Tito F. Harris #345287
Lieber Corr. Inst. 5-B-62
P.O. Box 205
Ridgeville, SC 29472-0205

August 16, 2018

Hon. Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Tito Harris v. State
Appellate Case No. 2018-000047

Dear Clerk,

Enclosed please find the original and one copy of my pro se response to Johnson Petition. Please file with your office and time-stamp the copy and return to me.

Sincerely submitted
Tito Harris
Tito F. Harris

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
AUG 22 2018
S.C. SUPREME COURT

Certiorari to Berkeley County
William H. Seals, Circuit Court Judge

TITO HARRIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2018-000047

PRO SE RESPONSE TO JOHNSON PETITION FOR A WRIT OF CERTIORARI

Tito Harris #345287
Lieber Corr. Inst. Stono B-62
Post Office Box 205
Ridgeville, SC 29472-0205

Pro se Petitioner

INDEX

ISSUE PRESENTED

Was Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel violated when trial counsel failed to object to an improper manslaughter charge after which the trial court had determined that manslaughter was an appropriate charge to the jury after having viewed the credibility of witnesses.

STATEMENT

The victim and Petitioner were married with two children. App. 129, L.L. 22-23; App. 133, L.L. 2-5; App. 134, LL. 19-21; App. 155, L.L. 8-29. The victim and Petitioner were having marital problems in the summer of 2009, prompting her and the children to move to Moncks Corner with her sister. App. 130, L.L. 2-15; App. 140, L.L. 6-13; App. 162, L.L. 4-13; App. 178, L.L. 14-21. Petitioner was very upset regarding the dissolution of his marriage and his separation from his wife and children. App. 155, L. 25 - App. 156, L. 6. In August 2009, Petitioner was upset because the victim and his children stayed with his uncle over a weekend, provoking Petitioner's suspicions that victim and his uncle were having an affair. App. 139, L.L. 1-10.

On August 18, 2009, one of the children, E.H., got into trouble, and as a result, had to sleep in the room with his mother (victim). App. 163, LL. 2-4; App. 164, L. 1 - App. 165, L. 4. Around 5 am the following morning, the victim's sister heard a noise and looked outside where she saw Petitioner's car. App. 146, L. 21 - App. 147, L. 1; App. 147, LL. 8-9.

Petitioner entered the house and went to the

the victim's bedroom, where the victim and E.H. were sleeping. App. 150, LL. 8-12; App. 167, L. 21- App. 168, L. 13. Petitioner asked the victim to go outside with him so the two could talk, but the victim refused. App. 168, LL. 14-24. While the two were arguing, Petitioner found his uncle's name and phone number in the victim's phone. App. 171, LL. 9-14. When Petitioner saw his uncle's name and number in the victim's phone, he went "berserk". App. 178, LL. 1-9. Upset at losing his family, the victim was shot. App. 173, LL. 19-20; App. 174, LL. 7-9. Petitioner then left. App. 175, LL. 1-5.

When the police arrived, they stopped Petitioner about a block away from the victim's home. App. 191, LL. 1-23; App. 200, LL. 11-18. The police found a small gun in Petitioner's pocket. Petitioner cooperated with the police, even providing a statement. App. 248, L. 18-App. 249, L. 1.

Petitioner explained to the police that he and his wife had been arguing for several days because his wife was having an affair with his uncle. App. 253, L. 19-App. 254, L. 3. Petitioner was extremely upset with the victim (his wife) regarding her affair with his uncle. App. 282, LL. 2-20. Hoping to reunite

his family, Petitioner left his home in North Carolina at 1:45 am on August 19, 2009, driving to his wife's home to discuss their marital problems. App. 220, L.L. 8-19. When Petitioner arrived at his wife's home, he got a gun from a closet. App. 254, L.L. 3-6. Petitioner did not realize he had shot the victim until he was told so by the police. App. 280, L.L. 2-4.

The victim "died of brain stem, cerebral and cerebellar disruption due to a penetrating gunshot wound to the head." App. 317, L.L. 15-23. She suffered a single gunshot wound. App. 318, L.L. 1-2.

Trial

On February 17, 2010, a Berkeley County grand jury indicted Petitioner for murder (2010-GS-08-91). App. 533-534. On March 14-17, 2011, the State, represented by Bryan Alfaro and Anne Williams, called the case to trial before the Honorable Deadra L. Jefferson and a jury. App. 1. Guy J. Vitetta represented Petitioner. App. 1.

