STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO DARLINGTON COUNTY
Court of Common Pleas
Roger E. Henderson, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2018-000184

Breyon Toney,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S ISSUES PRESENTED

I. Did the PCR court err in granting relief due to the omission of a general permissive inference instruction where the trial testimony showed Toney explicitly expressed his malice for the victim?

II. Did the PCR court err in granting relief due to alleged deficiencies in closing argument where the PCR court relied upon presumed prejudices of the jury, substituted its own judgment for that of Counsel's, and where the trial court properly instructed the jury on each of the elements of self-defense after arguments?

STATEMENT OF THE CASE

Respondent Breyon Toney ("Toney") is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. Toney was indicted at the January 2010 term of the Darlington County Grand Jury for murder (2010-GS-16-00077), and possession of a weapon during the commission of a violent crime (2010-GS-16-00078). Matthew Swilley, Esq., J. Richard Jones, Esq., and Tiffany Gibson, Esq. represented Toney at trial. John Holt, Esq., Patti McKenzie-Parker, Esq., and Kendall Burch, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case. On May 16, 2011, Toney proceeded to trial before the Honorable J. Michael Baxley and a jury. The jury found Toney guilty as indicted on May 18, 2011. Judge Baxley sentenced Toney to imprisonment for concurrent terms of 30 years for murder, and 5 years for weapon possession.

Toney filed a timely notice of appeal and a direct appeal was perfected by Kathrine H. Hudgins, Esq., who raised the following issue:

> Did the trial judge err in refusing to suppress evidence of an altercation between appellant and a witness when, during the pre-trial suppression hearing, the State failed to prove that the altercation constituted evidence of witness intimidation, the evidence constitutes an inadmissible bad act and the prejudicial effect outweighs any possible probative value?

By opinion decided January 8, 2014, the South Carolina Court of Appeals affirmed Toney's convictions. State v. Toney, Op. No. 2014-UP-005 (S.C.Ct.App. filed Jan. 8, 2014). Toney, through counsel Jeremy A. Thompson, Esq., petitioned for rehearing, which was denied by order filed February 20, 2014. The Remittitur was issued on April 11, 2014.

Toney filed his application for post-conviction relief on October 23, 2014 (2014-CP-16-00875). He alleged the following grounds for relief in his application:

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 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"

Respondent made its return on March 28, 2016. Toney, though counsel Thompson, amended his application by filing on July 7, 2017, to allege the following grounds for relief:

1. "Trial counsel was ineffective for failing to object to the trial court's failure to charge the jury on the general permissive malice inference instruction."
2. "Trial counsel was ineffective for failing to require the State to deliver a closing argument on the law prior to his closing argument. See Tr. p. 393, lines 6-17."
3. "Trial counsel was ineffective for failing to adequately research and prepare a request charge on the lesser-included offense of involuntary manslaughter. See Tr. p. 386, line 19 – p. 389, line 14."
4. "Trial counsel was ineffective for failing to request that the jury be charged on the defense of accident."
5. "Trial counsel was ineffective for failing to request that the jury be recharged on the law of murder and voluntary manslaughter in response to two notes from the jury requesting the definition of murder and the definition of manslaughter. See Courts Exhibits #4 and 5."
6. "Trial counsel was ineffective for failing to object to the trial court's instructions on self-defense which repeatedly placed the burden of proof on establishing the defense on the Applicant. See Tr. p. 457, line 17-p. 461, line 18."
7. "Trial counsel was ineffective for failing to prepare the Applicant to testify and to meet on a sufficient number of occasions prior to trial with the Applicant to prepare the Applicant for trial generally."
8. "Trial counsel was ineffective during his closing argument in:"
    a. "Stating that he did poorly in philosophy and then comparing Proverbs to Friedrich Nietzsche at the outset of his argument, see Tr. p. 395, line 15-p. 396, line 15;"
    b. "Arguing that the Applicant should not have gone to park where he encountered LaVincent Hankins, see Tr. pp. 404-406;"
    c. "Failing to discuss the elements of self-defense and how they were met by the Applicant's testimony, see Tr. pp. 410-412;"

d. "Arguing that a friend who died as a result of a fall was comparable to the victim, see Tr. pp. 414-415."

