The lower court erred by not finding counsel provided prejudicial ineffective assistance when he failed to ensure that Petitioner understood the defense strategy prior to the rejection of the plea offer.

Upon review of the record before this Court and the controlling case law, Petitioner submits that the lower court erred by not finding counsel provided prejudicial ineffective assistance of counsel when he failed to ensure that Petitioner understood the defense strategy prior to the rejection of the plea offer. At the evidentiary hearing, Petitioner called Tyre Douglas Lee, Jr., Esquire was called to the stand, and he addressed his work as a public defender.<sup>1</sup> App. pp. 689-692. He testified he was appointed to Petitioner's case and requested full discovery, which he provided in piecemeal fashion and reviewed with Petitioner. App. pp. 692-695.

After reviewing a transcript dated November 20, 2015, he recalled the formal rejection of a plea offer (10 to 26 years for voluntary manslaughter) in front of Judge Gibbons. App. pp. 701-702. He could not specifically recall the advice he provided, but he recalled Petitioner not wanting to take the plea. App. pp. 702-703. When asked if

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<sup>1</sup> As stated, Petitioner, through undersigned counsel submitted a proposed Order, and a majority of counsel's summation of the record was adopted by the lower court in her final order and is incorporated in part in this Petition.

Petitioner was fully advised about the trial strategy prior to the rejection of the plea offer, he recounted what he remembered discussing with Petitioner prior to trial; specifically, he addressed how they prepared for him to testify. App. pp. 717-719.

On direct, Petitioner testified that he rejected the plea offer based upon counsel's advice that he would likely receive 25 years. App. p. 749, Ins. 6-19. He also testified that counsel did not advise him of the trial strategy or strength of the State's case prior to rejection of the plea offer. He remembered asking for time to hire a lawyer, but the court said the case could not be continued. App. pp. 749-750.

The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) (quoting *United States v. Wade*, 388 U.S. 218, 227-228, 87 S. Ct. 1926, (1967)). Critical stages include arraignment, post-indictment interrogations, post-indictment lineups, negotiation and the entry of a guilty plea. See *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157 (1961) (arraignment); *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199 (1964) (post indictment interrogation); *Wade*, supra (post indictment lineup); *Padilla v. Kentucky*, 559 U. S. 356, 130 S.Ct. 1473 (2010) (advice on guilty plea); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006 (1972) (guilty plea).

In *Hill v. Lockhart*, 474 US 52, 106 S.Ct. 366 (1985), the Supreme Court of the United States examined the role of advising a client about a plea offer, representation at the ensuing guilty plea and the proper application of the *Strickland* standard, and the Court held that an applicant that entered a plea on the advice of counsel may only attack the voluntary nature of that plea by showing that counsel's representation fell below an

objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, applicant would not have pled guilty and insisted on going to trial. The Supreme Court made it clear that the "voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." 474 U.S. at 57, 106 S.Ct. at 369.

Later, the Supreme Court issued opinions in *Missouri v. Frye*, 132 S. Ct. 1399, 1405-06 (2012) and *Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376 (2012) on the same day and addressed the situation of when ineffective assistance of counsel led to the rejection of a plea offer. In *Lafler*, the Court addressed the appropriate remedy "when inadequate assistance of counsel caused non-acceptance of a plea offer and further proceedings led to a less favorable outcome." 566 U.S. at 160, 132 S.Ct. at 1383

The Court further explained:

Respondent received a more severe sentence at trial, one 3 ½ times more severe than he likely would have received by pleading guilty. Far from curing the error, the trial caused the injury from the error. Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.

*Lafler*, 566 U.S. at 166 , 132 S. Ct. at 1386.

Prior to *Lafler*, this Court addressed whether counsel offered ineffective assistance for advice rendered in rejecting a plea offer and held: "The Sixth Amendment protects criminal defendants against ineffective assistance of counsel during the plea bargaining process, even if the plea offered ultimately is rejected." In *Judge v. State*, 321 S.C. 560, 471 S.E.2d 146, 149 (1996), this Court further held that "a petitioner still must prove both ineffective assistance in counsel's advice to reject a plea agreement, as well as

prejudice resulting from that ineffectiveness.” While addressing the standard of attorney competence during plea negotiations, this Court reasoned that “counsel’s advice to reject a plea agreement does not fall below the reasonably effective assistance standard simply because, in hindsight, the advice was wrong or the attorney’s trial tactics backfired.” *Judge*, 321 S.C. 560, 471 S.E.2d 150. Following *Judge*, this Court’s ruling was overruled to the extent it could “be read to hold that a petitioner’s statement is insufficient evidence to satisfy the prejudice prong.” *Jackson v. State*, 342 S.C. 95, 535 S.E.2d 926, fn. 2 (Reversing the denial of post conviction relief and finding that petitioner’s self-serving statement that he would not have pled guilty but for counsel’s advice was sufficient to establish prejudice.); *see also Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (“The defendant’s undisputed testimony that he would not have pled guilty to the charges but for trial counsel’s advice is sufficient to prove that defendant would not have pled guilty.”).

