STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Oconee County
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHANE ADAM BURDETTE,

PETITIONER,

Appellate Case No. 2017-001990

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the trial judge's ruling to permit the state to introduce multiple statements made by Petitioner during custodial interrogation where the Court's conclusion that a subsequent reading of Miranda warnings cured the taint of the initial officer's advisement that the rights "did not mean anything" contravenes federal and state law?

II. Did the Court of Appeals err in affirming the trial judge's ruling concerning the admissibility of Petitioner's statements to law enforcement by parsing the circumstances in order to consider them individually, instead of in totality, in contravention of federal and state law, and proper consideration of the totality of the circumstances requires suppression?

III. Did the Court of Appeals err in affirming the trial judge's decision to allow the introduction of statements given by Petitioner during custodial interrogation where the police requested Petitioner sign his statement after he requested counsel in violation of the Fifth and Fourteenth Amendments to the Constitution?

IV. Did the Court of Appeals err in concluding Petitioner "suffered no prejudice" from the undisputed erroneous jury charge regarding inference of malice from the use of a deadly weapon based upon the charge as a whole, the erroneous language being charged twice, the evidence supporting the defense of accident, and the heightened risk of a compromise verdict based upon the erroneous charge?

RESPONDENT'S COUNTER QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly found the trial judge acted within his discretion when he found Petitioner made a knowing and voluntary waiver of his Miranda rights under the totality of the circumstances and admitted Petitioner's statements. (Petitioner's Questions I and II.)

II. Whether the Court of Appeals erred in finding the trial judge acted within his discretion to refuse to qualify the defense expert in ballistics where the witness had no formal training in ballistics, was not employed in a profession studying ballistics, and whose only experience in ballistics evidence was personal experience removing lead debris from a shooting range. (Petitioner's Question III)

III. Whether the Court of Appeals erred in finding Petitioner suffered no prejudice from the trial court's erroneous instruction that malice may be inferred from the use of a deadly weapon where the evidence may have reduced or mitigated the

charge of murder in light of the jury's rejection of the verdict of murder in favor of voluntary manslaughter. Petitioner's Question IV)

RESPONDENT'S STATEMENT OF THE CASE

An Oconee County grand jury indicted Petitioner, Shane Adam Burdette, in October 2013, for murder and possession of a weapon during a violent crime. (R. pp. 492-493.) On February 23, 2015, Petitioner's case was called to trial before the Honorable J. Cordell Maddox, Jr. (R. p. 1) W. Wilson Burr, Esquire, represented Petitioner during the trial. (R. p. 1). Assistant Solicitor David Wagner, Jr., represented the State. (R. p. 1.) The jury returned a verdict of guilty of the lesser included charge of voluntary manslaughter and guilty of the charge of possession of a weapon during a violent crime. (R. p. 473.) Judge Maddox sentenced Petitioner to twenty five years' imprisonment suspended upon the service of fifteen years' imprisonment and five years' probation. (R. p. 477, lines 11-19.) Judge Maddox also sentenced Petitioner to a consecutive term of five years' imprisonment for the possession of a weapon charge. (R. p. 477, lines 20-24.)

Petitioner filed a timely notice of appeal. Following briefing and oral argument, the Court of Appeals affirmed Petitioner's convictions and sentence in Unpublished Opinion No. 2017-UP-237 (Ct. App. June 7, 2017). (App. pp. 1-5). A Petition for Rehearing followed and was denied on August 28, 2017 (App. pp. 6-27).

Petitioner next timely sought a Petition for Writ of Certiorari, to which Respondent makes the instant Return.

WHY CERTIORARI SHOULD BE DENIED

Respondent maintains certiorari should be denied because the Court of Appeals properly affirmed the trial court's decisions to admit Petitioner's voluntary statements to law enforcement

following subsequent readings of Miranda rights and to refuse to qualify a defense expert in ballistics. The Court of Appeals also correctly found Petitioner suffered no prejudice from the erroneous jury instruction when the jury rejected the State's argument of malice and Petitioner was not convicted of murder.

Petitioner argues the decision by the Court of Appeals conflicts with prior decision of the Supreme Court on substantial constitutional claims, but Respondent maintains no such conflict exists. Pursuant to Rule 242(b), SCACR, there are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this case. Indeed, the decision was a straightforward exercise of reviewing and affirming the trial court's application of established precedent, logic, and practical considerations of the particular facts and circumstances of Petitioner's case. Therefore, Respondent respectfully requests the Petition for a Writ of Certiorari be denied and dismissed.

RESPONDENT'S STATEMENT OF FACTS

The victim, Evan Tyner, was killed on July 9, 2013, near Mount Pleasant Baptist Church in the Westminster area of Oconee County. (R. p. 188, lines 4-10.) The Petitioner's father lived in the nearby parsonage, and Petitioner would stay there from time to time. (R. p. 185, lines 1-6.) Petitioner's fiancé (Tiffany), with whom he had two children, was the sister of the victim. (R. p. 77, lines 5-14.)

