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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

William Jeffrey Young, Circuit Court Judge

ROGER DALE BURKE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001419

PETITION FOR WRIT OF CERTIORARI

CARMEN V. GANJEHSANI
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Division of Appellate Defense
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INDEX

INDEX 1

ISSUES PRESENTED 3

STATEMENT 4

ARGUMENT 7

I. The PCR court erred in finding that trial counsel was not ineffective by calling a defense witness who testified that Petitioner had told him he planned to put his entire family in a caustic chemical tank where such testimony eliminated any chance of a jury finding Petitioner guilty of voluntary manslaughter instead of murder 8

II. The PCR court erred in finding that trial counsel was not ineffective in failing to object to the solicitors' repeated references during opening and closing arguments to the jury that Petitioner acted as "judge, jury, and executioner" where it is improper for a solicitor to officially characterize a defendant as a murderer and cold-blooded killer until the defendant has been found guilty of murder 10

III. The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to object to the solicitor's remarks during closing argument which improperly vouched for the credibility of the State's witness and branded Petitioner as a liar and untruthful 13

IV. The PCR court erred in finding that trial counsel was not ineffective in failing to pursue an insanity defense where based upon the concern of several witnesses as to Petitioner's mental condition at the time of the shooting, trial counsel should have conducted a reasonable investigation with respect to the possibility of an insanity defense and should have requested a jury charge on the defense of insanity 16

V. The PCR court erred in finding that trial counsel was not ineffective for failing to object to the implied malice jury charge where the charge that malice may be inferred from the use of a deadly weapon is improper where evidence is presented that would reduce, mitigate, excuse or justify the homicide 19

VI. The PCR court erred in finding that trial counsel was not ineffective for failing to object to the solicitor's cross-examination of Petitioner regarding facts not supported by the evidence 20

CONCLUSION 21

ISSUES PRESENTED

I. Whether the PCR court erred in finding that trial counsel was not ineffective by calling a defense witness who testified that Petitioner had told him he planned to put his entire family in a caustic chemical tank where such testimony eliminated any chance of a jury finding Petitioner guilty of voluntary manslaughter instead of murder?

II. Whether the PCR court erred in finding that trial counsel was not ineffective in failing to object to the solicitors' repeated references during opening and closing arguments to the jury that Petitioner acted as "judge, jury, and executioner" where it is improper for a solicitor to officially characterize a defendant as a murderer and cold-blooded killer until the defendant has been found guilty of murder?

III. Whether the PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to object to the solicitor's remarks during closing argument which improperly vouched for the credibility of the State's witness and branded Petitioner as a liar and untruthful?

IV. Whether the PCR court erred in finding that trial counsel was not ineffective in failing to pursue an insanity defense where based upon the concern of several witnesses as to Petitioner's mental condition at the time of the shooting, trial counsel should have conducted a reasonable investigation with respect to the possibility of an insanity defense and should have requested a jury charge on the defense of insanity?

V. Whether the PCR court erred in finding that trial counsel was not ineffective for failing to object to the implied malice jury charge where the charge that malice may be inferred from the use of a deadly weapon is improper where evidence is presented that would reduce, mitigate, excuse or justify the homicide?

VI. Whether the PCR court erred in finding that trial counsel was not ineffective for failing to object to the solicitor's cross-examination of Petitioner regarding facts not supported by the evidence?

STATEMENT

Indictments

On September 9, 2002, Petitioner Roger Dale Burke was indicted by the Lexington County Grand Jury for (1) murder; (2) possession of weapon during the commission of a violent crime; (3) attempt to commit arson; and (4) first degree burglary. App. 791-808.

Trial and Verdict

On August 23-25 and 27, 2004, Petitioner was tried before the Honorable Marc H. Westbrook and a jury on the above-referenced charges. App. 1-602. Petitioner was represented by William N. Nettles, and the State was represented by Assistant Solicitors Robert M. Madsen and Marion Moses. App. 1.