At the conclusion of the trial, Judge Jefferson instructed the jury regarding murder and voluntary manslaughter. App. 424, L. 20 - App. 428, L. 18. When instructing the jury concerning malice, Judge Jefferson explained that malice could be

express or inferred. App. 425, LL 11-12. After defining express malice, the judge told the jury: "Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when a deed is done with a deadly weapon." App. 426, LL 1-4. Trial counsel posed no objection to this jury instruction. App. 495, LL. 15-19.

The jury found Petitioner guilty as charged. App. 440, LL. 3-8. Judge Jefferson sentenced Petitioner to life imprisonment. App. 457, LL. 6-8, App. 535.

Direct Appeal

Robert M. Dudek represented Petitioner on appeal. App. 459-474. Appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 459-474. On December 18, 2013, the Court of Appeals dismissed the appeal. State v. Harris, 2013-UP-477 (S.C.Ct. App. filed Dec. 18, 2013); App. 475-476. Remittitur was issued on January 8, 2014. App. 477.

Post-conviction relief proceedings

Thereafter, Petitioner filed an application for post-conviction relief (PCR) on July 29, 2014. App.

478-484. The matter proceeded to a hearing on January 13, 2017, before the Honorable William H. Seals. App. 491. Alicia Olive represented the State, and C. Rauch Wise represented Petitioner. App. 491.

At the PCR hearing, trial counsel explained he was not familiar with State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), at the time of Petitioner's trial. App. 495, Ll. 20-25. Trial counsel admitted Petitioner's trial occurred over a year after this Court rendered its opinion in Belcher. App. 496, Ll. 3-8.

By order filed on October 31, 2017, Judge Seals denied Petitione relief. App. 512-523. The PCR court held "the inference of malice from the use of a deadly weapon jury instruction was proper based on the facts presented at trial." App. 520. Despite the trial judge's decision to charge the jury with the lesser-included offense of voluntary manslaughter, the PCR judge concluded "there was no evidence presented during [the] trial that would have reduced, mitigated, excused, or justified the shooting death" of the victim. App. 520. Additionally, the PCR court concluded that any purported error in giving the inference of malice charge would be harmless based on the

evidence of malice presented." App. 520. According to the PCR court, Petitioner failed to prove prejudice resulting from trial counsel's deficient performance because there was "no reasonable probability the result of [Petitioner's] trial would have been different had counsel objected to the inference of malice charge as instructed by the trial court." App. 520.

Subsequently, Petitioner moved to alter or amend the judgment. App. 524-526. In his motion to alter or amend, Petitioner argued the PCR judge erred by failing "to consider the findings of the trial judge that concluded there was sufficient evidence to submit manslaughter to the jury." App. 524. As Petitioner explained, "[t]he trial judge was in a better position to judge the credibility of witnesses on the crucial issue" and the PCR court should have been bound by the factual findings of the trial court. App. 524. Nonetheless, the PCR court rejected Petitioner's argument. App. 532. By order filed on December 28, 2017, Judge Seals denied the motion. App. 532.

On January 9, 2018, Petitioner served his notice of Appeal. This pro se response to Johnson Petition follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to an improper manslaughter charge after the trial court had viewed the credibility of the witnesses determined that manslaughter was an appropriate charge to the jury.

During Petitioner's trial, the trial judge advised that she was charging voluntary manslaughter. App. 375, L.L.4-5. The trial judge then in her jury charge states: "... Inferred malice may also arise when a deed is done with a deadly weapon." App. 426, L.L.3-4.

The trial judge went on to charge voluntary manslaughter. Sudden heat of passion and sufficient legal provocation needed for voluntary manslaughter, stating that "The provocation needed for voluntary manslaughter must come from some act of or related to the victim. Words alone, however vulgar or insulting, are not enough to meet legal provocation," and "the words must be accompanied by

some overt, threatening act which would have produced the heat of passion." App. 427, LL 21 - App. 428, LL 3.

Trial counsel failed to object to this improper manslaughter. After the trial judge in this matter having viewed the credibility of the witnesses determined that manslaughter was an appropriate charge. Once the trial judge elects to charge manslaughter, the principles of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) would prevent the trial judge from charging inference from the use of a deadly weapon.

As argued in Petitioner's motion to alter or amend, the PCR court erred in holding that the trial court properly charged the jury saying "the words must be accomplished by some overt, threating act which would have produced the heat of passion." The correct standard established in State v. Ferguson, 20 S.C.L. 619, 621-23 (S.C. App. L. & Eq. 1835), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) does not require the overt threatening act.

