STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge
Case No. 2013-CP-40-2107
Appellate Case No. 2014-000967

ADAMS GIBSON, ...RESPONDENT,

v.

STATE OF SOUTH CAROLINA, ... PETITIONER.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The PCR court's findings regarding the inferred malice jury charge were without support. The charge given by the trial court properly conveyed the principles of inferred malice and did not shift the burden of proof. Counsel exercised reasonable judgment in not setting forth an objection under prevailing professional norms. Moreover, Applicant was not prejudiced by any error in this regard. As the PCR court's findings are unsupported, the decision should be reversed.

STATEMENT OF THE CASE

Respondent Adams Gibson ("Applicant") was indicted during the October 2005 term of the Richland County Grand Jury for Murder (2005-GS-40-9085). (App. pp. 1283-1284.) Nathaniel Roberson, Esquire, ("Counsel") represented Applicant. On May 21-24, 2007, Applicant proceeded to a jury trial alongside his co-defendant, younger brother Jacques Gibson,[1] before the Honorable Steven H. John. (App. pp. 1-1044.) He was convicted as indicted. On May 24, 2007, Judge John sentenced Applicant to thirty years imprisonment. (App. p. 1282.)

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Robert M. Dudek, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence on September 29, 2010. State v. Gibson, No. 4747 (Ct. App. Sept. 29, 2010). (App. pp. 1045-1054.) Applicant thereafter filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. (App. pp. 1055-1098.) The Supreme Court subsequently dismissed Applicant's Petition as improvidently granted. State v. Gibson, No. 27221 (February 13, 2013). (App. pp. 1099-1100.) The Remittitur was issued on March 1, 2013. (App. p. 1101.)

Applicant filed an application for post-conviction relief (PCR) on April 8, 2013. (App. pp. 1102-1107.) In his application for post-conviction relief, Applicant alleged the following:

1. Ineffective assistance of trial counsel
   a. Defense counsel failed to conduct an adequate investigation into the Applicant's case.
   b. Defense counsel failed to adequately prepare for trial and failed to make appropriate objections and motions at trial.
2. Ineffective assistance of appellate counsel
   a. Appellate counsel failed to raise all meritorious claims on appeal.

The State's Return was dated July 31, 2013. (App. pp. 1109-1113.) Applicant filed his amended

[1] Jacques Gibson also filed a PCR application setting forth the same issue addressed in this Petition. Jacques Gibson's PCR application was denied, however. Jacques Gibson has filed notice of appeal to this court seeking review of that ruling. Upon information and belief, the petition in that case will be due as provided under the rules upon receipt of the PCR hearing transcript.

application on September 27, 2013. (App. pp. 1115-1116.) In his amended application for post-conviction relief (PCR), Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of voluntary manslaughter;

2. Trial counsel was ineffective for failing to object to the introduction of Jacques Gibson's statement on Confrontation Clause grounds;

3. Trial counsel was ineffective for failing to request a jury instruction that Jacques Gibson's statements could only be considered as evidence against Jacques Gibson;

4. Trial counsel was ineffective for failing to move to sever and for failing to request a separate trial from Jacques Gibson;

5. Trial counsel was ineffective for failing to request that the jury be reinstructed regarding reasonable doubt following the jury's note to the Court marked as Court's Exhibit #4;

6. Trial counsel was ineffective for failing to object to the implied malice instructions inasmuch as the implied malice instructions did not contain explicit instructions to the jury that they could accept or reject the implication of malice;

7. Trial counsel was ineffective for failing to preserve his argument that the jury should be instructed that prior inconsistent statements of witnesses could be considered by the jury as substantive evidence and not simply as evidence of impeachment;

8. Appellate counsel was ineffective for failing to argue on appeal that the trial court erred in failing to instruct the jury that prior inconsistent statements of witnesses could be considered by the jury as substantive evidence and not simply as evidence of impeachment.

A hearing was convened on October 1, 2013, before the Honorable James R. Barber, III. (App. pp. 1117-1189.) The hearing record was supplemented by the affidavit of appellate counsel Robert Dudek. (App. pp. 1190-1191.)