The defense put forth by Petitioner's trial counsel was that Petitioner was guilty of breaking and entering into his estranged wife's home, was guilty of possessing a firearm during the course of a violent crime, and was guilty of attempted arson by trying to burn his estranged wife's home down after he shot and killed her. Trial counsel argued that Petitioner was not guilty of murder but rather lacked the required malice and committed the act in a heat of passion. App. 63-67. The argument was that Petitioner became enraged when estranged wife left Petitioner for Petitioner's brother, took the children away to a bad living environment, and threatened to take Petitioner's children away from him forever. Id.

The jury found Petitioner guilty of (1) murder; (2) attempt to commit arson; (3) first degree burglary; and (4) possession of a weapon during the commission of a violent crime. App. 589, l. 23 – 590, l. 15. Judge Westbrook sentenced Petitioner to (1) life without parole on the murder charge; (2) thirty years for first degree burglary; (3) twenty years on the

attempted arson charge; and (4) five years for possession of a weapon during the commission of a violent crime, with all sentences to run concurrently. App. 602, ll. 9-15.

Direct Appeal

Chief Appellate Defender Robert M. Dudek filed a direct appeal with the South Carolina Court of Appeals pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed the appeal on January 24, 2007. App. 604.

PCR Application and Evidentiary Hearing

On May 18, 2007, Petitioner filed his first application for post-conviction relief ("PCR") (2007-CP-32-1784). App. 605-631. Petitioner filed a second PCR application on June 5, 2007 (2007-CP-32-1965). App. 632-659. The Stated filed its Return on August 27, 2007. App. 660-663.

On April 24, 2009, the PCR court filed an order merging the two duplicate PCR applications filed by Petitioner. App. 665.

On August 14, 2012, an evidentiary hearing was held before the Honorable W. Jeffrey Young. App. 690-779. Petitioner was represented by David W. Melnyk, and the State was represented by Assistant Attorney General Kaelon E. May. App. 690. Both Petitioner and his trial counsel testified at the hearing. App. 692-778.

Order of Dismissal

On June 19, 2013, Judge Young filed his Order of Dismissal denying Petitioner's PCR application and dismissing it with prejudice. App. 781-790. Judge Young made the following rulings in his Order:

1. trial counsel was not ineffective for failing to pursue an insanity defense at trial;

2. trial counsel was not ineffective for calling a witness at trial who testified that Petitioner told him that he would kill his entire family, including the children, by placing them in a tank filled with acid;

3. trial counsel was not ineffective for failing to object to comments made by the solicitors during opening and closing argument to the effect that Petitioner acted as the judge, jury and executioner;

4. trial counsel was not ineffective for failing to object to comments made by the solicitor during closing argument that attacked the credibility of Petitioner and vouched for the credibility of the State's witness;

5. trial counsel was not ineffective for failing to object to the solicitor's cross-examination of Petitioner regarding facts not in evidence; and

6. counsel was not ineffective for failing to object to the jury charge that malice could be implied by the use of deadly weapon.

App. 787-789.

This petition for writ of certiorari follows.

ARGUMENT

To establish ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Id. at 117-18, 386 S.E.2d at 625 (internal citations omitted). A reasonable probability has been defined by this Court as a probability sufficient to undermine the confidence in the outcome of a trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

Where defense counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Defense counsel may not, however, explain away errors and omissions which acted to the prejudice of his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, this Court held that:

> Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (emphasis in original) (internal citations

omitted).

I. The PCR court erred in finding that trial counsel was not ineffective by calling a defense witness who testified that Petitioner had told him he planned to put his entire family in a caustic chemical tank where such testimony eliminated any chance of a jury finding Petitioner guilty of voluntary manslaughter instead of murder.

At trial, trial counsel called Clint Addy as a defense witness. App. 319. Mr. Addy knew Petitioner from growing up and working together. App. 320, ll. 3-8. On cross-examination, the solicitor elicited testimony from Mr. Addy that Petitioner had spoken of killing his wife and that he could dispose of the body in a 4,000 chemical tank containing a chemical that could get rid of skin and bones. App. 326, ll. 3-25. The solicitor also had Mr. Addy admit that Petitioner had further told him that he planned to also put his children in that tank of acid. App. 329, l. 22 – 330, l. 1.