Thereafter, in *Davie v. State*, 381 S.C. 601, 675 S.E.2d 416 (2009), this Court addressed the matter of deficient performance resulting from counsel not communicating a more favorable plea offer. After applying the principles set forth in *Jackson* and *Smith*, this Court concluded “that the difference in the sentence Petitioner received and the plea offer is proof of prejudice.” 381 S.C. at 614, 675 S.E.2d at 423.

Here, the lower found that the record did not support a finding of deficiency, and Petitioner submits that this finding is not supported by the record nor does it take into account the caselaw discussed herein. App. p. 774. As addressed, Petitioner’s testimony clearly established that he rejected the plea offer based upon the advice of counsel. Notably, the record further established the advice counsel provided did not come with a proper

understanding of the trial strategy and led Petitioner to request time to hire a private lawyer. This request alone sufficiently undermines the confidence that counsel provided effective representation during the plea bargaining process.

Turning to prejudice, not only does counsel's failure to properly advise Petitioner prior the rejection of the plea offer support a finding of prejudice, but the difference in the amount of time that Petitioner was sentenced to in comparison to the amount of time offered under the plea also establishes prejudice. *Davie*, 675 S.E.2d at 423. Under the plea offer to the lesser included offense of voluntary manslaughter, Petitioner was facing between 10-25 years. After going to trial with an ineffective lawyer as more fully addressed below, he received a life sentence. Therefore, Petitioner submits that the lower court's limited analysis and finding of no prejudice is also in error. Therefore, Petitioner submits that the lower court must be reversed due to failing to find deficiency and prejudice amounting to ineffective assistance, and relief should be granted.

B. The lower court erred in failing to find that counsel was ineffective in matters related to his preparation and utilization of Petitioner as a trial witness that resulted in prejudice.

Petitioner submits that the lower court erred in failing to find that trial counsel was ineffective in matters related to his preparation and utilization of Petitioner as a trial witness that resulted in prejudice. While on the stand, Mr. Lee acknowledged receiving discovery, to include the investigative reports and Petitioner's statements. App. pp. 692-695. He recalled Petitioner's story being very similar to his final statement. App. pp. 694-696, 722. He recalled how he prepared Petitioner to testify. App. pp. 717-719, 728-729

He remembered advising Petitioner that his testimony was "crucial." App. p. 697, lns. 3-4, p. 137. He advised Petitioner of his Fifth Amendment rights, and he told him

that the jury would not know his side of the story without him testifying. App. pp. 698-699. When asked why Petitioner did not testify, he responded with concerns about cross-examination. App. pp. 699-700, 728-730. He explained Petitioner's decision was made just before the defense started their case. App. pp. 700-701, 730.

When Petitioner took the stand, he recalled discussing his statements with trial counsel and providing additional information not in his statements, which included that he did not intend to kill the victim and that her death was accidental. App. pp. 746-747. He also recalled counsel advising him to not testify because the State "could open up more doors," but counsel did not tell him what those doors were. App. p. 747, Ins. 19-24. He agreed that if he understood that his entire case hinged on his testimony, he would have taken the stand. App. p. 748. He also provided the additional information he would have wanted to testify about in front of the jury. App. pp. 748-749.

On cross, Petitioner testified trial counsel did not prepare him to take the stand. App. p. 753. He did recall counsel discussing with him what happened that night and providing him "paperwork" on possible questions he could be asked. App. pp. 153-154.

When the State called Justin Jones, Esquire, to the stand, he explained how he came into the case to assist, and Mr. Lee informing him that Petitioner would testify. App. pp. 754-755. He recalled meeting with Petitioner during trial, Petitioner deciding not to testify, and "scrambling" at that point to "rework the strategy." App. pp. 755-756.

Clearly, Petitioner testified that he did not understand that the entire case hinged on his testimony. Counsel testified Petitioner's decision to not testify caused the defense to scramble and rework their strategy. Even though counsel cannot force a witness to testify, the lower court failed to acknowledge the deficient performance from counsel's

handling of Petitioner's decision when he lacked a full understanding of the defense thus resulting in "scrambling." In denying relief, the lower court assigned the error to Petitioner for making a last minute decision, but Petitioner urges this court to find that counsel's deficient performance led to his last minute decision and the resulting prejudice is abundantly clear from the testimony of the trial attorneys and the complete record before this Court. Therefore, Petitioner submits that the lower court must be reversed due to failing to find deficiency and prejudice amounting to ineffective assistance, and relief should be granted.