Judge Barber issued his order granting PCR dated and filed March 20, 2014. (App. pp. 1244-1270.) Judge Barber granted relief based solely on trial counsel's failure to object to the jury charge on implied malice. (App. pp. 1250-1262.) The State's Motion to Reconsider was

denied in a Form 4 order filed April 23, 2014. (App. pp. 1271-1281.) This Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "'any evidence' of probative value" exists to sustain the PCR judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged 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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, supra). 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, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

SUMMARY OF FACTS ADDUCED AT TRIAL

On September 4, 2005, a group of young men from Winnsboro travelled to Chance's Sports Bar on Two Notch Road in Columbia. The group consisted of Torri Boyd, Ravaris Henry (known as "B"), Antwan Martin (known as "AJ"), and Dennis Irby, and they travelled to Columbia in AJ's Tahoe. (App. pp. 243-244, p. 299-300, pp. 363-364.) The Winnsboro group met with another friend from Winnsboro, Antonio Smith (known as "Yo-Yo"), at Chance's. (App. p. 300, p. 365.) The same evening, another group from Ridgeway went to Columbia for a night out. The Ridgeway group planned to go to a bowling alley, but when it was closed, they proceeded to Chance's. (App. p. 444-445, p. 466.) The Ridgeway group at Chance's consisted of Lakisha Davis (known as "Punkin"), Marcus Tucker, Demetric Davis (known as "Bam"), Tramele Davis, and Applicant. (App. p. 245, p. 465-466.) Tucker arrived separately, but the Ridgeway group arrived in Lakisha's burgundy car. Various members of the groups knew one another, having attended the same schools and being from the same general community. (e.g., App. p. 248, p. 298, p. 525.) Initially there were no problems between the groups; Henry and Tramele even bought drinks for one another at the bar. (App. p. 249, p. 301, p. 367, pp. 472-473, p. 447.)

The mood soon soured, however. (e.g., Tr. p. 368; p. 501.) Boyd testified about his minor run-ins with Applicant and Demetric on prior occasions. (App. p. 246-247.) Boyd stated that Lakisha went to the jukebox, and he warned her not to waste her money as the machine had taken his money earlier. (App. pp. 249-250.) According to Boyd, Applicant was angry and told Lakisha not to speak to Boyd. (App. p. 250.) Boyd stated that he attempted to smooth things over, following Applicant to the bathroom to talk. (App. p. 250.) When Applicant left the bathroom, Boyd heard him on a cell phone, speaking so that others could hear, telling someone how to get to Chance's, and Boyd "started telling everybody it might well be time to go ...

because it wasn't like he [Applicant] was letting it go." (App. p. 250.) Testimony established Applicant called his younger brother, Jacques, and directed him to Chance's. (App. p. 250, p. 275, p. 350, p. 502, p. 527, p. 740, p. 768, p. 803.) The defense maintained that the phone call was made simply to have Jacques pick Applicant up because Applicant was concerned that there may be fighting. The State's theory was that Applicant summoned Jacques to the scene as back up and because Jacques was driving Applicant's car with a weapon inside. Jacques arrived in a white Ford Escort.[1] Leaving his friends Stephon Willingham (known as "Fat Man") and Vernon Davis, Jr. (known as "Du Wop") in the car, Jacques went inside Chance's to locate Applicant. (App. pp. 527-528, p. 768, p. 803.) According to some witnesses, words were exchanged inside the bar, and the proprietor addressed the groups about the unruly behavior. (App. pp. 384-385, p. 565.)

The groups ultimately exited Chance's and spilled into the parking lot. (App. p. 252, p. 304; p. 368-369, p. 528.) Applicant did not get into Jacques' car to leave. While witnesses vary in details, it was generally agreed that Boyd and Demetric began arguing in the parking lot. (e.g., App. pp. 449-450, pp. 471-472.) The quarrel apparently arose from an allegation that Boyd's cousin had robbed Demetric, and Demetric believed that Boyd had a role in it. (App. p. 253.) As the quarrel escalated, Tramele took off his shirt, ran around the vehicle, and hit Henry with a beer can. (e.g., App. p. 255, pp. 369-370, p. 481.) At that point, a physical fight erupted. (App. p. 256; p. 305-308, p. 450.) Gunfire erupted soon after. (App. p. 450.)