At the PCR hearing, Petitioner's trial counsel conceded that the State had shared with him that Mr. Addy would say that Petitioner had planned to put his entire family in the caustic chemical tank if Mr. Addy testified at trial. App. 765, ll. 9 – 20. Trial counsel testified that he nevertheless decided to call Mr. Addy to the witness stand because he did not believe that anybody would ever really think that Petitioner would place his children in acid and he felt like the good things Mr. Addy said about Petitioner outweighed this damaging statement. App. 765, l. 20 – 766, l. 16.

In a case where the primary defense was that Petitioner was at the most only guilty of voluntary manslaughter, the testimony of Mr. Addy that Petitioner had talked about killing and placing his entire family in a caustic chemical tank was devastating to the defense. In fact, while deliberating, the jury asked to hear the testimony of Mr. Addy again regarding Petitioner's alleged statements to him that Petitioner had told Mr. Addy

that he would kill his family and place them in acid. App. 583, l. 1- 588, l. 5. Mr. Addy's testimony no doubt influenced the jury's decision to find Petitioner guilty of murder instead of voluntary manslaughter.

Therefore, trial counsel was deficient in calling this highly adverse witness as a defense witness. This strategy, in calling a witness whom trial counsel knew would provide direct, contradictory evidence to the defense, was unreasonable and invalid. See Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002) (finding trial counsel was ineffective for calling petitioner's girlfriend, who he had not interviewed, as a defense witness where she denied having sex with petitioner the morning of the alleged sexual assault of his girlfriend's daughter and where the girlfriend's testimony refuted the defense that the semen found on the bed was a result of petitioner and his girlfriend having sex); see also McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) (finding trial counsel ineffective for calling a defense expert witness who undermined the defense).

Petitioner was undoubtedly prejudiced by Mr. Addy's damaging testimony which essentially eviscerated his contention that he was at most guilty of voluntary manslaughter. Trial counsel was therefore ineffective in calling Mr. Addy as a defense witness, and Petitioner is entitled to a new trial.

II. **The PCR court erred in finding that trial counsel was not ineffective in failing to object to the solicitors' repeated references during opening and closing arguments to the jury that Petitioner acted as "judge, jury, and executioner" where it is improper for a solicitor to officially characterize a defendant as a murderer and cold-blooded killer until the defendant has been found guilty of murder.**

During opening and closing arguments, the solicitors made repeated references that Petitioner was acting as "judge, jury, and executioner:"

> "Judge, jury, and executioner. Ladies and gentleman, on December 19, 20101, the Defendant, Roger Dale Burke, took it upon himself to be the judge, to be the jury, and to be the executioner of his ex-wife, Jenny Burke." App. 59, ll. 19-23.
>
> "Ladies and gentleman, on December 19, 2001, the Defendant took it upon himself to be the judge of his ex-wife. He was her jury, And when he convicted her, he sentenced her to death." App. 62, ll. 14-17.
>
> "Mr. Moses told you this case is about a man who decided on December 19th to be his wife's judge, decided to be her jury. And when he sentenced her on that day, he decided to be her executioner." App. 548, ll. 12-16.
>
> "You will know what that final shot was after he decided to be her judge, jury, and her executioner." App. 548, ll. 19-20.
>
> "I sentence you to death, that I have decided to become your judge, jury, and executioner." App. 552, ll. 1-3.
>
> "He decides on that day to be his wife's judge, jury, and executioner." App. 556, ll. 17-18.
>
> "He knew they would hunt him down, and he knew that they would eventually find him because he had decided to become his wife's judge, jury, and executioner. He executed her with a contact wound to her head." App. 558, ll. 13-17.
>
> "I am asking you to find this Defendant . . . guilty for murdering his wife, for being her judge, her jury, and when he found her guilty, her executioner." App. 558, l. 23 – 559, l. 7.