9. "Trial counsel was ineffective for failing to adequately cross-examine the witnesses who were at the scene regarding their discussions with each other about the case."

10. "Trial counsel was ineffective for failing to present readily available witnesses who could have testified in support of the Applicant regarding his altercation with LaVincent Hankins."

11. "Trial counsel was ineffective in failing to object to improper hearsay, vouching, and opinion testimony given by Investigator Mike Anderson in the following respects:"
    a. "Testimony walking through the incident with the jury based entirely on accounts given to him by witnesses at the scene; see Tr. pp. 126-129;"
    b. "Testimony that other witnesses that he interviewed substantially matched the accounts given by Marcus Brunson and Crystal Robinson, see Tr. p. 131, lines 10-24;"
    c. "Testimony that the victim's fingerprints were on the bottle matched the version of events that he got from four witnesses at the scene, see Tr. p. 132, line 12-p. 133, line 5."

12. "After-discovered evidence exists to show that the primary witnesses against he Applicant collaborated to falsify their statements against the Applicant in order to make the case against the Applicant stronger."

An evidentiary hearing into the matter was convened on July 18, 2017, before the Honorable Roger E. Henderson. Toney was present at the hearing and represented by counsel Thompson and Tricia Blanchette, Esq. Johnny Ellis James Jr., Esq., and Megan Harrigan Jameson, Esq., of the South Carolina Attorney General's Office, represented Petitioner. By written order dated October 19, 2017, and filed November 3, 2017, Judge Henderson granted Toney post-conviction relief. Petitioner filed a motion to reconsider on November 13, 2017, which was denied by order dated January 10, 2018, and filed January 29, 2018.

This appeal follows.

STATEMENT OF THE FACTS

a. The Death of James Tucker

During the early morning hours of March 24, 2009, Hartsville authorities were dispatched to Darlington County's Carolina Pines Medical Center ("CPMC") after hospital personnel reported treating a patient who had been stabbed. (Appx. 109-10, 271-72, 289-90, 292-93). The victim, later identified as James Tucker ("Victim"), was pronounced dead at 3:40 AM. (Appx. 271-72). According to forensic pathologist Dr. Janice Ross, the knife used to stab Victim likely penetrated at least four inches into Victim's chest. (Appx. 235-36).

b. The Investigation

Upon hearing Victim had died, Officer Cheryl McCall, who along with Officer LaVern Davis had been dispatched to CPMC when staff initially advised authorities about the situation, called her supervisor Tracey Meyers to report Victim's death. (Appx. 271-72, 274). After speaking with Meyers, McCall contacted detectives Mike Anderson and John Specht, who made their way to CPMC. (Appx. 274). McCall and Davis then obtained written statements from two witnesses, Crystal Robinson and Marcus Brunson, who separately explained Victim and Toney were squaring up to fight one another when Toney pulled a knife on Victim, refused to put the knife down and stabbed Victim as he was attempting to flee. (Appx. 276, 147-49, 177-79). After giving statements, both Robinson and Brunson were interviewed later that morning by Anderson at the Hartsville Police Department. (Appx. 112-13). Once there, Specht prepared a photographic lineup for each witness, who in turn, separately identified Toney as the person who stabbed Victim. (Appx. 117, 120). Additionally, Anderson and Specht accompanied Robinson and Brunson to the corner of Marion Avenue and Chaplin Circle, where the incident occurred.[1]

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[1] Marion Avenue is also referred to as Marion Street throughout the record.