The hostility between the victim and Petitioner escalated the day before the killing. The two men began shoving each other, and Evan and Bubba made Petitioner leave the house. (R. p. 80, lines 4-11.) Petitioner returned a few hours later with his friend Ken, and the men made him leave again. (R. p. 81, lines 9-11.) Petitioner screamed, "it isn't over," and before he left pointed

in the victim's direction and said, "I got somethin' for his ass." (R. p. 81, lines 12-14; p. 168, lines 1-9.)

Evan and his friends decided they wanted to get some cigarettes, so they left Tiffany's house in her green SUV to go to Walmart. (R. p. 81, line 16 – p. 82, line 17.) As the men drove off, they began to have car trouble. (R. p. 84, lines 7-9.) They pulled into a driveway and borrowed someone's phone to call Tiffany, who said she would find someone to pick them up. (R. p. 84, lines 7-24.) The men fell asleep in the car waiting, and when they awoke they noticed Petitioner driving by -- waiving, laughing and making rude gestures. (R. p. 84, line 24 – p. 85, line 3.) This infuriated Evan, who was determined to drive the car back to the parsonage to confront Petitioner, despite the noises coming from the car's engine. (R. p. 85, lines 7-13.)

When the men arrived at the parsonage, Petitioner's car was not there, so they waited for him to return. (R. p. 86, lines 17-20.) After about five minutes, Petitioner drove up and parked his car behind the men. (R. p. 86, line 18 – p. 87, line 5.) Petitioner walked over to Evan's side of the car, and they began arguing. (R. p. 87, lines 14-17.) Petitioner told Evan he "had something for [them]." (R. p. 86, line 19.) Petitioner walked into the house and was gone for about ten minutes. (R. p. 90, lines 1-16.) Petitioner returned from the house via the carport with a shotgun. (R. p. 91, lines 1-3.) Petitioner yelled, "You're not taking my kids," and fired a round. (R. p. 91, lines 5-9.) Bubba got out of the car and ran into the woods but noticed Petitioner change his position from the left side of the car to the right side of the car to fire again. (R. p. 92, lines 1-7.) When Bubba looked up, he saw Evan lying on the ground. (R. p. 93, lines 4-9.) Bubba then saw Petitioner toss the shotgun onto the ground. (R. p. 93, lines 16-20.) Bubba heard Petitioner telling his parents he was "goin to jail for layin the law down." (R. p. 94, lines 15-23.)

Evan died from a single shotgun pellet to the back of the right side of his neck. (R. p. 160, lines 6-9.)

ARGUMENT

I. The Court of Appeals correctly found the trial judge acted within his discretion when he found Petitioner made a knowing and voluntary waiver of his Miranda rights under the totality of the circumstances and admitted Petitioner's statements. (Petitioner's Questions I and II.)

The trial judge's proper admission of Petitioner's statements to law enforcement was supported by substantial evidence at trial Petitioner made a knowing and voluntary waiver of his Miranda rights when he spoke to law enforcement officers. Under the totality of the circumstances -- in which Petitioner was Mirandized on numerous occasion, curing any taint of an improper Miranda warning, Petitioner was offered food and water and allowed to use the bathroom, Petitioner was agitated but coherent and able to speak clearly, law enforcement made no offers or threats to Petitioner to obtain his statements, and Petitioner re-initiated questioning following his mention of counsel -- Petitioner freely gave his statements in an effort to minimize his culpability in the killing of his friend.

How the Issue Was Raised at Trial: *Jackson v. Denno*[1] Hearing

John William Towery, of the Oconee County Sheriff's Department, responded to the dispatch call indicating shots were fired near the Mount Pleasant Church. (R. p. 2, line 10 – p. 3, line 7.) Towery found Petitioner at the scene, and advised him of his Miranda rights. (R. p. 3, lines 4-21.) Towery read the rights from a form provided by the department. (R. p. 3, line 16 – p. 4, line 11.) Towery acknowledged he told Petitioner before he read him his rights, "[t]his does not mean anything, it's just something the law we gotta do." (R. p. 9, lines 3-14.) Petitioner signed the form acknowledging the receipt of his Miranda rights. (R. p. 4, lines 9-12.) Towery

[1] *Jackson v. Denno*, 378 U.S. 368 (1964).

placed Petitioner in his patrol car for Petitioner's safety, while he roped off the area and interviewed other people at the crime scene. (R. p. 4, lines 12-17.)

Towery opined Petitioner may have been under the influence of some substance that morning, based on his behavior. (R. p. 6, lines 1-10.) Towery said Petitioner was shouting, he spoke hurriedly, and his words were slurred. (R. p. 6, lines 10-25.) Towery also testified, however, Petitioner appeared to understand what he was saying, was able to follow instructions, was able to read his Miranda waiver form, and was able to respond appropriately when directed by Towery. (R. p. 7, lines 1-20.)