- C. The lower court erred in failing to find deficiency and resulting prejudice from counsel's failure to further question Dr. Janice Ross and utilize an expert pathologist for the defense.

The lower court erred in failing to find deficiency and resulting prejudice from counsel's failure to further question Dr. Janice Ross and utilize an expert pathologist for the defense. During trial, the State called Dr. Janice Ross and qualified her as an expert in pathology. App. pp. 224-225. She addressed the forensic autopsy of the victim and discussed her autopsy report. App. pp. 226, 228. She opined that the cause of death was asphyxia due to strangulation. App. p. 236.

At the evidentiary hearing, Petitioner called Dr. John David Wren and qualified him as an expert in forensic pathology. App. pp. 625-626. Dr. Wren addressed the items he reviewed and his findings that he could have shared with defense counsel and/or testified to at trial. App. p. 672, ln. 19- p. 673, ln. 3. Referencing the scene and autopsy photos, he explained his findings to include: victim's forehead injuries were indicative of a fall, a contusion on her thigh was resolving, the right eye hemorrhage could be the result of asphyxia or an acute episode of heart failure, her positioning was indicative of

those that die from anal intercourse, no defensive wounds, and the likelihood of sudden collapse. App. pp. 629-638.

Turning to the autopsy report and findings of Dr. Ross, he noted several findings of Dr. Ross that he could not comment on because of the lack of pictures or procedure done, to include her finding of a probable fracture of the thyroid cartilage indicative of strangulation. App. pp. 642-645. Dr. Wren also noted the following issues in relation to the autopsy report: the fecal matter around the anus and vagina could add to accentuation or decomposition, the hyoid bone was intact which mitigates against manual strangulation, hypertrophic cardiomegaly – meaning that both ventricles of the heart were enlarged and thickened, hypertension was probable, a slight amount of frothy fluid was in the tracheobronchial tree indicative of a quick death, gallstones in the kidney which is typically an indication of hardening of the arteries or stenosis of the small vessels in the kidney, no contusion of the brain, the report did not indicate whether the cause of death was manual / soft ligature strangulation or just strangulation, and the report alternates between a possible fracture and a fracture. App. pp. 642-645, 648-651.

When asked on cross if he agreed with Dr. Ross's conclusions regarding the cause of death, he responded: "No, I said that was open to question as to whether there were contributing factors to it." App. p. 675, lns. 12-13. He explained how toxicology could be a contributing factor to consider as well as coronary disease and the possibility of a vasovagal response from anal intercourse resulting in cardiac arrest. App. p. 687, ln. 7- p.

688, In. 14.<sup>2</sup> Dr. Wren addressed the likelihood of cardiac arrest resulting from pressure on the vagus nerve during anal intercourse. App. pp. 670-672.

Regarding toxicology, Dr. Wren addressed the reports and his concerns regarding toxicology. App. pp. 656-657. He noted that the toxicology was done in duplicate, one report by SLED and one by National Medical Services Lab. App. p. 656. He explained the overall findings and differences in the reports. App. pp. 656-659. He addressed the reports in light of Dr. Ross's findings, and he explained how victim's blood cocaine concentration was a concern as it was in the range for cocaine related fatalities. App. pp. 660-662. He further explained that she was in the range for toxic effects and lethal effects, which can cause sudden arrhythmia. App. pp. 661-663. He also addressed the reported benzoylecgonine levels and the effects that could result. App. pp. 661-663. On cross-examination, he explained that he could not issue an opinion in Spartanburg County where he practices until toxicology was returned. App. pp. 675-676.

Regarding the DNA analysis and findings, he noted that some of the findings were "confusing" and addressed how they related to Petitioner. App. pp. 663-665. He addressed the pictures and supposed injuries on Petitioner. App. p. 665. While referencing the trial exhibits and additional pictures, he addressed several areas of discoloration, injury, and scarring, and the absence of any scratch marks on Petitioner's body. App. pp. 665-670.