(Appx. 127-28). Subsequently, Anderson also spoke with Phillip Franklin and LaVincent Hankins, both eyewitnesses to the incident. (Appx. 131, 215, 244, 249). According to Anderson, Franklin and Hankins' statements corroborated Robinson and Brunson's version of events. (Appx. 131).

c. Opposing Theories at Trial

At trial, the State theorized Toney and Victim had a disagreement on the afternoon of March 23rd; decided to meet sometime after midnight on the 24th; the meeting turned into a fight; and Toney pulled a knife on Victim stabbing him as he was attempting to retreat. (Appx. 78-79). Meanwhile, the defense theorized Toney stabbed Victim in self-defense claiming Victim wanted to fight Toney because he was jealous about a girl they were both dating. (Appx. 82-83).

In support of its murder theory, the State offered eyewitness testimony from Robinson, Brunson, Franklin and Hankins. (Appx. 140, 175, 203, 236). Each eyewitness corroborated that Victim was stabbed following an altercation with Toney occurring near the corner of Marion Avenue and Chaplin Circle. (Appx. 147-49, 177-79, 206-10, 238-40). Additionally, the State presented testimony from Hankins demonstrating that in the weeks leading up to trial, Toney, who was out on bond, confronted Hankins about the statement he had given to authorities in the aftermath of the incident, hit him six times and threatened Hankins saying, "I read your statement and I'm going to kill you bitch." (Appx. 242-43).

Meanwhile, defense counsel, in support of its self-defense theory, called Tiffany Huggins, who was not at the scene that night, but testified Victim was angry with Toney and wanted to fight him over the fact Toney had sex with Victim's girlfriend. (Appx. 329-30, 335, 343-44). Toney further testified he stabbed Victim, but said he was acting in self-defense when he did so contending Victim was attempting to stab him with a broken bottle in the moments

leading up to the incident. (Appx. 350). Addressing Hankins testimony regarding the confrontation following the murder, Toney denied he was attempting to intimidate Hankins explaining the confrontation actually occurred between Hankins' girlfriend and himself at which point Hankins got angry and approached him, which prompted him to punch Hankins in self-defense. (Appx. 351-53). Thus, the main question at trial was one of criminal intent.

d. Testimony from the State's Eyewitnesses

Crystal Robinson was the first of the State's eyewitnesses to testify about the incident. (Appx. 140-74). Specifically, Robinson explained she was at the intersection of Marion Avenue and Chaplin Circle in her car talking to Brunson, when Victim approached them and began talking to Brunson. (Appx. 142-43). During the course of Victim and Brunson's conversation, Robinson learned Toney wanted to fight Victim because he had purchased diapers for the mother of Toney's child. (Appx. 146). Recounting the events of the evening, Robinson said she observed Toney walk up Marion Avenue towards Victim at which point the two squared up to fight. (Appx. 147). According to Robinson, Toney and Victim were circling and had taken a swing at one another when Victim yelled, "he got a knife." (Appx. 147). Continuing, Robinson said Victim asked Toney to drop the knife, but he refused, prompting her to ask Brunson and Franklin, who were also watching the altercation, to get the knife from Toney. (Appx. 148). When Brunson and Franklin did not attempt to retrieve the knife, Robinson said she told Victim to run. (Appx. 148). Thereafter, Robinson testified that Victim ran down the street before stopping and picking up two large beer bottles in an effort to defend himself. (Appx. 148-49). Robinson stated she watched Victim throw the bottles at Toney after which she explained Toney swung at Victim, who fell to the ground before getting back up and running away from Toney in her direction. (Appx. 149). As Victim approached Robinson, he told her, "oh shit he cut me.

Breyon cut me." (Appx. 149). Robinson then attempted to help Victim and upon seeing the wound, put him in her car and drove him to the hospital. (Appx. 149). On cross-examination, Robinson admitted a person she knew by the nickname "Mouk" was also at the scene of the crime along with Toney, Victim, Franklin, herself and Brunson.[2] (Appx. 168).