Detective Amanda Tinsley, of the Oconee County Sheriff's department, arrived on the scene around 8:30 am. (R. p. 11, lines 1-20.) Petitioner was still seated in the back seat of Towery's car. (R. p. 11, lines 21-22.) Tinsley moved Petitioner to the front passenger seat of a Crown Victoria driven to the scene by the Victims' Advocate. (R. p. 12, lines 5-11.) Tinsley also Mirandized Petitioner, wanting to "make sure he understands his rights." (R. p. 12, lines 21-25.) Petitioner initialed the waiver form and agreed to talk to the detective. (R. p. 13, line 21 – p. 14, line 4.) Tinsley took notes of Petitioner's statement. (R. p. 14, lines 18-22.)

According to Tinsley, Petitioner gave an extremely detailed account of the preceding thirty-six hours. (R. p. 16, line 13 – p. 17, line 14.) Tinsley took four pages of notes from Petitioner's account. (R. p. 17, lines 11-12.) In Tinsley's opinion, Petitioner was agitated and upset at the events, but he was not intoxicated. (R. p. 17, lines 15-22.) Petitioner was responsive to questioning, spoke in narrative form, and gave details in chronological order. (R. p. 17, line 23 – p. 18, line 6.) Tinsley asked Petitioner to provide a written statement, and he agreed. (R. p. 18, lines 19-24.) Petitioner provided a two page statement in which he indicated he shot the victim while throwing the shotgun at him. (R. p. 20, line 3 – p. 22, line 5.) While giving his first

written statement, Petitioner did not ask for an attorney or otherwise indicate he wanted the interview to stop. (R. p. 22, lines 10-25.) Petitioner completed the written statement at approximately 1:47 pm, after he was transported to the sheriff's department. (R. p. 22, line 22 – p. 23, line 2.)

The investigators continued interviewing other witnesses about the crime. (R. p. 23, lines 16-21.) Sometime after lunch, when investigators asked Petitioner if he would agree to a polygraph test, Petitioner declined and stated he wished to speak to an attorney before he would take the test. (R. p. 24, lines 3-15.) Officers concluded the interview, and Petitioner remained in an interview room while they continued their investigation. (R. p. 24, lines 21-23.) At some point, Petitioner began banging on the wall or table in the interview room and turning off the lights. (R. p. 25, lines 4-9.) When the officers asked Petitioner what he needed, he told Captain Greg Reed he wanted to talk to them and add information to his first statement. (R. p. 25, lines 7-9.)

Tinsley re-read Petitioner his *Miranda* rights at 5:45 pm. Petitioner initialed and signed the waiver again. (R. p. 26, lines 7-9.) Tinsley provided Petitioner with a form to write his requested addition to his first statement. (R. p. 26, lines 10-25.) Tinsley also took notes of their conversation. (R. p. 27, lines 11-18.) The statement read:

> As I pulled up my father's home I saw that my wife's Blazer was there which was a problem because Evan had called Tiff sayin' it couldn't be drove and I'd just seen it up the road waitin' ten minutes before. As I walked up, I see the door to house is open after I locked it. I went in and walked to mom's room where the door was open and I also had been and also had been locked. As I came back through the house, my daddy's shotgun was in kitchen and not in bedroom. I was worried that they were stealing it or wantin' to hurt me and went outside wanting to know who did it and why sayin' I'd call the law and Bubba jumped outta car and ran into woods. Josh and Evan got out and came to front t -- front of Blazer. Josh was hollerin' and I was tellin' him he was supposed to be my friend and, etc., and Evan spoke. I turned and saw him slippin' up on me and stomped yellin', Don't sneak up on me. He ran behind car and I went around front and as he was

> runnin' down the road I held shotgun up above his head and to the left so if he looked back it scare him 'cause it wasn't loaded but then when I pulled trigger to pretend to fire and make myself more safe in mind, the safety wen -- was off and and it discharged. I was so scared, I throwed it away and ran to Evan.

(R. p. 28, line 11 – p. 29, line 7.) Petitioner finished and signed this statement at 7:54 pm. (R. p. 29, lines 8-11.) Tinsley also read her notes to Petitioner, who signed them, indicating the notes reflected what he intended to say. (R. p. 31, lines 2-17.)

After the second statement, Tinsley discussed with Petitioner some inconsistencies in the physical evidence and his story. (R. p. 32, lines 1-11.) Tinsley told Petitioner they knew two shots were fired from the shotgun, not one as he claimed. (R. p. 32, lines 9-13.) Petitioner told Tinsley he was tired, and he wanted to sleep on it; he felt he would remember more the next day. (R. p. 32, line 15 – p. 33, line 7.)