When trial counsel took the stand and was asked if he had consulted with an expert prior to trial and/or looked into any of the matters addressed by Dr. Wren, he

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<sup>2</sup> On direct and cross-examination, Dr. Wren explained in detail his concern with the reporting regarding the percent occlusion of the heart vessels. App. pp. 645-648, 675.

responded that he recalled reaching out to Dr. Ross and asking her about “sexual asphyxiation” and discovering she was aware of it.<sup>3</sup> App. pp. 704, 732. He explained: “I think she basically came to the conclusion, she wouldn’t have – she wouldn’t say that that didn’t happen. That it could have happened. You know, she didn’t know. I thought her testimony was pretty good. I was going to get that from her and I didn’t see the need to hire anybody else.” App. p. 704, ln. 22 – p. 705, ln. 2. When asked about the State’s objection to his line of questioning with Dr. Ross, he responded that he got the “main thing” from her testimony. App. p. 705, lns. 9-15.

Regarding Dr. Ross’s testimony about toxicology, counsel responded that he did not recall there being 2 toxicology reports. App. pp. 706-707. When asked if he had the Coroner’s file, he responded that he had what the State had given him. App. p. 707. He confirmed that Dr. Ross was the only person he consulted, but he did not provide a clear answer as to whether he discussed other alternate causes of death such as heart disease or vasovagal susceptibility with her. App. pp. 707-708. He recalled Dr. Ross not having “a definite opinion on that.” App. p. 708, lns. 6-7. When asked if it would have been helpful to raise and/or argue possible causes or alternative contributing factors to the victim’s death, he agreed it could have been helpful and “it might have been better to have done something,” but he explained that they were “sort of rushing it.” App. p. 708.

In reference to the charge on proximate cause, counsel was asked if he tried to argue or show Petitioner was not the proximate cause of the victim’s death, and he responded: “I would have to look again. I don’t recall it.” App. p. 708, ln. 16- p. 709, ln.

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<sup>3</sup> During direct examination, counsel was asked about his preparation with Petitioner, and he stated: “I don’t know if I told him or not, about that I talked to Dr. Ross and that Dr. Ross mentioned that this sort of stuff did go on. I just – I can’t recall on that.” App. p. 718, lns. 16-19.

16. He explained his trial strategy was to show Petitioner was following victim's instruction in how to engage in "hard core sex." App. pp. 709-710.

When Deputy Solicitor Collins testified, she recalled objecting to the line of questioning about a sexually erotic act of suffocation during cross of Dr. Ross. App. pp. 760-761. She testified: "I objected vehemently to that. I felt strongly and I still feel that it was wildly outside of the scope of the expertise of Dr. Ross." App. p. 761, lns. 2-4.

During his testimony, Petitioner recalled counsel talking with him about sexual asphyxiation, but he could not remember counsel's exact words. App. p. 751. When asked if counsel ever spoke with him "about getting an expert to address other potential causes of death or other ways or things that could have contributed to the victim dying in this case", he responded that counsel did not. App. p. 750, ln. 23 – p. 751, ln. 2.

Petitioner submits that the lower court erred by not finding that counsel was ineffective for his failure to utilize an expert and to merely rely upon a strategy to cross the State's expert pathologist to establish a defense. At the evidentiary hearing, Deputy Solicitor Collins testified that she objected vehemently to counsel's line of questioning of Dr. Ross about the sexually erotic act of suffocation and that the testimony was "wildly outside her area of expertise," which begs the question of how counsel's strategy to briefly discuss this defense theory with Dr. Ross and cross-examine her on it at trial could be deemed a reasonable trial strategy. App. p. 761, lns. 2-4. Petitioner urges this Court to reverse the lower court's finding of a reasonable trial strategy and find that counsel's decision to not utilize a pathologist and rely solely upon this line of questioning briefly discussed with Dr. Ross amounts to ineffective assistance.

As discussed above, the defense was scrambling when Petitioner did not testify. The lower court's decision fails to consider recognize that the utilization of a duly qualified expert to address the scene, report of Dr. Ross, statements of Petitioner, possible scenarios, contributing factors and alternative causes of death would have not only cured the gap created when Petitioner did not testify, but it would have allowed for a reasonable trial strategy to be developed prior to trial and prior to Petitioner's decision about testifying. The choice to rely solely upon a discussion with the State's expert and objectionable cross-examination on a possible defense theory was simply unreasonable.

In *McKnight v. State*, 661 S.E.2d 354, 378 S.C. 33 (2008), McKnight argued that counsel was ineffective in calling an expert witness whose testimony undermined the defense and in failing to call an expert witness whose testimony supported the defense. In granting relief, this Court addressed counsel's decision to not utilize a defense expert utilized in McKnight's first trial and to call an expert that essentially bolstered the State's theory of the case. This Court noted: "This Court has recognized that 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." See *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) (quoting *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S.Ct. 2527 (2003)). *McKnight*, 378 S.C. at 359. In the instant case, the record is absent of evidence of reasonable professional judgment exercised by counsel that limited his investigation into the matters raised by Dr. Wren or made his decision to rely solely upon the State's expert reasonable.