Through testimony of the various parties, it was posited that Boyd was fighting with Demetric (App. p. 256-258), Henry was fighting with Tramele (App. pp. 306-308, p. 476-477.),

[1] The white Escort was actually registered to Applicant's girlfriend's uncle, but Applicant exercised ownership of the car. (App. p. 866-867.) He apparently loaned the car to Jacques on this occasion. For ease of reference, the vehicle is referred to as Jacques' car as Jacques drove the white Escort to and from the scene. However, part of the State's theory was that Applicant knew there was a weapon(s) in his vehicle, prompting him to tell Jacques to come to Chance's.

and Tucker was fighting with Martin (App. p. 370-372). Each man involved in pairs fighting denied that his opponent had a gun and claimed to hear shots after the physical fight began. (App. p. 260, pp. 302-303, p. 317, p. 373, p. 478; p. 502.) Smith was also eliminated as a possible shooter because Jacques claimed to have a gun aimed at him when the shots rang out. Tramele testified that Irby hit him once but mostly observed the fight. Smith apparently tried to serve as a peacemaker, and Smith testified that Irby was also attempting to break up the fight. (App. p. 50-504.) According to several witnesses Applicant was not involved in the fight, though Smith reported seeing Applicant kick Boyd and Vernon reported seeing Applicant swinging at someone. (App. p. 506, p. 809.) As Smith moved toward Applicant to intervene, Jacques drew a pistol, pointed it at Smith, and said, "Yo-yo, don't even think about it." (App. p. 151, p. 506, p. 804.) Thereafter, shots were fired, suddenly sending everyone scurrying. Irby, however, had been shot in the back with a single nine-millimeter bullet fired from a High Point firearm. (App. p. 688, p. 701, p. 714.) A patron of Chance's unconnected with the groups from Winnsboro and Ridgeway, Shunta Wilson, attempted to render aid. (App. pp. 569-570.) Irby died of complications from the wound later that night.

Various witnesses unanimously agreed that there were louder shots as well as quieter shots, more like popping. (App. pp. 387-388, p. 568.) In addition to the nine-millimeter bullet recovered from Irby's body, .25 caliber casings fired from a single weapon were found at the scene. (App. p. 698, p. 908.) Additional fragments were consistent with nine-millimeter shells. A fragment found in Wilson's tire was consistent with a nine-millimeter. (App. pp. 703-704.) Pursuant to testimony and shell fragments found in tires of two vehicles, the gunfire appeared to be aimed or at least consistently in the area where the individuals were fighting.

Willingham saw a black object in Jacques' hand, possibly a gun, and saw Smith back away when Jacques approached. (App. pp. 531-533.) Willingham then heard gunshots. (App. p.

534.) Vernon saw Jacques fire from the vehicle, though Vernon stated that the weapon was not pointed at anyone. (App. pp. 803-804.) Wilson, watching from just inside Chance's, claimed that Applicant had approached the white Escort, retrieved a gun, and fired. (App. pp. 566-567.) Wilson believed that Applicant was the shooter, and Jacques was involved in the fight.[2] Another patron unconnected to the groups, Melvin DeWitt, saw a gun fired from the white car and stated there was another gun outside the car. (App. p. 389.) Henry reported seeing Jacques with a gun firing into the air then someone fired shots directly at the people fighting. (App. pp. 308-310.) By eliminating the pairs fighting, Smith in Jacques' control, Irby on the sidelines, and Stephon and Vernon inside Applicant's vehicle uninvolved in the fight, the State theorized that in addition to Jacques' nine-millimeter weapon, Applicant was the only possible remaining shooter. (Tr. p. 968, line 5 – p. 969, line 22.)

Applicant initially gave a statement stating that he had not seen who was firing as he sat in Lakisha's car. (App. pp. 865-866.) He later stated that, at Lakisha's request, he had entered the fray to get her cousin Demetric. (App. p. 866.) Applicant consistently denied possessing or firing a gun. (App. p. 867.) Jacques provided a handwritten statement on notebook paper when police took him into custody from his high school. (App. p. 738.) In the handwritten statement, Jacques claimed that he responded to a call from Applicant to pick him up because a conflict was brewing at Chance's. (App. p. 740.) Jacques claimed that he went in to retrieve Applicant, and an argument broke out. (App. p. 740.) Applicant went to Lakisha's car, and Jacques returned to the white car. Jacques claimed that he "was like y'all chill out" before fighting broke out, and gunshots followed. (App. p. 740.) Jacques wrote that he pulled away when he heard the shots. (App. p. 740.) Thereafter, Jacques gave two statements to police. In the first, Jacques recounted