Marcus Brunson was the second of the State's eyewitnesses to testify. (Appx. 175-200). Brunson, who was talking with Robinson when the incident occurred, testified to essentially the same version of events. (Appx. 177-79). Like Robinson, Brunson said Toney wanted to fight Victim because Victim had purchased diapers for the mother of Toney's child. (Appx. 177). Brunson also explained that Toney pulled a knife on Victim as they were squaring up to fight which prompted Victim to retreat from Toney. (Appx. 178-79). Further corroborating Robinson's description of the incident, Brunson testified that Victim, despite being told to run, stopped as he was retreating from Toney, threw a bottle at Toney in self-defense and then fell to the ground before jumping back up and running towards Robinson. (Appx. 179). Brunson explained that as Victim approached him (Brunson was next to Robinson), Victim said Toney stabbed him. (Appx. 179). On cross-examination, Brunson confirmed "Mouk," Franklin and Robinson also witnessed the incident. (Appx. 191).

Phillip Franklin also testified about what he observed on the night in question. (Appx. 203-26). Like Robinson and Brunson, Franklin believed Toney was angry with Victim because Victim bought diapers for the mother of Toney's child. (Appx. 213). Franklin further added that Toney had text messaged Victim telling him to "meet [him] on Marion Street." (Appx. 217). According to Franklin, who spoke with Victim prior to the incident, Victim said he was going to meet with Toney and "they were just . . . going to . . . talk it out[.]" (Appx. 205). Continuing,

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[2] In his testimony on direct examination, Hankins testified his nickname was "Mouk." (Appx. 237).

Franklin testified he observed Toney walk up the street "talking loud" when the two met and began talking, which Franklin said, escalated into a fight. (Appx. 206-07). As Toney and Victim were preparing to fight, Franklin testified Victim saw Toney had a knife stating, "he got a knife" which in turn caused Victim to retreat from Toney. (Appx. 207). Franklin then admitted Victim and Toney backed into the shadows where he could not see what transpired next. (Appx. 208). Nevertheless, Franklin confirmed Victim was not bleeding when he walked into the shadows, but was bleeding when he left them. (Appx. 208-09). Franklin further noted that in the time the two were in the shadows he heard bottles breaking, after which he heard Victim say that Toney cut him. (Appx. 209). In the aftermath of the event, Franklin later called Toney to tell him that Victim was in the hospital in critical condition. (Appx. 210). According to Franklin, Toney said "he didn't give a fuck." (Appx. 210).

As its final eyewitness, the State called LaVincent Hankins.[3] (Appx. 237). In his testimony, Hankins, like Robinson, Bruson and Franklin, confirmed he was near the intersection of Marion Avenue and Chaplin Circle when Toney stabbed Victim. (Appx. 238-40). Specifically, Hankins recalled that just before the stabbing occurred, Victim was explaining he had received text messages from Toney telling him to come to "Marion Street" and fight. (Appx. 239). Hankins further recounted that Toney was walking down Marion Avenue approaching Victim saying "let's get it mother fucker" and "you are going to die[.]" (Appx. 239). Continuing, Hankins explained Toney and Victim were preparing to fight when Victim indicated Toney had a knife. (Appx. 239). Hankins then said that he and the others who were present at the scene told Victim to run, at which point Victim began backing up and threw a beer bottle at Toney. (Appx. 240). Next, Hankins testified that Toney dodged the beer bottle at which point

[3] Hankins is also referenced in the record as Quintell, which he confirmed, is his middle name. (Appx. 237).

he "came over with the knife" stabbing Victim. (Appx. 240). Hankins said Victim then approached Robinson telling her, "I can't breathe" prompting Robinson to take him to the hospital. (Appx. 240).