Petitioner submits that he was clearly prejudiced by counsel's deficient performance. Petitioner was adamant that he did not intentionally take the life of the

victim, yet counsel failed to utilize an expert that could have helped establish a defense and/or provide testimony that supported a viable argument for a conviction on a lesser included offense or a complete defense. As a result, Petitioner urges this Court to find that the lower court must be reversed and relief granted.

- D. The lower court's finding of deficiency for counsel's failure to request an accident charge should be upheld, but the lower court should be reversed for failing to find resulting prejudice.

Petitioner submits that the lower court's finding of deficiency for counsel's failure to request an accident charge should be upheld, but the lower court should be reversed for failing to find resulting prejudice. Here, counsel's deficiency in handling an accident defense and requesting an accident charge led to a "scant" record being developed regarding the defense of accident that the lower court errantly relied upon to excuse a finding of prejudice. App. p. 788.

After Petitioner's decision to not testify was put on the record, a discussion was held regarding the jury charges. App. pp. 452-3. During that discussion, the State requested an inference of malice from a deadly weapon charge and argued that a hand or fist could be considered a deadly weapon. App. p. 454, ln. 6. In response, the court provided the charge he intended to give, unless defense counsel convinced him otherwise. App. p. 454, ln. 17 – 455, ln. 12. The court explained: "Now, there's no evidence in the record, and the defendant has indicated he is not testifying, there's no evidence in the record that I know of which would show any self-defense or any mitigating circumstances and I therefore intend on charging the deadly weapon language." App. p. 454, ln. 23- p. 455, ln. 3.

Thereafter, the court asked the parties about charging voluntary manslaughter. App. p. 455. The State requested a charge on voluntary manslaughter and provided argument. App. pp. 455-461. During the State's argument, the trial court asked about an involuntary manslaughter charge. App. p. 461, ln. 15. When the court inquired about the defense's position, counsel responded that the defense objected to a charge on voluntary manslaughter but requested an involuntary manslaughter charge. App. p. 463. Counsel responded to the court's question about charging involuntary without charging voluntary. App. pp. 463-465. In the middle of counsel's argument, the court stated: "I agree with you on that, I'll charge involuntary. Talk to me about voluntary." App. p. 465, lns. 8-9. In response, trial counsel argued against a voluntary manslaughter charge. App. pp. 465-466. As counsel was concluding his response, the court stated: "And then again, they could believe that it was an accident." App. p. 466, lns. 18-19.

After hearing from both parties, the court determined that he would charge murder, voluntary and involuntary manslaughter, which he did following closing arguments. App. pp. 466, lns. 23-25, 503-506. In part, the murder instruction was given as follows:

Now, malice aforethought may be express or inferred. These terms expressed and inferred do not mean different types of malice, but merely the manner in which malice may be shown to have existed, that's either by direct evidence or by inference from the facts and circumstances which have been proved to you.

[Portion relating to express malice omitted.]

Now, malice can also be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. Now, a deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. A hand or fist is not normally considered a deadly weapon, however under some circumstances depending on the manner and means of its use the wounds inflicted and other relevant facts, a hand or fist may be considered a

deadly weapon. It's for you to decide in this case beyond a reasonable doubt whether or not a hand or fist is a deadly weapon. Voluntary manslaughter.

App. p. 504, ln. 6-7, ln. 24 – p. 505, ln. 5. No request was made or instruction given on accident.

At the evidentiary hearing, trial counsel was asked if Petitioner ever discussed the victim's death being accidental, and he responded that he could not remember. App. p. 705-706. When asked about the State's argument against a voluntary manslaughter charge, the court's response that the jury could believe it was an accident and the State's argument in closing that victim's death was not an accident, counsel agreed that he did not fully argue accident and he could not recall why he did not request an accident charge. App. pp. 713-7114, 717. On cross-examination, he agreed that he was familiar with elements of an accident defense and/or charge. App. p. 734.

When Petitioner took the stand, he recalled discussing his statements with counsel. App. p. 746. He recalled providing counsel additional information that was not fully addressed in his statements, such as he did not intend to kill the victim and her death was accidental. App. pp. 746-747. As addressed herein, Petitioner did not take the stand and testify at trial. Petitioner testified that he was relying on counsel to make all necessary arguments and requests for charging the jury. App. pp. 751-752.