[2] Wilson stated that Applicant wore a black tee shirt and blue jeans. Other witnesses testified that Jacques had been wearing a black tee shirt and Applicant white tee shirt. Applicant also told police he had been wearing a white tee shirt.

the phone call from Applicant and arriving at Chance's to pick him up due to a fight. (App. p. 768.) In this statement, Jacques claimed that a man from Winnsboro who he did not know "went over to a grey SUV and got something out of the back and put it in his pocket. Then he put it behind his back and walked back over by the group. I thought it might be a gun but I didn't see one." (App. p. 769.) Jacques denied having a gun and maintained that he drove off upon hearing "maybe three" gunshots, later seeing Applicant in the burgundy car as they passed on the way to Ridgeway. (App. p. 770.) In his second statement, Jacques admitted that he was not completely forthright in his earlier statement. Jacques explained that the first statement to law enforcement was true "except when you get to the part where I said 'I didn't shoot out of the car.'" (App. p. 881-882.) In this statement, Jacques stated that he had pulled around in the white car while Applicant pulled around in the burgundy car. (App. p. 883.) Arguing started, and Jacques saw "the big dude reach in his SUV, and he pulled something and put it in his pocket, but I didn't see what it was." (App. p. 883.) Fighting broke out. (App. p. 883.) Jacques then saw Smith approach Applicant, and Jacques pulled out a gun and told Smith not to try to hit Applicant. (App. p. 883.) Jacques reported that Smith backed away while the others were still fighting. (App. p. 883.) He then claimed to hear two gunshots before pulling away in the white car. Jacques admitted that he was firing as he pulled away. (App. pp. 883-884.) Jacques reflected that he "was shooting the gun in the air when [he] first started but the gun may have dropped down." (App. p. 884.) Jacques conceded he may have shot Irby, but stated "I didn't just look at him and shoot him... I promise I don't remember seeing him and aiming." (App. p. 885.)

Applicant, Demetric, Tramele and Marcus left Chance's in Lakisha's burgundy sedan and returned to Ridgeway. (App. pp. 451-452, pp. 481-482.) The group in Jacques' car also returned to Ridgeway. Along the way, Jacques threw something small from the floorboard out the window. (App. p. 817, p. 884.) Jacques also stopped at one point, got out of the car, ran into the

bushes, and returned to the car. (App. p. 804.) Upon receiving a call from Applicant, Jacques met with the Ridgeway group met at Demetric Davis' house, and Applicant later drove Jacques and his friends home. (App. pp. 804-805, pp. 815-816.)

Jacques guided police to a bridge where he disposed of the gun, but conditions at the site prevented divers from locating the weapon. (App. pp. 677-679, pp. 717-719, p. 883.) Jacques also described a location where he had thrown shells from the window of the car, but a search was unsuccessful. Law enforcement found no additional evidence linking the brothers to the scene during a search of their homes and the white Escort days later. (App. p. 857-859.)

ARGUMENT

The PCR court's findings regarding the inferred malice jury charge were without support. The charge given by the trial court properly conveyed the principles of inferred malice and did not shift the burden of proof. Counsel exercised reasonable judgment in not setting forth an objection under prevailing professional norms. Moreover, Applicant was not prejudiced by any error in this regard. As the PCR court's findings are unsupported, the decision should be reversed.

Applicant alleges that trial counsel was ineffective in failing to object to a jury charge on inferred malice as the court's charge (1) was a presumptive charge and (2) even if not burden shifting, failed to convey essential language required by South Carolina law as stated in State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983). The charge as given by the trial court in this matter in 2007 developed from a series of cases clarifying the proper content of the charge on inference of malice. The charge as a whole constitutes a proper statement of law, does not constitute impermissible burden shifting, and is almost verbatim the Circuit Court Benchbook charge. For these reasons, Counsel was not ineffective in failing to object.

In 1983, the South Carolina Supreme Court set forth the following suggested charge on the inference of malice:

> The law says that if one intentionally kills another with a deadly weapon, the inference of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of the malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983) (overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

In 1985, in State v. Peterson, 287 S.C. 244, 335 S.E.2d 800, the Supreme Court found erroneous a charge containing multiple uses of the terms "presumption," "rebuttable," and "implied and presumed," calling them "constitutionally infirm phrases." The Court guided the

trial bench to replace such terms with phrases such as "might infer" or "may be presumed" to denote a permissive inference.