Petitioner's trial counsel did not object to these remarks by the solicitors. At the PCR hearing, Petitioner's trial counsel explained he did not object to these remarks

because he thought they were not "terribly effective" and he did not see any reason to object. App. 763, l. 19 – 764, l. 3; 767, l. 24 – 768, l. 3.

The United States Supreme Court has long ago counseled prosecutors to "refrain from improper methods calculated to produce a wrongful conviction . . . ." See Berger v. United States, 295 U.S. 78, 88 (1935). During closing argument, "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). Yet, the "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Rudd, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted); See State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). As this Court explained,

> Solicitors are bound to rules of fairness in their closing arguments ... While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (internal citation and quotation omitted).

"The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (finding "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument."); See State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873

(1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice."). Ultimately, "[t]he appropriateness of a solicitor's . . . argument is a matter left to the trial court's sound discretion." Id. at 548, 586 S.E.2d at 156.

Here, it was highly improper for the solicitors to repeatedly argue to the jury that Petitioner was acting as "judge, jury and executioner" before the jury had actually convicted Petitioner of murder. These repeated statements presupposed the guilt of Petitioner. "No man on trial for murder can be officially characterized as a murderer or as a cold-blooded killer until he is adjudged guilty of murder or pleads guilty to that charge." State v. Medrano, 27 A.2d 52, 65 (Conn. App. Ct. 2011) (internal citations omitted). In Medrano, the Appellate Court of Connecticut concluded the prosecutor's characterization of the defendant as the victim's "judge, jury, and executioner" was improper where the prosecutor labeled the defendant as an "executioner" who took the life of his victim. Id.

At Petitioner's trial, the solicitors' multiple references to Petitioner as "judge, jury, and executioner" were highly improper and only served to inflame the jury, especially in a case where there was evidence that Petitioner was only guilty of voluntary manslaughter. Petitioner's trial counsel was ineffective in failing to object to these repeated characterizations of Petitioner and allowing the State to embark on a continual character assassination of Petitioner. Trial counsel's failure to object to these improper characterizations of Petitioner was not harmless error where the case hinged on the jury deciding whether Petitioner was guilty of murder or voluntary manslaughter. Accordingly, Petitioner is entitled to a new trial.

III. The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to object to the solicitor's remarks during closing argument which improperly vouched for the credibility of the State's witness and branded Petitioner as a liar and untruthful.

During closing argument to the jury, the solicitor improperly vouched for the credibility of the State's witness and characterized the Petitioner as a liar and not credible:

> "Who has something to gain? Who has something to lose? Sergeant Frier doesn't. He is taking a statement. What reason does he have to lie?" App. 548, l. 25 – 549, l. 3.
>
> "He can't dispute that he killed her. So he is trying to pull one over on you as to why." App. 557, ll. 6-7.
>
> "Mr. Burke will admit a lot, but he has to, doesn't he? Like my grandfather said: The best lie contains 90 percent truth, doesn't it? App. 557, ll. 19-21.

Petitioner's trial counsel did not object to these remarks by the solicitor during closing argument to the jury. Trial counsel did not offer any valid explanation for failing to object to the remarks at the PCR hearing.

"A lawyer's personal opinion regarding the credibility of a witness is not a proper subject for argument to a jury." Ellison v. Pope, 290 S.C. 100, 110, 348 S.E.2d 367, 373 (Ct. App. 1986). This Court has defined when a solicitor vouches for the credibility of a witness in State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001), *rev'd on other grounds*, Kelly v. State, 534 U.S. 246, 122 S.Ct. 726 (2002):

> Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury. . . . A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence is not presented to the jury but known to the prosecutor,

> supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. at 368-69, 540 S.E.2d at 860 (quotation omitted). See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805, *cert. denied,* 534 U.S. 977, 122 S.Ct. 404 (2001) ("[A] solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness . . . . 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[.]") (citations omitted). Accordingly, "[b]ecause a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility." Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) (quoting Kelly, 343 S.C. at 369, 540 S.E.2d at 861); see also Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004) (finding solicitor's closing argument which vouched for credibility of police officer was improper); Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

Here, it is clear that the solicitor's comments to the jury served to bolster the credibility of the prosecution witness, to discredit the credibility of the Petitioner, and to pit the testimony of the State's witness and the Petitioner against each other.