As the lower court held, it is clear from the record that counsel failed to make a request for an accident charge despite the trial court's comment that counsel's argument could lead the jury to believe it was an accident. Counsel admitted that accident was part of his argument prior to Petitioner's decision to not testify, but he did not "have a specific charge on that." App. p. 714, lns. 13-22. Petitioner testified that he told counsel that the

victim's death was accidental. App. pp. 746-747. Therefore, the lower court correctly held that counsel was deficient for failing to request an accident charge. App. p. 787.

After finding that it could be deduced that the trial court would have considered giving a charge on accident, the lower court determined that she was not convinced of the prejudice that resulted from the failure to request an accident charge because counsel failed to put up a viable case under the defense of accident. App. p. 788. As noted by the lower court, in *State v. Owens*, 427 S.C. 325, 831 S.E.2d 126 (Ct. App. 2019) affirmed by *State v. Owens*, Op. No. 28035 (S.C. Sup. Ct. filed June 16, 2021), the South Carolina Court of Appeals opined that that "the defense of accident is a recluse: it is seldom seen and often misunderstood." It is apparent from the record but misunderstood by the lower court how counsel's failure to request an accident charge undermined the reliability in the outcome of the trial and should not be excused due to a finding of "scant amount of evidence" to support an accident charge when counsel was responsible for failing to fully develop and argue that the victim's death was accidental. As is argued above, Petitioner submits that the court's finding of a lack of evidence to support accident does not negate a finding of prejudice but demonstrates the clear prejudice suffered due to counsel's ineffective assistance in developing a defense of accident through a duly qualified expert. Therefore, Petitioner submits that relief should be granted due to the finding of deficiency and the court's erroneous finding as to prejudice. Then, Petitioner can be afforded a fair a trial whereby a defense of accident could be properly developed and charged to the jury with a just result. *See Strickland*, 466 U.S. at 686, 104 S.Ct. 2052 (Holding "[t]he benchmark for judging any claim of of ineffectiveness must be whether counsel's

conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”)

E. The lower court should be upheld for finding that counsel failed to request proper instructions on malice and enter objections and/or exceptions when such instructions were not given, but the lower court erred in failing to find resulting prejudice.

The lower court should be upheld for finding that counsel failed to request proper instructions on malice and enter objections and/or exceptions when such instructions were not given, but the lower court erred in failing to find resulting prejudice. App. pp. 791-797. As addressed above and cited, the trial court instructed the jury on murder, voluntary and involuntary manslaughter. App. pp. 503-506.

During the charging conference, the State requested an inference of malice from the use of a deadly weapon charge. App. p. 454, ln. 6. When asked at the evidentiary hearing if there was any reason he did not raise *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), or make argument against the charge, trial counsel responded that he was aware of *Belcher* and did not have a reason for not objecting or making an argument in response to the State’s request. App. pp. 710-711. When asked about the charge stating that a hand or fist could be a deadly weapon, counsel could not recall if he had ever been involved in case where the hand or fist was considered a deadly weapon. He responded that he did not have a reason for not objecting to the State’s request for the charge. App. p. 711. Regarding the malice charge given to the jury, counsel stated that he could not recall a reason for not objecting to the charge as being a comment on the facts. App. pp. 715-716.

Counsel explained that the defense strategy was to get a manslaughter charge, preferably involuntary manslaughter. App. pp. 706, 725-726. On cross, he recalled that

after hearing Petitoiner's version of events he remembered hearing about some cases involving erotic sexual asphyxiation and advising Petitioner "we certainly ought to get it down lower than what you're charged with." App. p. 725, lns. 2-3. When asked if he had a specific reason or strategy for objecting to a voluntary manslaughter charge, he responded that what he said in the transcript did not make sense since they certainly would have taken "it" (voluntary manslaughter) over murder.<sup>4</sup> App. p. 712, lns. 17-23. Regarding the manslaughter charge, counsel was asked about the court's failure to instruct the jury that malice is not an element of voluntary manslaughter, and he could not recall a reason for not objecting or entering an exception to the charge. App. p. 717.

Counsel was asked about *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), regarding a permissive inference versus a mandatory inference, and the absence of the language set forth in *Elmore* in the instant case. App. p. 716. He said that he had probably read the case and was familiar with it, but he could not recall a reason for not requesting the language from *Elmore*. App. p. 716.

Petitioner testified that he was relying on counsel to make all necessary arguments and requests for charging the jury. App. pp. 751-752. He also testified that he was relying upon counsel to be familiar the applicable caselaw. App. p. 752.

When Deputy Solicitor Collins was on the stand, she testified that the prosecution knew the defense "would be – it was a consensual act between two consenting adults that went horribly wrong but that there was no malice." App. p. 764, lns. 7-9.

Based upon the review of the record, the lower court held :

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<sup>4</sup> Despite counsel's objection, the court gave a voluntary manslaughter charge. App. pp. 463-466, 505.