In keeping with this guidance, in the case at bar, the trial court charged the jury on murder and the inference of malice as follows:

> Both defendants in this case have been charged with the offense of murder. The State has to prove beyond a reasonable doubt that the defendant charged killed another person with malice aforethought.
>
> Malice: that's hatred, ill will, hostility towards another person. It's the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under such circumstances as that the law would infer an evil intent.
>
> Now, malice aforethought does not require that that [sic] malice exist for any particular amount of time before the act was committed but malice has to exist in the mind of the defendant just before and at the time the act was committed. Therefore, there has to be that combination of the previously evil intent and the act.
>
> Now, malice aforethought can either be express or *inferred.* Express means that malice is shown when a person speaks words with express hatred or ill will for another or the person prepared beforehand to do the act which was later accomplished. Malice *can 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. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon *depends upon the facts and circumstances of each case.*
>
> I'll just give you some examples of deadly weapons. There's a lot of them, and I'm not – this is obviously not an exhaustive list. It could be a knife, a dagger, a slingshot, metal knuckles, a rifle, a shotgun, a pistol, a razor, gasoline. Any number of things that *you determine from the facts* would be a deadly weapon.

[Emphasis supplied.] (App. p. 1019, line 9 – p. 1020, line 14.) See also Circuit Court Bench Book, Suggested Jury Instructions, Murder, http://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=896.

As to Applicant's first assertion, that the charge is a burden-shifting presumptive charge, the trial court's charge clearly conveys to the jury a permissive inference instead of a

presumption, relying on phrases such as "can be inferred," "may arise," and "depends on the facts and circumstances of each case." The court also additionally instructed the jury that the burden of proof remained on the State. (See for example App. p. 1015, line 6 – p. 1016, line 11; p 106, lines 18-24; p. 1021, lines 2-5.) Counsel was not deficient in failing to object to the charge on the basis that the charge created a presumptive rather than permissive inference. As such, the court's charge does not amount to unconstitutional burden-shifting. The PCR court erred in finding otherwise and therefore erred in finding Counsel ineffective in failing to object on this basis.

Applicant further asserts that Counsel should have made an objection because common law mandates the charge from Elmore be given. Applicant particularly complained that the second sentence in the recommended charge from Elmore should be given so that the jury would have been instructed:

> If facts are proved beyond a reasonable doubt sufficient to raise an inference of the malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

It flows from the permissive inference that the jury is free to accept or reject the use of the weapon as evidence of malice. Furthermore, the jury was explicitly instructed that the burden was upon the State to prove every element of the offense charged beyond a reasonable doubt. In total, the instructions on the law of inferred malice made it clear that whether malice had been proved was an issue of fact for the jury to determine under all of the evidence. Therefore, even though the charge given does not contain the specific language suggested in Elmore, specifically the second sentence, the charge as a whole constitutes a proper charge on the law. See for example State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990) (jury instruction is sufficient if, when considered as a whole, it covers the law applicable to the case). Our courts have not

required specific verbiage be charged, and Elmore, while setting forth a suggested charge, did not mandate its verbiage be used.

As an additional basis for finding that Counsel was not deficient in failing to pose an objection based on Elmore, the State submits that the charge given was a customary one at the time. Counsel is an attorney with a wealth of experience in murder trials, including 30-40 death penalty cases. (App. p. 1151, line 18 – p. 1152, line 8.) Counsel quickly noted the correct standard of inferred malice as opposed to implied malice.[3] (App. p. 1151, lines 7-17.) Counsel believed that the charge given by the trial court was the standard charge at the time, and he did not feel that the charge shifted the burden or failed to convey the principles of inferred malice. (App. pp. 1152-1156.) The charge given was verbatim the charge suggested in the Circuit Court Benchbook, and further, as noted in Belcher v. State, 385 S.C. 597, 601, 685 S.E.2d 802, 804 (2009), a substantially similar charge given by that trial court has long been considered "textbook." While the fact that a charge is customary does not mean that it is a correct statement of law, it is relevant to the standard of practice at the time of trial. [4] See Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (counsel is not required to be clairvoyant). There is no existing authority to indicate the suggested charge is improper, and Counsel is not required to be clairvoyant should this Court decide to reach that conclusion today. Where Counsel performed within reasonable professional norms at the time of the trial, Applicant has failed to meet the first prong of the Strickland test.