The following day, Tinsley approached Petitioner again to discuss his version of events. (R. p. 33, lines 3 – 25.) Tinsley Mirandized Petitioner for a third time, and again Petitioner signed the waiver of his rights form. (R. p. 34, lines 1-4.) In his third statement, Petitioner said he fired a shot into the ground. (R. p. 36, lines 5-7.) One of the three men ran into the woods, another went toward a nearby church, and Evan, the victim, "took off down the road." (R. p. 36, lines 7-19.) Petitioner claimed he shot into the air so the men would keep running, but he accidentally hit Evan. (R. p. 36, lines 21-25.) Petitioner then offered a remorse laden confession discussing how much he loved his brother-in-law. (R. p. 36, line 25 – p. 38, line 2.) Petitioner signed the statement, and Tinsley witnessed it. Petitioner at no time asked for an attorney or indicated he wanted to stop giving the statement. (R. p. 37, lines 9-18.)

Tinsley testified Petitioner told her another version of the story in which he confronted the men about using meth, and in which he admitted he also "snorted a line of meth" himself. (R.

p. 45, lines 7-15.) Tinsley wrote this in her notes and had Petitioner sign them to indicate she wrote his statement correctly. (R. p. 45, lines 7-15.)

Justin Ward, also of the Oconee Sheriff's Department, testified he arrived on scene shortly before Tinsely at approximately 8:15 am. (R. p. 46, line 15 – p. 47, line 7.) Ward as present when Tinsley Mirandized Petitioner, and noticed he seemed excited and "out of sorts." (R. p. 47, line 11 – p. 48, line 2.) Ward could not determine if Petitioner was intoxicated because Ward was not familiar with Petitioner's ordinary demeanor. (R. p. 48, lines 1-11.) Ward testified, however, Petitioner was able to provide numerous details about the previous night, was coherent, and was able to write his statement without assistance. (R. p. 48, lines 9-18.) Ward also testified that when the captain approached Petitioner about the possibility of a polygraph, Petitioner stated he would want to speak to a lawyer before taking the polygraph. (R. p. 49, line 24 – p. 50, line 3.) At that point, Petitioner had finished writing the statement he began at the scene, but he had not signed it. (R. p. 50, lines 3-7.) Although Ward asked Petitioner to sign his statement from the morning, he did not continue the interview with Petitioner and left the room. (R. p. 50, lines 4-10.)

Under the Totality of the Circumstances, Petitioner Made a Knowing and Voluntary Waiver of His Miranda Rights.

The Supreme Court has long recognized that one may waive one's constitutional rights upon proper warnings. *Miranda v. Arizona*, 384 U.S. 436, 478-479 (1966). However, establishing whether a defendant received the *Miranda* warnings is only one part of the process to determine the correctness of the waiver – the inquiry is divided into two separate parts: the waiver must be voluntary and be made with full awareness of the nature of the rights being waived. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

"In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." *State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct.App. 2010). Factors to consider include "background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep." *Id,* 390 S.C. at 513-514, 702 S.E.2d at 401.

Subsequent Interviews Cured by Proper Advisement of Rights

Petitioner claims Towery's first advisement of Miranda rights tainted all future Miranda warnings pursuant to *Missouri v. Seibert*, 542 U.S. 600 (2004) and *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010). However, the trial court properly found the subsequent confessions were not tainted by Officer Towery's statement the *Miranda* rights did not mean anything. Petitioner was properly Mirandized three more times, each time before Tinsley interviewed Petitioner. *Siebert* and *Navy* are completely inapplicable to the case at hand. In those cases, the courts' preclusion of a subsequent waiver of Miranda rights following an unwarned, inculpatory statement was meant to prohibit the type of police misconduct in which officers force a confession, then administer the warnings and immediately re-initiate questioning now that the cat is out of the bag. The courts admonished police for what seemed to be a deliberate attempt to evade the *Miranda* requirements by use of a two part interrogation.

Subsequent statements are to be evaluated under their own totality of the circumstances analyses. *See State v. Register*, 323 S.C. 471, 478, 476 S.E.2d 153, 157-58 (1996) (finding defendant's initial oral confession was improperly obtained, but holding because defendant was freshly advised of his Miranda rights, and he knowingly and voluntarily waived them before signing the confession, the confession was admissible.

Here, Deputy Towery's hurried, off the cuff comments to Petitioner in the back of the patrol car were not an attempt to elicit an inculpatory response from Petitioner. Towery testified he was one of two officers on scene initially, and he was busy securing the scene, roping it off, and interviewing witnesses. Petitioner shouted out some declarations that the shooting was accidental, but Towery did not attempt to interrogate Petitioner while he was in the patrol car -- he was too busy. The deputy also testified he read *Miranda* rights to everyone he talked to at the scene. Towery's comments easily could have been interpreted as the reading of the rights to Petitioner did not mean Petitioner would be charged with anything. The comments could also mean Towery was warning Petitioner of his right to remain silent, but Towery also knew he would not have time to question Petitioner. Thus, the reading did not mean anything because he would conduct no interrogation. Admittedly, Towery's comments could be construed as improper, and the trial judge properly excluded Petitioner's initial outburst out of an abundance of caution, but the comments certainly did not taint the voluntariness of Petitioner's future statements.