Simply put, this Court is confused by counsel's performance during the charging conference and lack of explanation at the evidentiary hearing.<sup>5</sup> As discussed below, this Court agrees that counsel rendered ineffective assistance when he failed to request proper instructions and enter objections and/or exceptions when such instructions were not given.

App. pp. 790-791.

Thereafter, the Court addressed and properly applied *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) and *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), before holding:

This Court finds that trial counsel erred in failing to argue that the lower court should not have given the inference of malice instruction involving a deadly weapon when evidence was presented that could reduce, excuse, justify or mitigate the homicide. Here, counsel testified that the strategy was to get something less than murder but he failed to argue for a limited malice instruction under *Belcher* based upon the premise that evidence existed to reduce, excuse or justify the homicide. In making his argument for involuntary manslaughter, which caused the trial court to question if the jury could believe it was an accident as discussed above, counsel addressed evidence that would reduce, excuse or justify the homicide but he failed respond when the court inquired about the same. Trial pp. 454-455, 463-466.

App. pp. 791-791.

Next, the lower court examined the relevant portion of the malice instruction, applied *Burdette* and *State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570 (572) (1989) and correctly held that counsel was deficient when he failed to object to the hand or fist language in the malice charge on the basis that it specifically emphasized facts in evidence. App. pp. 792-793. The relevant portion of the instruction reads:

Inferred malice may also arise when the deed is done with a deadly weapon. Now, a deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. A hand or fist is not normally considered a deadly weapon, however under some circumstances

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<sup>5</sup> At the evidentiary hearing, counsel seemed confused by the questions regarding his objection to voluntary manslaughter despite making a lengthy argument to the trial court against it. He stated at the evidentiary hearing that the defense wanted a charge on voluntary manslaughter. App. pp. 712-713.

depending on the manner and means of its use the wounds inflicted and other relevant facts, a hand or fist may be considered a deadly weapon. It's for you to decide in this case beyond a reasonable doubt whether or not a hand or fist is a deadly weapon.

App. p. 504, ln. 20 – p. 505, ln. 4, p. 792-793. In contrast to the court's later finding of no prejudice, the court reasoned: "By failing to object to this portion of the instruction, counsel missed another opportunity to limit the malice instruction given to the jury and to ensure that the instruction given to the jury did not result in prejudice to Applicant." App. p. 792.

Then, the court correctly found that counsel was ineffective for failing to request a complete inference of malice instruction and/or enter an objection or exception when the court's instruction lacked the general permissive inference instruction as set forth in *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983). App. p. 504, ln. 6-7 – p. 505, ln. 5. After a thorough discussion of the applicable law and applying it to the instant case, the lower court held:

A trial attorney's failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient performance by trial counsel. *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016). This Court finds that the trial court should have given the general permissive inference instruction provided in *Elmore*, and counsel admitted that he was familiar with *Elmore* and had no reason for not requesting the instruction set forth therein. Therefore, this Court finds that trial counsel was deficient when he did not request, object or enter an exception when the trial court proposed and gave an instruction that omitted a general permissive inference instruction.

App. pp. 793-795.

The lower court failed to recognize the interesting myriad of deficiencies on the part of counsel directly related to the malice instruction. As discussed, the lower court found counsel was deficient for not requesting the complete omission of the deadly

weapon portion of the charge under *Belcher* or the hand or fist language as an impermissible comment on the facts. Additionally, the court found counsel was deficient for failing to ensure that the permissive inference language set forth in *Elmore* was given to the jury. Therefore, the instant case goes beyond the error addressed in *Gibson*, yet the prejudice analysis set forth therein gives guidance as was noted but misapplied by the lower court.

When evaluating the question of prejudice pursuant to *Gibson*, the court “must decide whether the erroneous malice instruction contributed to the jury’s verdict based on all the evidence presented to the jury.” *Gibson* at 265, 786 S.E.2d at 265. “The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge.” *Id.*

Here, Petitioner and counsel made it clear that the case boiled down to the absence of malice in the death of the victim, yet counsel failed to ensure that a proper inferred malice instruction was given. Even when the Deputy Solicitor took the stand, she admitted that the prosecution knew the defense “would be – it was a consensual act between two consenting adults that went horribly wrong but that there was **no malice.**” App. p. 764, lns. 7-9 (emphasis added).

