THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Case No. 2015-CP-15-00662

Sincere J. Owens,

Appellant,

v.

State of South Carolina,

Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE PCR COURT ERR IN NOT FINDING TRIAL COUNSEL DEFICIENT FOR FAILING TO REQUEST AN INVOLUNTARY MANSLAUGHTER JURY CHARGE AND SUCH DEFICIENCY SUBSTANTIALLY PREJUDICED THE APPELLANT?

II. DID THE PCR COURT ERR IN NOT FINDING TRIAL COUNSEL DEFICIENT FOR FAILING TO OBJECT TO A JURY CHARGE ON VOLUNTARY MANSLAUGHTER AND THAT THE DEFICIENCY SUBSTANTIALLY PREJUDICED THE APPELLANT?

III. DID THE PCR COURT ERR IN FAILING TO RULE AND/OR DENYING THE APPLICANT'S MOTION TO AMEND HIS APPLICATION PURSUANT TO RULES 59(e) AND 15(b) SCRCP?

STATEMENT OF THE CASE

The Appellant was tried on September 13-14 2010 in Colleton County for murder and possession of a weapon during the commission of a violent crime. The jury specifically acquitted the Appellant on the charge of murder on a special verdict form. The jury did, however, convict the Appellant of voluntary manslaughter and possession of a weapon during the commission of a violent crime. Presiding Judge D. Craig Brown sentenced the Appellant to twenty-seven (27) years on the voluntary manslaughter and five (5) years on the possession of a weapon during a violent crime to be served consecutively.

The Appellant filed a timely appeal. Office of Appellate Defense perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). Office of Appellate Defense was relieved as counsel and the remittitur was returned to the circuit court on November 21,

2014.

The Appellant timely filed and served his Application for Post Conviction Relief (PCR) on June 19, 2015. Owens raised the issue of ineffective assistance of counsel for failing to objection to the voluntary manslaughter charge in his PCR Application. The State filed its Return to the Application on October 26, 2018. Appellant's PCR hearing occurred on April 1, 2019 before the Honorable William H. Seals, Jr. The PCR was denied in an email sent April 4, 2020, as were all other PCRs heard on April 1-3, 2019. Judge Seals' email instructed the Attorney General to prepare all the orders denying PCR without any further instruction to the A.G's office. (ROA at p. **). An Order dismissing the Appellant's PCR Application was filed on October 18, 2019.

The Appellant filed and served a Motion to Alter or Amend the Judgment on October 18, 2019 under Rule 59(e) of the South Carolina Rules of Civil Procedure. The State informally, by email, posted its Return to the Appellant's Motion to Alter or Amend on January 13, 2020. The Appellant supplemented his Motion to Alter or Amend on January 10, 2020 to address the issues raised in the State's informal Return to Appellant's pending Motion. In the Rule 59(e) Supplemental Motion, Owens moved to Amend his PCR Application to conform with the evidence presented at the PCR hearing under Rule 15(b) SCRCP) to address the concurrent issue raised on voluntary and involuntary manslaughter.

The PCR Court filed a Form 4 Order denying the Appellant's Motion to Alter or Amend on March 16, 2020. (ROA at p.**). The Form 4 Order did not address any of the issues raised in the Applicant's Rule 59(e) Motion or Supplemental Motion to alter or amend pursuant to Rule 15(b) SCRCP. This appeal follows.

STANDARD OF REVIEW

A Post Conviction Relief (PCR) applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). When alleging ineffective assistance of counsel, a PCR applicant must satisfy the two-prong *Strickland* test. Strickland v. Washington, 466 U.S. 668, 687 (1984). First. The applicant must establish trial counsel's performance was deficient. Second, generally the applicant must demonstrate trial counsel's "deficient performance prejudiced the [applicant] 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.'" Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

In reviewing a PCR court's decision, this Court will uphold the PCR court's findings if there is any evidence of probative value to support them. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). However, if the PCR court's conclusions are controlled by an error of law or are unsupported by the evidence, this Court must reverse the decision. Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