Intoxication

Petitioner cites several reasons why his waiver of rights was not valid under the circumstances, but he offers little support from the record to substantiate those claims. Petitioner

claims his intoxication precluded his knowing waiver of rights, but the record does not reflect Petitioner was intoxicated at all, much less intoxicated to the point of substantial impairment.

A defendant must be impaired to a substantial degree to overcome his ability to knowingly and intelligently waive his privilege against self-incrimination. *See also U.S. v. Phillips*, 506 F.3d 685 (8th Cir. 2007) (waiver was voluntary despite defendant's claimed intoxication from four ecstasy pills and a cup of brandy); *U.S. v. Shan Wei Yu*, 484 F.3d 979 (8th Cir. 2007) (waiver was voluntary despite defendant's argument that he was on prescription medicine and should have received rights in Chinese). The mere fact of drug or alcohol use does not preclude a finding of a knowing and voluntary waiver of rights. *United States v. Burson*, 531 F.3d 1254, 1258 (10th Cir. 2008).

Length of Interrogation

Petitioner also cites the length of interrogation in support of his argument the waiver of his rights was not knowing and voluntary. Petitioner confuses the length of interrogation with the length of detention, however. Petitioner was placed in the back of the patrol car by Deputy Towery for his own safety while Towery secured the scene. (R. p. 4, lines 4-14.) Tinsley arrived on scene but did not Mirandize Petitioner until 9:46 am. (R. p. 12, lines 1-13.) Petitioner gave a long narrative about the events of the night before the shooting while Tinsley took notes. (R. p. 17, lines 9-14.) Petitioner then agreed to write a statement for the investigators, and they left him to write it in the back of the patrol car. (R. p. 22, lines 10-25.) During the time Petitioner was left alone to write his statement, the officers were interviewing other witnesses and collecting evidence. (R. p. 23, lines 16-21.)

Throughout the day, Petitioner was in an interview room at the station, but an investigator provided lunch for him and the other witnesses. (R. p. 24, lines 3-7.) Shortly after Petitioner

invoked his right to counsel with respect to the polygraph, the officers halted the questioning about the incident. (R. p. 24, lines 8-18.) Petitioner was left alone until he re-initiated conversation with Tinsley by turning off the lights and banging on the table or walls. (R. p. 25, lines 4-9.) Petitioner told the officers "he want[ed] to talk to [them], he ha[d] some information he want[ed] to add to his first statement." (R. p. 25, lines 7-9.) Accordingly, Tinsley Mirandized Petitioner again at 5:45 pm. (R. p. 25, lines 21-23.) Petitioner finished his second written statement at 7:54 pm. (R. p. 29, lines 8-11.) Following the second statement, Petitioner stated he was tired and wanted to continue the conversation in the morning. Tinsley agreed they would end the interview for the night and resume the next day. (R. p. 32, lines 15-20.)

Early in the investigation, Petitioner was clearly identified as the perpetrator of the shooting. Although Petitioner was detained throughout the day, he was not subjected to a continuous interrogation. He was made as comfortable as possible, under the circumstances, by the officers when they offered him food, beverage, and trips to the bathroom. When Petitioner stated he was tired, the officers respected his wishes and ceased the interview. Although Petitioner was not free to leave the officers' custody, their interrogation was neither inordinately lengthy nor overbearing of Petitioner's will.

The trial judge properly considered the totality of the circumstances in determining whether the State met its burden of proving Petitioner's confessions were knowingly and voluntarily given. The following evidence in the record supports the trial judge's finding:

- Detective Tinsley followed proper protocol for advising Petitioner of his Miranda rights each time she initiated questioning of Petitioner.
- Tinsley advised Petitioner of his Miranda rights on three occasions, including Petitioner's re-initiation of questioning.

- Petitioner was provided lunch and allowed to use the bathroom when needed.
- Out of an abundance of caution, officers ceased questioning Petitioner about the shooting when he stated he would want to speak to an attorney before he agreed to a polygraph.
- Officers made an administrative request Petitioner sign the statement after he conditionally referred to counsel.
- Petitioner re-initiated the discussion with the officers without any prompting.
- Petitioner gave long, narrative statements to the officers full of details which were self-serving to Petitioner.
- Officers made no promises to Petitioner nor made any threats to obtain his statements.