Petitioner's trial counsel in this case therefore was ineffective in failing to object to the solicitor's improper comments vouching for the credibility of the State's witness and calling the Petitioner a liar. These comments made by the solicitor constituted an

error of law and were inherently prejudicial to Petitioner's case. See id. at 276, 565 S.E.2d at 768.

Trial counsel's failure to object to the solicitor's improper remarks during closing argument was not harmless error. The case against Petitioner depended on his credibility and whether his account of the incident resulting in the death of his estranged wife was true. Accordingly, given the fact that Petitioner's conviction was inextricably linked to his credibility, trial counsel's failure to object to the State's improper vouching of the State's witness and improper characterization of Petitioner as a liar prejudiced Petitioner's case. This Court should therefore reverse the PCR court's order denying relief and grant Petitioner a new trial.

IV. The PCR court erred in finding that trial counsel was not ineffective in failing to pursue an insanity defense where based upon the concern of several witnesses as to Petitioner's mental condition at the time of the shooting, trial counsel should have conducted a reasonable investigation with respect to the possibility of an insanity defense and should have requested a jury charge on the defense of insanity.

Trial counsel elected not to pursue an insanity defense at trial, stating at the PCR hearing that he felt the case did not warrant an insanity defense although he acknowledged it would have been up to the judge to decide. App. 760, l. 13 – 761, l. 1.

"Insanity is an affirmative defense to a prosecution for a crime." State v. Lewis, 328 S.C. 273, 277, 494 S.E.2d 115, 117 (1997). "South Carolina has adopted the M'Naghten test to determine insanity. A defendant is insane if, at the time of the commission of the act constituting the offense, as a result of mental disease or defect, he lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong." Id. at 277-78, 494 S.E.2d at 117; S.C. CODE ANN. § 17-24-10(A) (Supp.1996). "The key to insanity is the power of the defendant to distinguish right from wrong in the act itself-to recognize the act complained of is either morally or legally wrong." Lewis, 328 S.C. at 278, 494 S.E.2d at 117 (internal citations omitted).

A defendant may rely on lay testimony to establish insanity. State v. Hinson, 253 S.C. 607, 172 S.E.2d 548 (1970); see also State v. Rimert, 315 S.C. 527, 446 S.E.2d 400, *cert. denied*, 513 U.S. 1080, 115 S.Ct. 730, 130 L.Ed.2d 634 (1995) (State relied on lay testimony to establish sanity); State v. Smith, 298 S.C. 205, 379 S.E.2d 287 (1989) (where defendant presents expert testimony on his insanity, State is not required to present expert testimony on sanity; lay testimony may be sufficient).

"A trial court has a duty to give a requested instruction that is supported by the

evidence and correctly states the law applicable to the issues." State v. Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007). A trial court commits reversible error where it fails to give a requested charge on an issue raised by the evidence. Id. at 406, 649 S.E.2d at 50.

At Petitioner's trial, trial counsel elected not to pursue an insanity defense or request a jury charge on insanity. This was despite the testimony of witnesses that Petitioner had changed and was suffering from mental problems:

Michael Ratliff: "[Petitioner] was a totally different person after that [when his wife left him for his brother]." App. 303, ll. 13-22.

Terry Anderson: "[Petitioner] lost weight and was very emotional all the time. Even when we was having fun or whatever, you know, thought we was having fun, he would break down and cry sometimes. He was just going through a real tough time, you know." App. 340, ll. 5-9.

Terry Anderson: "[Petitioner] was just totally - - you know, he was emotional real bad all the time. He wouldn't eat. He said he couldn't sleep. It was tearing him apart. He'd tell me about nights that he would wake up and dream not having - - he said he would think about losing his kids and all. He said he couldn't live without his kids." App. 342, l. 20 – 343, l. 1.