Based upon a review of the evidence presented to the jury and the record made at the evidentiary hearing, it is clear that the erroneous malice instruction contributed to the jury’s verdict. Here, the evidence presented at trial did not amount to a showing of express malice that negated the erroneous inferred malice instruction as held by the lower court. Additionally, the defense case was best summarized by the Deputy Solicitor - “there was no malice.” App. p. 764, lns. 7-9. Here, where the absence of malice was the

lynchpin of the defense, the prejudice suffered from erroneous inferred malice instruction clearly contributed to the jury's verdict and amounts to prejudice. Therefore, a new trial must be granted.

- F. The lower court erred by not making a finding of ineffective assistance of counsel when counsel failed to request a proper instruction on voluntary manslaughter and enter an objection or exception when the trial court failed to instruct the jury that malice is not an element of voluntary manslaughter and for finding no resulting prejudice.

Petitioner submits that the lower court erred by not making a finding of ineffective assistance of counsel when counsel failed to request a proper instruction on voluntary manslaughter and enter an objection or exception when the trial court failed to instruct the jury that malice is not an element of voluntary manslaughter. App. pp. 505-506. By way of the Order the lower court noted the allegation, and only provided a brief analysis before finding no resulting prejudice. App. p. 797.

At the evidentiary hearing, counsel explained that the defense strategy was to get a manslaughter charge, preferably involuntary manslaughter. App. pp. 706, 725-726. On cross, he recalled that after hearing Petitioner's version of events he remembered hearing about some cases involving erotic sexual asphyxiation and advising Petitioner "we certainly ought to get it down lower than what you're charged with." App. p. 725, lns. 2-3. When asked if he had a specific reason or strategy objecting to a voluntary manslaughter charge, he responded that what he said in the transcript did not make sense since they certainly would have taken "it" (voluntary manslaughter) over murder.<sup>6</sup> App. p. 712, lns. 17-23. Counsel also was asked about the court's failure to instruct the jury

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<sup>6</sup> Despite counsel's objection, the court gave a voluntary manslaughter charge. App. pp. 463-466, 505.

that malice is not an element of voluntary manslaughter, and he could not recall a reason for not objecting or entering an exception to that charge. App. p. 717.

Petitioner testified that he was relying on counsel to make all necessary arguments and requests for charging the jury. App. pp. 751-752. He also testified that he was relying upon counsel to be familiar with the applicable cases. App. p. 752.

When Deputy Solicitor Collins was on the stand, she testified that the prosecution knew the defense “would be – it was a consensual act between two consenting adults that went horribly wrong but that there was no malice.” App. p. 764, Ins. 7-9.

As discussed in *Burdette*, here the lower court failed to instruct the jury that malice “is not an element of voluntary manslaughter, despite section 16-3-50 of the South Carolina Code (2015) referring to ‘manslaughter’ as the ‘unlawful killing of another without malice, express or implied.’” 427 S.C. at 500, 832 S.E.2d at 581. Petitioner submits that the trial court gave an incomplete voluntary manslaughter charge by failing to instruct the jury that malice is not an element of voluntary manslaughter and urges this Court to find that counsel should have requested a proper instruction or entered an objection or exception when one was not given.

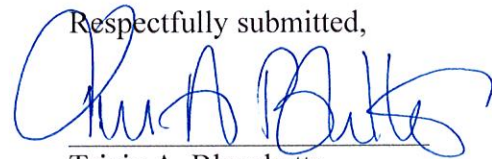
As noted by the lower court, counsel seemed confused at the evidentiary hearing about his objection to the manslaughter charge and testified that the defense wanted the charge. App. pp. 712-71, 791. He also testified that the strategy was to get a manslaughter charge, and he advised Petitioner “we certainly ought to get it down lower than what you’re charged with.” App. p. 725, Ins. 2-3. He followed up by testifying that is the way he thought it was going to happen. App. p. 725, Ins. 6-7. Clearly, counsel’s strategy hinged on getting a manslaughter conviction, yet he failed to ensure a complete

instruction was given to ensure proper representation and that the trial result could be deemed reliable.

In one sentence, the lower court denied this argument finding “prejudice cannot be established since the jury found Applicant guilty of murder, which requires malice. App. p. 797. Petitioner urges this Court to find this basis for dismissal is too simplistic and erroneous when counsel made it clear that the defense hinged on getting it down to manslaughter and counsel failed to ensure that a proper instruction was given. Additionally, as argued above, the court found counsel made numerous errors and was deficient in his handling of the malice portion of the murder charge. As a result of counsel’s deficient handling of the instructions, Petitioner submits the outcome of his trial cannot be deemed just and a new trial must be granted.

CONCLUSION

Based upon the arguments and record before this Court, Petitioner would respectfully ask that this Court grant certiorari, allow briefing of the issues addressed herein, and/or grant relief.

Respectfully submitted,  


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