The record contains more than enough evidence to affirm the trial judge's ruling Petitioner made a knowing and voluntary waiver of his Miranda rights when he gave law enforcement multiple variations of the story in which he killed the victim. Petitioner clearly understood his rights when he declined the polygraph without first speaking to counsel. Petitioner had time alone to think on his evolving story and change some of the detail in an effort to lessen his culpability. Therefore, the Court of Appeals correctly affirmed the trial judge's decision to admit Petitioner's statements to police was not an abuse of discretion.

II. The trial judge properly refused to qualify defense expert in ballistics where the witness had no formal training in ballistics, was not employed in a profession studying ballistics, and whose only experience in ballistics evidence was personal experience removing lead debris from a shooting range. (Petitioner's Question III)

The trial court did not abuse its discretion in limiting the qualification of Petitioner's expert testimony to that of gunsmithing and the repair of weapons and in refusing to qualify him

as an expert in the area of ballistics. Petitioner's expert had no professional training or experience in studying the motion of projectiles, or, ballistics. His proffered testimony indicated his experience was limited to the mass removal of projectile fragments as part of a lead recycling program. Moreover, his means of comparison—a visual inspection of the lead waste during its removal—was not a reliable form of testing ricochet patterns. Thus, the court committed no error by limiting his testimony.

How the Issue Was Raised at Trial

Both the State and the defense attempted to address the issues of whether the shotgun fired accidentally and whether the pellet that killed the victim ricocheted off the ground before striking him in the back of the neck. The State's firearms expert, a nine year employee of SLED as a forensics firearm examiner, testified about the functionality of the shotgun, and identified the ammunition used in the shooting. (R. pp. 233 - 237.) The State's expert also testified about the nature of lead as a soft metal, stating, "When they get shot, they could have any kind of deformation from hitting anything, including each other, coming out of the shotgun." (R. p. 238, lines 6-9.)

The defense called Richard Belmore, Jr., to the stand. (R. p. 380, lines 10-12.) Belmore was the owner of Salem Gun & Archery Club and Richard's Firearms, and he worked full time for Allstate Insurance Company. (R. p. 380, lines 17-19.) The club promotes sport shooting and offers training for the use of firearms. Belmore was an instructor, as well. (R. p. 380, line 25 – p. 381, line 8.) Belmore was also a gunsmith repairman, with training via a correspondence course, and had a license to receive and resell firearms. (R. p. 381, lines 9-18.) Belmore had a license for pistol and home defense and a concealed weapon permit from SLED, and he was a member of the National Shooting Sports Foundation. (R. p. 381, lines 18-21; p. 382, lines 3-7.) The defense

attempted to qualify Belmore as an expert in "gun, gunsmith, and ballistics." (R. p. 382, lines 8-10.) The State objected to his qualification in ballistics. (R. p. 382, lines 11-25.)

The trial judge considered Belmore's experience in lead removal at the shooting range, but declined to qualify him as an expert in ballistics, stating:

> THE COURT: Okay. And I understand your objection. I still don't think that's enough. I mean, just -- I think the way the law is going in South Carolina regarding experts, that he hadn't met the requirements. But he can testify about the gunsmith and all that business. I assume the question is going to be about the slamming the gun shut, but I understand. I mean, I understand your objection. I just don't think that's enough.
> MR. BURR: Your Honor, since he did just answer under voir dire that he has inspected the pellet involved in this case, will the defense be allowed to ask him if that is a picture of the pellet that he saw?
> THE COURT: You can ask him if that's a picture of the pellet he saw, but I don't think you can then go ask him if that pellet was a ricochet.
> MR. BURR: Very good. Thank you, your Honor.

(R. p. 386, line 13 – p. 387, line 4.) Belmore went on to testify about the age of the shotgun, the wear to the gun's safety, and the defect in the trigger mechanism. (R. pp. 388 – 391.) Belmore also testified he believed the weapon to be unsafe. (R. p. 391, line 24 – p. 392, line 1.)

Petitioner's Expert Was Not Qualified in Ballistics

The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion. *Gooding v. St. Francis Xavier Hosp.,* 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997); *McGee v. Bruce Hospital System,* 321 S.C. 340, 468 S.E.2d 633 (1996); *Creed v. City of Columbia*, 310 S.C. 342, 426 S.E.2d 785 (1993). An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support. *Lee v. Suess*, 318 S.C. 283, 457 S.E.2d 344 (1995).

Expert testimony receives additional scrutiny relative to other evidentiary decisions. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability, and further find that the proposed evidence will

assist the trier of fact. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009). First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. *See State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim).

Next, the expert does not have to specialize in the particular branch of the field in question, but the proffered expert must have acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. *See Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements).

Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate. *See White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (observing that the "familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has

vetted the matters of qualifications and reliability and admitted the evidence"); *Watson v. Ford Motor Co.*, 389 S.C. 434, 446-47, 699 S.E.2d 169, 175 (2010).