Jane Singleton
[next door neighbor of
Petitioner who was
also a nurse]: "[Petitioner] would come to the house, and he would sit and cry. He would be so emotional that he would jerk so bad that he would shake my kitchen table." App. 355, l. 25 – 356, l. 2.

Jane Singleton: "I said, 'You need help, Dale.' I said, 'You need to go to mental health.'" App. 358, ll. 8-9.

Jane Singleton: "His nerves were shot. He cried all the time. He would come to the house, and he couldn't keep his conversations straight. He would go to tell me something. He would get off on another subject." App. 361, ll. 4-7.

Dell Anderson: "He was temporarily insane in my opinion when this thing happened." App. 390, ll. 16-17. "I would say at that point in time that he wasn't exactly sure what he was doing." App. 391, ll. 2-3.

Petitioner: "I thought I was doing what I thought to be the right thing, which was the wrong thing . . . ." App. 514, ll. 13-14.

Given Petitioner's mental state at the time of the shooting, trial counsel was ineffective in failing to adequately investigate and pursue the possibility of an insanity defense. See Becton v. Barnett, 920 F.2d 1190 (4th Cir. 1990); Hooper v. Garraghty, 845 F.2d 471, 474 (4th Cir.1988); Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir.1978).

While trial counsel may not have believed that Petitioner was insane at the time of the shooting, "a lawyer is not entitled to rely on his own belief about a defendant's mental condition, but instead must make a reasonable investigation." Becton, 920 F.2d at 1192.

Petitioner was prejudiced by his trial counsel's failure to pursue an insanity defense and request that the trial judge charge the jury on the defense of insanity. If it could have been established that Petitioner was not guilty by reason of insanity, the outcome would have been vastly different that the life without parole sentence that Petitioner received. Petitioner is therefore entitled to a new trial.

V. **The PCR court erred in finding that trial counsel was not ineffective for failing to object to the implied malice jury charge where the charge that malice may be inferred from the use of a deadly weapon is improper where evidence is presented that would reduce, mitigate, excuse or justify the homicide.**

The trial judge gave the following instruction to the jury: "Malice may also be implied from the willful, deliberate, and intentional doing of an unlawful act without just cause or excuse or from the use of a deadly weapon." App. 569, ll. 18-21. Trial counsel did not object to this charge. Where Petitioner contended he was not guilty of murder but rather only of voluntary manslaughter, this charge was in error. See State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) (holding jury charge instructing that malice may be inferred from the use of a deadly weapon is improper where evidence is presented that would reduce, mitigate, excuse or justify the homicide). Trial counsel was ineffective in failing to object to this jury charge, and Petitioner is entitled to a new trial.

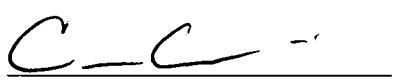
VI. The PCR court erred in finding that trial counsel was not ineffective for failing to object to the solicitor's cross-examination of Petitioner regarding facts not supported by the evidence.

During cross-examination of Petitioner, the solicitor asked Petitioner if he washed his hands in the sink after the killing to portray Petitioner as a calm and cold-blooded killer. App. 519, ll. 3-4. However, there was no evidence of Petitioner washing his hands in the sink. See State v. Medrano, 27 A.3d 52, 61 (Conn. App. Ct. 2011) (finding a prosecutor should not make remarks during cross-examination not based on reasonable inferences from the record). Trial counsel should have objected to this line of questioning, and Petitioner is entitled to a new trial for his trial counsel's failure to object.

CONCLUSION

For the reasons set forth herein, Petitioner Roger Dale Burke respectfully requests this Court to grant his Petition for Writ of Certiorari and allow full briefing on the issues raised in this petition.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of January, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

William Jeffrey Young, Circuit Court Judge

ROGER DALE BURKE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Roger D. Burke, #304613, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 9th day of January, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of January, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.