FACTS

The State's theory of the murder case was that on April 22nd 2009 Sincere Owens shot and killed Keith Williams. A single bullet struck Williams in the buttocks. Owens fired the shot somewhere in between Annie Glover's residence and the decedent's residence both of which are on Francis Street in the City of Walterboro, South Carolina. The Appellant and the decedent, Keith Williams, each had a child with Shante Glover. (ROA at p. **). Shante

Glover's grandmother, Annie Glover, provided afternoon childcare for Shante's children, one fathered by Owens and the other by Williams. The grandmother lived only a few houses from Williams's residence.

Earlier in the day Williams was at Shante's workplace (Subway Restaurant), he was upset and talking disrespectfully to Shante. Williams was apparently upset about the fact that she and Owens were back together as a couple. Williams was still upset when he left Shante's workplace. Because of this, Shante thought it would be better for her not go near Williams' residence and asked Owens to pick up her kids from Annie Glover's residence instead of her, to avoid any further confrontation with Williams. (ROA at p. **). Owens took Shante's SUV and went to Francis Street to get the kids from Annie Glover's house. Shante kept a pistol in the glove-box of the SUV. (ROA at p.**).

There was only one witness, other than the Appellant, that saw the events of the shooting unfold, and that was Mark McCune[1], a witness called by the State. According to McCune, Williams just got home from work, checked his mailbox and Williams verbally confronted Owens by saying, "what did you say? What you say?" (ROA at p.**). McCune saw Owens with a gun. (ROA at p.**). McCune then testified at the jury trial when being questioned by the State as follows:

Q. "All right. Who had the gun?

A. Sincere.

A. Okay. And he [Owens] wasn't trying to shoot

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1 Mr. Mark McCune was incorrectly referred to as "Martin" McCune at the PCR hearing.

> him [Williams] or nothing, you know. He pulls the gun and he was like, "Man, I should - - " and then he stopped. He didn't finish his statement. He was like - - and Keith was like, "Oh, so you got a gun? "You got a gun?" and he started walking off and Sincere fired three times at the ground, you know, trying to scare him. And he ran and he must be got hit in the back."

(ROA at p.**). McCune further testified:

> Q. "All right. So your testimony, now, is that this was an accidental shooting? That he just shot at the ground to try to scare him?
>
> A. Yeah, the first shot was at the ground, and then, you know, he just kind of like aimed, like he was shooting, but he was still shooting at the ground. He was still shooting - - not towards like trying to shoot him, but he was shooting at the ground."

(ROA at p. **). Still further, McCune testified:

> A. "Yeah, that he was shooting at him at the - - you know, he wasn't pointing at him. He was shooting at the ground.
>
> Q. And that's what your testimony is?
>
> A. Yeah." (ROA at p. **).

The State introduced Owen's written statement and published it to the jury. The published statement read as follows:

> "I [Owens] pulled up to my child's grandmother's house to pick up my baby and they told me the kids were still at daycare. So I started walking back to my baby mother's truck when somebody said, "Look." He was walking from his house on Francis Street

> towards the truck, reaching. Then he [Williams] pulled out a black gun and started - - and told me to run. I was shooting and ran. I didn't know where I was at. I didn't know what he could have did to me. I just ran and shot. Showtime [Williams] was the one with the gun." (ROA at p.**).

At the Appellant's trial, his counsel told the jury in his opening statements that, "[s]ome killings are, sadly, justified; and some are accidents, and there was no intent to kill at all." (ROA at p.*). Trial counsel told the jury in closing argument that Owens "didn't intent to hurt anybody." (ROA at p. **). Trial counsel continued on saying, "If you [jury] believe he [Owens] went looking there for problems, the he probably - - you look at that sudden heat of passion, okay, that's voluntary manslaughter . . .." (ROA at p. ***). Trial counsel argued further, " . . . the State has not proven intent, certainly not. Sudden heat of passion, he didn't intend to kill anybody. He was trying to defend himself." (ROA at p. ***). There were no facts adduced at the jury trial that there was "sufficient legal provocation," and no facts that Owens acted out of a "sudden heat of passion."