Further, even if Counsel had made an objection and requested the specific language from Elmore, the result of trial would have been no different. The evidence in this case was such that

[3] The PCR court's order also employs the term "implied malice."

[4] The charge given was at the time of Applicant's trial, and still is, the standard charge in the Suggested Jury Instructions compiled by the South Carolina Supreme Court Staff Attorneys Office. The State is mindful that this fact alone is not an indication of the correctness of the charge and heeds the notation that the charges are "merely suggestions" not sanctioned by the Supreme Court. However, in assessing Counsel's reasonableness under professional norms, this may be considered.

the use of the weapon alone under the circumstances constituted overwhelming evidence of malice. Even analyzing the case purely under the theory that Jacques was the only shooter, under "hand of one/hand of all" the court's finding that Jacques' actions could have been found to have been perpetrated without malice – yet not satisfy the requirements of any other lesser offense (e.g. involuntary manslaughter, voluntary manslaughter) or defense (e.g. accident, self-defense, defense of others) produces an absurd result. Under this reasoning, a defendant could arrive at the scene of a brewing conflict, purposefully pull the trigger of a gun, fire randomly into a crowd at will, and merely by claiming ignorance of the possible fatal results of his actions evade punishment, essentially committing a legal murder simply by claiming he didn't mean to kill anyone when he did so. Our case law has made clear that unprovoked, unmitigated firing into a crowd constitutes murder – the killing of another with malice. State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007) (Defendant approaching altercation in which he had no prior involvement with weapon and intending to fire shots into the air not entitled to self-defense instruction); State v. Ross, 55 S.E. 977, 978 (1906) ("If you would take the pistol and deliberately fire it into that crowd, with no intention of killing any particular man, but recklessly shot into that crowd and killed someone, that would be murder.")

The second sentence of the suggested Elmore charge invites consideration of other evidence in determination of malice. In this case, other evidence of malice the jury would consider would include Applicant's summons of younger Jacques to the scene with knowledge that there was a weapon in the vehicle, the fight, the unjustified firing of the weapon, and the flight from the scene to the meeting point in Ridgeway. The firing of the weapon into the crowd multiple times, bullets striking vehicles and the victim, inevitably leads to the inference of disregard for human life. There is simply no way that the actions of Applicant and Jacques can be said to have been perpetrated without malice. Under the facts of this case, no other inference

can arise in the mind of any reasonable juror. Therefore, even if the charge were erroneous and counsel considered deficient in failing to object, the charge would not be considered prejudicial. See State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008) (to warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant).

The judge's instruction that malice could be inferred from the use of a deadly weapon was correct. Moreover, here we have overwhelming evidence of malice even in the attendant circumstances where weapons were deliberately brought to a scene and fired into an unarmed crowd. If the jury accepts that Applicant was in fact the second shooter, the evidence of malice becomes even more pronounced. Clearly, the evidence of malice in this instance is such that had the specific charge from Elmore referenced above been added to the trial court's charge, the result of trial would have been no different.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the PCR Court's Order. If this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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January 2, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
The Honorable James Barber, Circuit Court Judge
Case No. 2013-CP-40-2107
Appellate Case No. 2014-000967

ADAMS GIBSON, RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITONER.

PROOF OF SERVICE

I, Mary W. Leddon, certify that I have served the within **Petition for Writ of Certiorari** on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Jeremy A.Thompson, Esquire
Post Office Box 12891
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 2nd day of January, 20___.

MARY W. LEDDON
Assistant Attorney General
S.C. Bar No. 76192

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ALAN WILSON
ATTORNEY GENERAL

January 2, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Adams Gibson v. The State of South Carolina
Appellate Case No. 2014-000967

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Petitioner's Petition for Writ of Certiorari and Appendix.

Sincerely,

Mary Williams Leddon

Mary W. Leddon
Assistant Attorney General
S.C. Bar No. 76192

MWL/sbm
Enclosures

cc: Jeremy A. Thompson, Esquire
Trisha Allen, Victim's Services