Elaborating about his confrontation with Toney, Hankins first explained he encountered Toney twice after the incident; once about a month before trial where Toney asked him what he "was going to do about that court shit" (Appx. 240); and a second time, occurring approximately two weeks before trial. (Appx. 241). Explaining his initial interaction with Toney, Hankins admitted he simply told Toney he would not be attending his trial. (Appx. 240). Describing his second interaction with Toney, Hankins said he was at Pride Park in Hartsville when he saw Toney approaching him. (Appx. 241-42). Upon seeing Toney, Hankins and his girlfriend began walking to his car in order to avoid him. (Appx. 241-42). Hankins testified that as he was getting into his car, he glanced back at the park when Toney said "let's get it mother fucker" after which he pulled Hankins out of the car and hit him in the face six times. (Appx. 242). After Toney had been pulled off of Hankins he then said, "I read your statement and I'm going to kill you bitch." (Appx. 242-43).

e. Toney's Testimony

As noted above, Toney testified in his own defense. (Appx. 342-85). According to Toney, in the afternoon before Victim was killed, he overheard Victim talking to a third party, Demetrious Sowell, telling Sowell he had discovered that Toney had sex with his girlfriend and he was going to do something about it. (Appx. 343). Following the confrontation, Toney said he received a three-way phone call from Victim and his girlfriend. (Appx. 344). During the conversation, Victim's girlfriend asked Toney why he was telling people he had sex with her, to

which Toney responded he did not. (Appx. 344). Toney stated that when he said this, Victim called him a liar. (Appx. 344).

Continuing, Toney testified that after the three-way conversation, he received a text message from Huggins which implied Victim was talking about Toney. (Appx. 344). After reading the text message, Toney called Huggins, who, according to Toney, gave the phone to Victim. (Appx. 345). Toney admitted he and Victim had words during the conversation. (Appx. 345). Toney further said that following this telephone call, he received a text message saying "meet me on Marion Street." (Appx. 345). According to Toney, he and Victim then began arguing via text message until later that night when Toney claimed he received a telephone call from Franklin, who called from Victim's phone and allegedly tried to persuade Toney to meet Victim on a different street. (Appx. 345-46). Toney claimed Brunson was also involved in this discussion. (Appx. 346). According to Toney, it was after this discussion that Victim sent him a text message indicating he better meet Toney on Marion Avenue. (Appx. 347). Toney agreed. (Appx. 347).

Next, Toney recounted the incident, testifying that as he approached Victim he observed Victim giving his coat and CD player to Brunson. (Appx. 347). Shortly thereafter, Toney admitted the two squared up to fight, but when they did, he observed Victim go "for his jacket" prompting him to draw "a key ring knife." (Appx. 348). Toney said Victim then called out telling the others that Toney had a knife at which point Victim began to back up. (Appx. 348). Toney claimed Victim then grabbed two bottles and after throwing the first bottle, kept the broken end of the second bottle. (Appx. 349). Toney stated Victim then attempted to stab him with the broken end of the bottle and when he dodged the attempt, Toney "moved the knife

towards [Victim]." (Appx. 350). Toney explained Victim then fell to the ground, got up, walked away and said he had been cut. (Appx. 350).

Addressing Hankins testimony regarding the confrontation in the park, Toney denied he was attempting to intimidate Hankins explaining the confrontation actually occurred between Hankins' girlfriend and himself at which point Hankins got angry and approached him, which prompted him to punch Hankins in self-defense. (Appx. 351-53).

f. The Conclusion of Trial

Following Toney's testimony the defense rested and directed verdict motions were renewed. (Appx. 384, 386). Thereafter, each party presented closing arguments, after which, the jury was charged and sent out for deliberations. (Appx. 386, 394-419, 419-44, 444-68, 470). An hour and twenty minutes later, the jury returned with a verdict finding Toney guilty as indicted. (Appx. 472).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

I. THE PCR COURT ERRED BECAUSE THE EVIDENCE OF EXPRESS MALICE FORECLOSES A FINDING OF PREJUDICE FROM THE OMISSION OF THE PERMISSIVE INFERENCE OF MALICE INSTRUCTION.