Petitioner was entitled to the manslaughter

charge. As the testimony of E.H. (child witness) established that Petitioner went "berserk" upon seeing his uncle's name and number in his wife's phone. While there was no physical threat to the Petitioner to upset him, the proof of the talk and texts required the manslaughter charge. This is squared with this Court's holding in State v. Martin, 216 S.C. 129, 133, 57 S.E.2d 55, 56-57 (1949) overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), the exact holding by this Court said "[T]he husband who finds his wife in the embrace of an adulterer, does not stop to reason about the extent to which he will carry his resentment; and if, under the influence of such an excitment, one man takes the life of another in whose wrong it originated, it is manslaughter and not murder." Thus, an overt act, threatening act is not required to reduce murder to manslaughter.

Trial counsel was ineffective, as he was not aware of the Belcher decision. Once the trial judge viewed the credibility of the witnesses and determined that manslaughter was an appropriate charge to the jury, the principles

of State v. Belcher, 385 S.C. 597 would prevent the trial judge from charging inference from the use of a deadly weapon. Had counsel objected to the jury instruction, Petitioner would have been granted a new trial upon review by the Court of Appeals.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel and Due Process were violated when trial counsel failed to object to the improper manslaughter charge.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, the Petitioner must satisfy the two-part 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, 386 S.E.2d 624 (1989) (internal citations omitted.

The second prong of Strickland 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 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 692.

Ultimately, the PCR judge held that trial counsel's failure to object to the improper Belcher instruction was not deficient performance prejudicial to Petitioner by comparing Petitioner's case to State v. Price, 400 S.C. 110, 732 S.E.2d 652 (Ct. App. 2012). App. 519-520. According to the PCR judge, the Court of Appeals affirmed Price's assault and battery with intent to kill conviction despite the judge instructing the jury that malice could

could be inferred from the use of a deadly weapon. App. 519. Specifically, the PCR just explained "[T]he Court of Appeals affirmed Price's conviction, finding the trial court committed no reversible error in charging the jury on infermalice from the use of a deadly weapon because there was no evidence presented during trial that would have reduced, mitigated, excused, or justified the assault and battery committed by Price." App. 519.

Thus, after explaining the Court's reasoning in Price, the PCR judge found "that the inference of malice from the use of a deadly weapon jury instruction was proper based on the facts presented at trial." App. 520. According to the PCR judge, the victim did not provoke Petitioner. App. 520. As a result, the PCR judge found "there was no evidence presented during trial that would have reduced, mitigated, excused, or justified the shooting death" of the victim. App. 520. The Court also found that "any purported error in giving the inference of malice charge" was "harmless based on the overwhelming evidence of malice presented" App. 520.

Thus, the PCR judge found Petitioner could not establish prejudice resulting from trial counsel's failure to object. App. 520.

The PCR judge erred in concluding that there was no evidence to reduce or mitigate the murder charge. The evidence in the record supported the jury instruction for voluntary manslaughter, which reduced or mitigated the offense. The undisputed evidence was that Petitioner went "berserk" when he found his uncle's name and phone number in the victim's phone. His worst fears were realized in that moment- his wife was having an affair with his uncle and she exposed his children to her adulterous relationship. As the trial judge indicated, there was some evidence in the record to support the jury instruction for voluntary manslaughter. The trial judge observed the demeanor of the witnesses and could gauge the evidence presented in a way that the PCR judge simply could not. See Milledge, 422 S.C. 366, 380 (811 S.E.2d 796, 804 (2018) (explaining that "[i]n determining whether a PCR applicant has established prejudice, the PCR court

does not act as a finder of fact and substitute its judgment for that of the trial court," but must view the trial court's ruling through the same lens that would be applied on appeal"). Therefore, the jury instruction on voluntary manslaughter was proper in light of the evidence tending to reduce or mitigate the charged offense of murder.

Trial counsel's unawareness of the Belcher decision, and failure to object to the charge by the judge - erroneous instruction prejudiced Petitioner. As in Belcher, the erroneous instruction that malice may be inferred from the use of a deadly weapon cannot be considered harmless here. The erroneous inference from the use of a deadly weapon jury instruction was reversible error because it was not harmless beyond a reasonable doubt. See Rose v. Clark, 478 U.S. 570 (1986). When the jury was instructed that it could infer malice from the use of a deadly weapon, its consideration of voluntary manslaughter was precluded because the use of a deadly weapon - a gun - was undisputed.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and and permit full briefing on the issue presented with the ultimate relief of reversing the PCR court and granting him a new trial.

Respectfully Submitted,

Tito F. Harris
Pro se Petitioner

This day of August, 2018.

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TITO HARRIS,

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Respondent.

CERTIFICATE OF SERVICE

I, the undersigned, declare under the penalty of perjury that I this day of August, 2018, placed my pro se Response to Johnson Brief Petition for a writ of certiorari in a prepaid postage envelope properly addressed to the following:

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