The trial court, in addition to a set of standard jury charges, specifically charged: 1) Murder and malice aforethought; 2) Voluntary Manslaughter, sudden heat of passion and sufficient legal provocation; 3) Self-defense.[2] (ROA at p. ***). Trial counsel had no objections to the jury charge as given. (ROA at p. ***). Trial counsel failed to request jury charges on "Involuntary Manslaughter and Accident."

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The self-defense charge was not a beacon of clarity and did not contain the instruction that the State must disprove a self-defense claim. The Appellant does concede that this issue was not raised below and is not a proper subject for this appeal.

At the PCR hearing trial counsel conceded several times that there were facts adduced by the State in the jury trial record that supported a charge on involuntary manslaughter. (ROA at p.**). Trial counsel specifically conceded that McCune's trial testimony supported a request to charge involuntary manslaughter. (ROA at p. ***). Counsel further testified that, "...the most probable outcome at trial looked to me to be voluntary manslaughter and that's sort of what I went with." (ROA at p. **). The only evidence trial counsel had to say about the elements of voluntary manslaughter was that Owens' mother (or mother of his child) was disrespected earlier in the day. This did not occur during the brief altercation between Owens and Williams. (ROA at p. **). Trial counsel did not object to voluntary manslaughter being charged to the jury, notwithstanding the lack of facts to support "sufficient legal provocation," or "sudden heat of passion." Oddly, trial counsel testified that he went with voluntary manslaughter simply because Williams was struck in the buttocks. (ROA at p. **).

ARGUMENTS

1. THE PCR COURT ERRED IN NOT FINDING TRIAL COUNSEL DEFICIENT FOR FAILING TO REQUEST AN INVOLUNTARY MANSLAUGHTER JURY CHARGE AND SUCH DEFICIENCY SUBSTANTIALLY PREJUDICED THE APPELLANT.

At the PCR hearing, trial counsel conceded that he "should have" requested a charge on Involuntary Manslaughter based upon the facts adduced by the State at trial. (ROA at p. **). When confronted with Mr. McCune's trial testimony, trial counsel was practically

dismissive of Mr. McCune's trial testimony. Trial counsel described Mr. McCune as a "regular." "Martin McCune he's a regular." (ROA at p. **). Trial counsel conceded that the State elicited testimony from McCune at trial, "that he [Owens] wasn't trying to hit him [Williams]; that he was firing at the ground." (ROA at p. ***). At the PCR hearing, trial counsel conceded that he should have asked for an involuntary manslaughter charge, and further conceded that he did not have any strategic reason for failing to do so. (ROA at p. ***).

The PCR Court held that, "[i]t is within the Court's discretion as to what to charge the jury, as long as there is evidence in the record to support the charge." (ROA at p. ***). The PCR Court held in it's Order, "[c]ounsel also testified that he did not request a charge on involuntary manslaughter because he did not believe there was evidence enough for the judge to grant the request." (ROA at p. ***). That pronouncement is not supported by the evidence given by trial counsel at the PCR hearing and the facts introduced at the jury trial. It seems apparent that trial counsel did not believe McCune's trial testimony. It is not trial counsel's job to the weigh the credibility of the State's witnesses. McCune gave specific testimony, which was allowed into evidence that supported a jury charge of involuntary manslaughter and defense of accident.

The PCR Court erred as a matter of law, *in the context of this case*, when it held that it is in the court's *discretion* as to what to charge the jury, as long as there is evidence in the record to support the charge. "If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction." Wigington v. State, 413 S.C. 578, 776 S.E.2d 407 (S.C. Ct. App. 2015). "A trial court commits reversible error if it fails to give a

requested charge on an issue raised by the evidence presented at trial." Id. at 586, 411. "The law to be charged to the jury is determined by the evidence at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993).