This Court should reverse the PCR court's grant of relief because there's no evidence in the record to support its finding Toney was prejudiced by the omission of the general permissive inference instruction. The PCR court granted relief upon a finding that Counsel was deficient for failing to object to the trial court's failure to charge the jury with a general permissive malice inference instruction. In State v. Elmore, this Court, upon review of a trial judge's instruction on the presumption of malice from the use of a deadly weapon, suggested the following charge:

> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts[ ] are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply 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.

Elmore, 379 S.C. at 421, 308 S.E.2d at 784. This Court then cautioned "that hereafter only slight deviations from this change will be tolerated." Id.

This Court reviewed the Elmore charge again a quarter-century later in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). There the Court functionally divided the charge into two parts: (1) the inference of malice from the use of a deadly weapon (the first sentence), and (2) the general permissive inference instruction (the second, longer sentence). Id., 385 S.C. at 612 n. 9, 685 S.E.2d at 810 n. 9. That division made, the Court circumscribed the applicability of the first sentence "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon[,]" but emphasized that the second sentence remained generally applicable. Id.

This Court again returned to Elmore in Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016), which provides the clearest guidance to the present matter. In Gibson, this Court reversed a denial of relief where trial counsel failed to object to the trial court's total omission of the second sentence of Elmore. Gibson, 416 S.C. at 264-65, 786 S.E.2d at 123-24. In weighing the prejudice prong, the Court explained that "this Court must decide whether the erroneous malice instruction contributed to the verdict based on all the evidence presented to the jury. The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge." Id. 416 S.C. at 265, 786 S.E.2d at 124 (citations omitted). The Court thereafter overturned the PCR judge's finding that there was evidence of malice other than the use of a deadly weapon because "there was little evidence of malice aside from the use of a gun[.]" Id. The implicit inversion of the Court's logic is that where there is evidence of malice aside from that which was subject to deficient treatment by counsel, there is no prejudice to a PCR applicant, and relief should be denied.

Here, unlike in Gibson, the record reflects numerous witness reports of express malice and, as such, the Court should find that there is no prejudice from Counsel's deficiency because there was no need for the jury to infer malice at all. Crystal Robinson, in a written statement to law enforcement made a few hours after the murder, stated that Toney "kept repeating over and over that he gonna kill this [*epithet*]" as he approached. (Appx. 112-13, 156-57). Robinson additionally testified that the victim, James Tucker, reported to her that he received a text message from Toney indicating that Toney wished to fight him. (Appx. 144-46). LaVincent Q. Hankins also testified Toney, as he approached the victim, declared "let's get it on mother fucker" and that the victim was going to die. (Appx. 247-48). Though he could not remember the precise statements Toney made, Phillip Anton Franklin corroborated Robinson's written

statement by testifying that Toney "was talking loud, and probably out of anger" as he approached the scene. (Appx. 205-06). Franklin additionally testified that Toney, upon being told that Tucker was in critical condition, responded "I don't give a 'F'". (Appx. 222-23).

There can be no more explicit a statement of malice than the permutations of "I am going to kill you" above described and attributed to Toney as he approached the victim. Though there are numerous valid bases from which a jury could have inferred malice, there was no need for them to do so as multiple witnesses testified to express malice and, therefore, Toney could not have been prejudiced by the absence of the general permissive inference language. That the jury requested to be charged again on murder and voluntary manslaughter does not invariably support the inference drawn by the Court that the jurors were struggling with whether malice existed—the reason or reasons why the jury sought additional instruction is left entirely to speculation with the record before the Court. There could have been a dispute among the jurors as to the precise definition of the terms, or perhaps there could have been sympathy for the Toney such that there was a desire to further inspect the possibility of the lesser-included charge. To the contrary of the language of the order, the fact that the jury convicted Toney of murder despite extra consideration of the lesser-included charge *and* self-defense arguably suggests they could find no way around Toney's express declarations of malice. Accordingly, this Court should overturn and vacate the order granting relief with respect to the failure to object to the lack of a general permissive inference charge.