The evidence supports the trial court's refusal to qualify Belmore as an expert in ballistics. Belmore had no knowledge, skill, experience, training or education specifically related to ballistics, or the motion of projectiles. Rather, it appears he merely studied the pellet before trial, which he indicated in his proffered testimony to the court. Petitioner intended to ask Belmore to compare the abrasions on the pellet retrieved from the victim's body to that of the lead retrieved from the rear of the shooting range. Professionally, Belmore was an owner of a shooting range, a firearms instructor at the range, a gunsmith, and a retailer of firearms. Though Belmore need not necessarily have been employed as a ballistics analyst with SLED to be qualified as an expert, he did need to have some experience studying the motion of projectiles in order to offer his opinion whether the pellet appeared to have ricocheted off the ground before striking the victim.

Belmore's only experience relevant to his proffered testimony concerning the ricocheted pellet was his participation in the lead removal from the gun club. Belmore had no training, held no certifications, and had no professional experience studying the markings of projectiles. Belmore had no experience examining projectiles in any scientific capacity or in any reliable format. Belmore did not offer any experience in conducting or witnessing tests of ricocheted bullets, only that he removed the lead en masse to comply with DHEC's disposal program. Thus, Belmore offered no explanation of how he would know which particular bullets had struck the ground before striking the berm so that he could make the comparison of those bullets to the pellet that struck the victim. His means of comparison—a visual inspection of the lead waste during its removal—was not a reliable form of testing ricochet patterns. Because the inspection

was not in a controlled setting, he could not know whether the bullets struck the ground or each other as they were ejected from the firearm before ricocheting off into the berm. Moreover, Belmore had no experience in examining projectiles removed from the human body after striking bone. Belmore lacked any experience in knowing whether the pellet's striking of the victim's spine could also cause the deformity on the pellet.

In the role of gatekeeper, the trial judge permitted Belmore to testify about the wear and functionality of the gun, which were properly within his purview. The judge did not abuse his discretion in finding the defense expert was not qualified as an expert because Belmore lacked experience and his basis for comparison lacked reliability. Therefore, the Court of Appeals correctly affirmed the court's decision to prohibit Belmore from offering an opinion on whether the pellet ricocheted off the ground before striking the victim.

III. The trial judge erred in instructing the jury malice may be inferred from the use of a deadly weapon where the evidence may have reduced or mitigated the charge of murder, but the error was harmless beyond a reasonable doubt in light of the jury's rejection of the verdict of murder in favor of voluntary manslaughter.

Petitioner correctly asserts the trial judge should not have given the implied malice instruction to the jury, but he cannot show how the judge's error contributed to the jury's verdict of voluntary manslaughter. When considering whether an error with respect to a jury instruction was harmless, the court must "determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435, reh'g denied (Apr. 2, 2014), cert. denied, 135 S. Ct. 196, 190 L. Ed. 2d 152 (U.S.S.C. 2014) (quoting *State v. Kerr*, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998). Voluntary manslaughter involves an intentional act on the part of the perpetrator but lacks the element of malice. *State v. Blassingame*, 271 S.C. 44, 46, 244 S.E.2d 528, 529 (1978). Because the

instruction pertained to the finding of malice, and the jury rejected the charge of murder, the instruction did not contribute to the verdict and the judge's error was harmless beyond a reasonable doubt.

How the Issue Was Raised at Trial

After the trial judge's questioning of Petitioner concerning the waiver of his right to testify, the court offered copies of his jury charge to counsel, then took a five minute recess to allow counsel to review the charge. The judge and defense counsel engaged in the following discussion:

> THE COURT: Any changes, objections from the State?
> MR. WAGNER: No, sir.
> THE COURT: From the defense?
> MR. BURR: Yes, your Honor. On page 19 of your instructions --
> THE COURT: Hold on a second. Okay.
> MR. BURR: First full paragraph, second paragraph, "Malice may be inferred from conduct showing a total disregard for human life."
> THE COURT: Yep.
> MR. BURR: "Inferred malice may also arise when the deed is done with a deadly weapon." I would object to that portion of that instruction, your Honor.
> THE COURT: Why?
> MR. BURR: I don't think we can infer there was a total -- based on the evidence presented, there's no -- we can't have any inference of total disregard for human life.
> THE COURT: Say that again.
> MR. BURR: There's been evidence presented on accident which would be in mitigation. So this inference leads to an improper conclusion.
> THE COURT: Okay. Let me look at accident. Because, basically, we're giving them the option, and I took some language out of the accident portion – hold on a second. Okay. I understand why you'd want that. I mean, it goes to the weight and goes to one of the
> things they have got to decide is whether or not there was a total disregard, but --
> MR. BURR: Your Honor, if I may.
> THE COURT: Yeah.
> MR. BURR: The footnote that goes with that --
> THE COURT: Right
> MR. BURR: -- kind of excludes that.
> THE COURT: Well, it says, "Where evidence is presented that will reduce, mitigate, excuse or justify." Actually that should not have been in there. That was a note to me. "But with intent to kill, the jury shall not be charged." Well, there's

> been evidence potentially that could reduce or mitigate. There's also been evidence that they did not. And I'll be very clear that the State has to prove malice by proof beyond a reasonable doubt. I understand your objection. You actually got a private note to me that was printed, so.
> MR. BURR: Thank you.