Involuntary manslaughter is, "the unintentional killing of another without malice, but while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the doing of a lawful act with a reckless disregard for the safety of others." State v. Scott, 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015). Involuntary manslaughter mandates a showing of criminal negligence, defined as "the reckless disregard of the safety of others." S.C. Code Ann. §16-3-60 (2015). "Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." State v. Pittman, 373 S.C. 527,571, 647 S.E.2d 144, 167 (2007).

At the PCR hearing, trial counsel admitted several times that he "should have" requested a jury charge on involuntary manslaughter. (ROA at pp. ***). Trial counsel further conceded that Owen's acts were or could have been seen as reckless. (ROA at p. **) Further, the trial court charged self-defense based upon the facts submitted to the jury. "When the evidence shows that the defendant was lawfully armed in self-defense at the time of the shooting and the defendant recklessly handled the loaded gun," that evidence supports a charge of involuntary manslaughter. State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 470 (2008). See also, State v. Rivera, 389 S.C. 399, 404-405, 699 S.E.2d 157,159-160 (2010); Tisdale v. State, 378 S.C. 122, 125-126, 662 S.E.2d 410, 412 (2008); State v. Burris, 334 S.C. 256,265, 513 S.E.2d 104,109 (1999). Submission of a jury charge on self-defense and

an involuntary manslaughter charge are not mutually exclusive as long as there is **any** evidence to support both charges. See, State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003); Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991).

The jury found Owens not guilty of murder. The jury's verdict of not guilty on the murder charge conclusively proves that Owens acted without malice as defined in the law. Under the first alternative of involuntary manslaughter, (1) "the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm," The evidence at trial was that Owens was firing at the ground and not trying to hit Williams. (ROA at pp. ***). If Owens was found not to be acting in self-defense, then he could have been in violation of Chapter 20, Article 20, Section 20-94 of the Walterboro Municipal Code (discharging a firearm in the city limits without legal cause) a city court misdemeanor. Shooting a firearm into the ground, while presumably reckless, does not lead to the conclusion that the act was one that was naturally tending to cause death or great bodily injury, as Owens was not aiming or intending to shoot Williams according to McCune. The discharge of the firearm was outdoors and not in a crowded or confined space.

Under the second alternative of involuntary manslaughter, (2) "the doing of a lawful act with a reckless disregard for the safety of others." The "lawful act" in this case would be if Owens was entitled to act in self-defense. See, e.g. State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999). The trial evidence raises the question of whether Owens consciously disregarded the risk posed to others, i.e. acting recklessly, by discharging a firearm into the ground while outdoors.

Trial counsel's failure to request a jury charge on involuntary manslaughter fell below

professional norms and substantially prejudiced Owens. It seems obvious that the jury wanted to hold Owens criminally responsible in the death of Williams, but not for murder. Counsel's unprofessional errors in not objecting the voluntary manslaughter charge (addressed in the next argument section) and failing to request an involuntary manslaughter jury charge left the jury no other option than a finding of guilty on voluntary manslaughter, assuming the jury rejected self-defense.

The PCR court made a factual finding that trial counsel, "testified that he might should have requested an involuntary manslaughter charge, but was not sure if the judge would grant the request." (ROA at p. **). Not being sure if the judge would grant a requested jury charge is not controlling on the issue of failing to raise an issue at trial, the facts dictate the law to be charged. "The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). The PCR court committed an error of law in its' holding that counsel's uncertainty of what a trial court "might" charge was not a deviation from professional norms in criminal cases.

Moreover, the PCR court's decision was not supported by the facts in the record. The PCR court found as a matter of fact that, "[c]ounsel also testified that he did not request a charge on involuntary manslaughter because he did not believe there was evidence 'enough' fo the judge to grant the request." (ROA at p. ***). The PCR hearing record, however, provides clear evidence that trial counsel conceded several times that he "should" have requested the involuntary manslaughter charge based on the facts. (ROA at pp. ***).