II. THE PCR COURT ERRED BECAUSE ITS GROUNDS FOR FINDING COUNSEL'S CLOSING ARGUMENT DEFICIENT WERE EITHER ENTIRELY BASELESS OR CURED BY THE TRIAL COURT'S JURY INSTRUCTIONS.

The PCR court additionally erred in granted relief due to three alleged deficiencies in Counsel's closing argument: (1) his reference to Friedrich Nietzsche; (2) his partial concession

of Toney's confrontation with a witness in a public park shortly before trial; and (3) his failure to present an argument as to each and every element of self-defense.

a. The PCR court all but denigrates Darlington County juries in finding Counsel deficient for referencing German philosopher Friedreich Nietzsche

As to the first alleged deficiency regarding Nietzsche, the sum of the PCR court's ruling is premised on an assumption that the jury vehemently disliked the German philosopher by way of only knowing and misinterpreting his declaration that "God is dead." At trial, Counsel offered to the jury Nietzsche's proposition that "no one is such a liar as the indignant man[,]" arguing that the victim's friends were lying about Toney's conduct and intentions out of their grief from the victim's death. (Appx. 395-96).

No evidence exists in the record to support any assertion that the jury, or that the broader jury pool, knows of Nietzsche, disfavors him, and would turn against Toney because Counsel used him as an example. The PCR court's order is simultaneously unrealistic and condescending to the jurors of Darlington County. Furthermore, the finding of constitutional deficiency based upon Counsel's failure to pander to the perceived ideological tilt of a rural South Carolina jury does not render any justice onto Toney, but only serves to establish through the judiciary a policy that, in order to avoid a finding of deficient performance, attorneys in this state must recognize and structure their arguments to reflect and respect certain prejudices. This Court can no sooner uphold the finding that Counsel was deficient for referencing Nietzsche than it could for referencing locally unpopular politicians (e.g. former President Barack Obama or Senator Lindsey Graham), locally unpopular religious figures (e.g. the Muslim prophet Muhammed), or other notable persons of a potentially divisive character (e.g. South Carolina football coach Will Muschamp or Clemson football coach Dabo Sweeney). The alternative amounts to a state-sponsored endorsement of an ill-defined set of majority beliefs, which is not appropriate and

would be highly restrictive of the nature of arguments available to attorneys throughout this state. The wisdom of cultural sensitivity in closing argument cannot be permitted to transform into cultural mandate by way of post-conviction grants based upon mere disagreement as to what constitutes the most effective rhetorical technique in a given community.

As for Counsel's humbling preface, a finding of any deficiency as to Counsel's remark runs contrary to best practices as to attorney conduct in a closing argument: "Let the jury know that you are human." The Honorable Joseph F. Anderson, Jr., The Lost Art: An Advocate's Guide to Effective Closing Argument 28 (3d ed. 2008); see also Id. at 20 ("It is generally safe to poke fun at yourself."). That Counsel took a complex idea, humanized its challenging character, and then correctly applied it to the facts of the case is not deficiency, but skilled advocacy.

Finally, that Counsel now, after a conviction, believes he could have crafted a better closing argument is of little to no probative value. See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Counsel testified at the evidentiary hearing that, at the time, he was permitted only the lunch break to modify and craft his closing argument to reflect the evidence as it was introduced at trial. Given the time constraints that Counsel faced, and which all attorneys face in the heat of trial, that a more perfect closing argument could have been crafted is inevitable, but that universal character of trial advocacy does not support a finding of deficient representation, let alone prejudice. Accordingly, this Court should vacate and reverse the order granting relief.

b. No evidence exists to show either deficiency or prejudice in Counsel's handling of witness intimidation testimony in closing argument.