(R. p. 408, line 1 – p. 409, line 22.) Thus, Petitioner's objection to the jury instruction was properly preserved for review. The judge later instructed the jury:

> Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's mind could be express and would be express malice. Malice may 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.

(R. p. 454, lines 1 - 10.) The judge read his instruction again on the charges of murder, voluntary manslaughter, and involuntary manslaughter after he received a note from the jury requesting clarification of the charges. (R. p. 467, line 8 – p. 472, line 3.)

The Instruction Was Harmless Beyond a Reasonable Doubt

The Respondent would agree with Petitioner the trial judge erred in giving the inferred malice instruction because the record contained evidence mitigating or reducing the charge of murder. *See State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009)(holding the "use of a deadly weapon" implied malice instruction has no place in a murder prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing). However, in *Chapman v. California*, the Supreme Court held error of even constitutional magnitude may be deemed harmless if, "considering the entire record on appeal, the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict." 386 U.S. 18(1967); see also *Taylor v. State*, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993). Respondent strongly disagrees with Petitioners assertion the trial judge's error was not harmless.

In the case at bar, the trial judge's instruction to the jury that it could infer malice from the use of a deadly weapon was entirely harmless and had no impact on the ultimate outcome of Petitioner's case based on the verdict returned by the jury. Despite the fact the jury was instructed it could infer malice from the use of a deadly weapon, its verdict reflected it was not misled to believe it could not find the existence of justification, excuse, or mitigation in a situation where a deadly weapon was used, which was the precise type of jury misunderstanding the Supreme Court's rule in *Belcher* sought to avoid. *See Belcher*, 385 S.C. at 610, 685 S.E.2d at 808-809 ("[I]nferring malice form the use of a deadly weapon is indeed only a 'half-truth.' The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts."). Critically, even though the evidence presented showed Evan's death resulted from the use of a deadly weapon, the jury demonstrated it found Petitioner's actions did not involve malice and were mitigated under the circumstances by convicting him of the lesser-included offenses of voluntary manslaughter. *Cf. Nation v. State*, 252 Ga. App. 620, 623-624, 556 S.E.2d 196, 200-201 (Ga. Ct. App. 2001) (finding any error that resulted from the giving of an erroneous jury charge was harmless and did not contribute to the verdict where the jury's verdict demonstrated it was not impacted by the erroneous charge). Thus, the inference of malice jury instruction did not confuse the jury in Petitioner's case or mislead them to believe the use of a deadly weapon alone mandated a finding of malice. *See State v. Chambers,* 194 S.C. 197, 203, 9 S.E.2d 549, 552 (1940) (finding any error resulting from the trial judge's jury instructions on malice was harmless where the jury convicted the defendants of lesser-included offenses of the offense of ABWIK and, thus, did not find the

defendants acted with malice). As a result, any error that could have resulted from the giving of that instruction was entirely harmless and did not impact the verdict in Petitioner's case.

Petitioner cites *Belcher,* and *Rose v. Clark,* 478 U.S. 570 (1986) for the proposition the instruction cannot be considered harmless. Petitioner is incorrect. In both *Belcher*, and *Rose*, and in *State v. Miller*, 397 S.C. 630, 725 S.E.2d 724 (2012), the courts said the instruction was subject to the harmless error analysis. In those cases, however, the defendant was convicted of murder and the error could not be harmless. In the instant case, there is no more striking example of harmless error than the jury clearly rejecting the erroneous charge. Petitioner's convictions should be affirmed.

CONCLUSION

Considering the foregoing, the State requests this Court deny the Petition for Writ of Certiorari to the Court of Appeals. For the reasons discussed above, the Court of Appeals was correct in finding the trial court acted within its discretion.

Respectfully submitted,

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October 26, 2017
Columbia, South Carolina

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Oconee County
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHANE ADAM BURDETTE,

PETITIONER,

Appellate Case No. 2017-001990

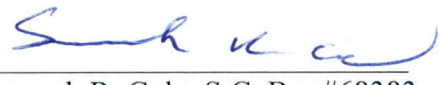
PROOF OF SERVICE

I, Susannah Cole, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Petitioner by depositing copies of the same via inter-agency mail, addressed to his attorney of record:

Susan B. Hackett
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

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

This 26th day of October, 2017.



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