As to the second ground for relief arising from Counsel's closing argument, Counsel intelligently and candidly addressed damning testimony of witness intimidation by focusing the attention of the jury away from Toney's fight in a public park and back towards the confrontation between Toney and the victim. (Appx. 405-06). The PCR court's order granting relief provides that Counsel should not have conceded any part of responsibility for the confrontation at Pride Park, but rather should have firmly stood by Toney's testimony as to what occurred. That argument and conclusion runs contrary to the totality of the circumstances that existed at the time of closing argument: Counsel testified at the evidentiary hearing that Toney's testimony went very poorly, as Toney appeared very anxious under the pressure of cross-examination by the State. (Appx. 669-70). In light of Toney's poor testimony on the stand, for Counsel to concede nothing and proceed undaunted in his closing argument with Toney's recollection of events at Pride Park would have been a weak, tone-deaf approach and would have only undercut Toney.[4] See The Lost Art at 22 ("It is also very important that you not overstate the strength of your case."); Thomas A. Mauet, Trial Techniques 397-98 (8th ed 2010) ("Closing argument is the time to solve problems, not ignore them. This is time to deal openly with the jury's concerns about the case, and discuss them candidly."). Accordingly, the PCR court's grant of relief runs afoul of the most basic principle of deference set forth in Strickland, and this Court should vacate and reverse the order granting relief.

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[4] Counsel could have conceivably taken a stronger position with respect to the Pride Park fight had there been additional testimony to corroborate Toney's story, but the only other witness who could have done so, Johnetta Wheeler Evans, testified at the evidentiary hearing that she would not have cooperated with the defense or testified at trial. (Appx. 586-87).

c. Counsel was not required to address each individual element of self-defense in his own closing, and to whatever extent he erred in not doing so, the error was cured by the trial court's subsequent, thorough instructions to the jury on self-defense.

As to the third ground for relief arising from Counsel's closing argument, no evidence exists to show deficiency or prejudice from Counsel's failure to specifically argue each and every element of self-defense where (1) the trial court properly charged the jury on each of the elements, and (2) no evidence exists in the record to show a meaningful argument as to each of the elements. During closing arguments, Counsel brought up the issue of self-defense and focused primarily on the first element, arguing Toney was without fault in bringing on the difficulty. (Appx. 410-13).

First, the trial court clearly and completely advised the jury as to each and every element of self-defense in its instructions, thereby curing any error. (Appx. 457-61); see State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986) (overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999)) (trial judge's correct charge on matters of law cured any error from misstatements by prosecution). Second, Toney failed to show what it was that Counsel was supposed to argue as to each of the elements, but only vaguely indicates that some argument should have been made. Given the ample evidence to show that Toney willingly went to the confrontation, willingly persisted and chased the victim throughout the confrontation, and ignored all opportunity to retreat from the fight, despite the victim's own attempts to retreat, the record shows that no reasonable argument as to the other elements of self-defense existed. Nonetheless, Counsel did the best he could with the facts he had. Therefore, Toney has not and cannot meet his burden of proof to support a grant of relief, and this Court should vacate and reverse the order granting relief.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari, and thereupon vacate and reverse the order granting post-conviction relief. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

5 Sept., 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County
Court of Common Pleas
The Honorable Roger E. Henderson, Circuit Court Judge

2014-CP-16-0875
Appellate Case No. 2018-000184

BREYON TONEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Petition for Writ of Certiorari and Appendix** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Jeremy A. Thompson, Esquire
PO Box 1834
Irmo, SC 29063

Tricia A. Blanchette, Esquire
PO Box 2147
Leesville, SC 29070

This 5th day of September, 2018.

MALLORY MORRIS
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
SEP 05 2018
S.C. SUPREME COURT

September 5, 2018

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

RE: **Breyon Toney v. State of South Carolina**
Appellate Case No. 2018-000184
Lower Court Case No. 2014-CP-16-0875

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Petition for Writ of Certiorari and an original appendix and one copy (1). By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/mm
Enclosures

cc: Jeremy A. Thompson, Esquire
Tricia A. Blanchette, Esquire
Victim Advocacy Division (without enclosures)