Voluntary manslaughter carries a maximum sentence of thirty (30) years and is classified as a violent "no parole" crime, whereas involuntary manslaughter is a non-violent

crime with a statutory maximum of five (5) years. Further, Owens could not have been convicted of possession of a firearm during a violent crime were he convicted of involuntary manslaughter, a crime for which he received a five (5) year *consecutive* sentence. Further still, by not requesting the involuntary manslaughter jury charge, Owens was prevented from raising that issue on direct appeal. The prejudice to Owens, caused by his trial counsel's unprofessional errors, is easily understandable and readily apparent.

II. THE PCR COURT ERRED IN NOT FINDING TRIAL COUNSEL DEFICIENT FOR FAILING TO OBJECT TO A JURY CHARGE ON VOLUNTARY MANSLAUGHTER AND THAT THE DEFICIENCY SUBSTANTIALLY PREJUDICED THE APPELLANT.

The PCR court found, "[c]ounsel testified that he did not see facts supporting proper[3] provocation." (ROA at p.***). In a complete contradiction, the PCR court found, "[c]ounsel testified that he did not object to the charge of voluntary manslaughter because there were facts presented during the trial that 'could' support that charge." (ROA at p.***). The PCR court made no findings of fact from the trial record or PCR hearing record as to the elements of "sufficient legal provocation," and "sudden heat of passion," i.e. "an uncontrollable impulse to do violence," both of which must be concurrently present in order to charge voluntary manslaughter. State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010). Owens requested the PCR court to make specific findings of facts in his Rule 59(e) Motion, which the PCR court summarily denied. (ROA at p.***).

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3 Proper, meaning "sufficient legal" provocation, Appellant Owens assumes.

"Voluntary manslaughter is the intentional and unlawful killnig of a human being in sudden heat of passion upon sufficient legal provocation." State v. Niles, 412 S.C. 515, 522, 772 S.E.2d 877 (2015). To receive a voluntary manslaughter charge, "there must be evidence of sufficient legal provocation and sudden heat of passion." Id. In State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996) this Court in, in defining the elements of voluntary manslaughter stated:

> "The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, it must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called *an uncontrollable impulse to do violence*." [Emphasis added].

"Whether or not the facts constitute a sudden heat of passion is an appropriate question for the court." State v. Hernandez, 386 S.C. 655, 662, 690 S.E.2d 280, 281 (S.C. Ct. App. 2010). Trial counsel argued to the jury, "if he [Owens] went there looking for trouble, that's 'sudden heat of passion.'" (ROA at p.***). If indeed Owens went to Francis Street "looking for trouble," with Williams, that argument is the anthesis of sudden heat of passion and would constitute evidence of malice toward Williams. Trial counsel's argument to the jury makes no sense legally. Trial counsel testified that he thought voluntary manslaughter was the "most probable" outcome, "so I went with that." (ROA at p. ***). Trial counsel admitted several times that he "should have" requested a jury charge on involuntary manslaughter based upon McCune's trial testimony, but failed to raise the issue at trial.

McCune's testimony was that Owens was aiming at the ground, "just trying to scare

him." (ROA at p.***). Owen's statement was that Williams was approaching him with a gun, and "I just shot and ran." (ROA at p. ***). This Court in Niles, 412 S.C. at 523 held that since Niles' "own testimony was that he shot at the men to scare them away. Appears to support a charge of self defense, not heat of passion." "Voluntary manslaughter, by definition, requires a criminal intent to do harm to another." Id. According to McCune and inferentially by Owens' statement, there was no criminal intent to do harm. If Owens' statement were as he suggests, that Williams was approaching him with a gun and he just shot and ran, "surely the defense of self-defense would be appropriate." Id. Notably, self-defense was charged by the trial judge. As stated in Niles, "Without any evidence supporting the view that the defendant fired the fatal shots while under an 'uncontrollable impulse to do violence,' the trial court properly declined to charge the law of voluntary manslaughter." Id. The jury's not guilty verdict on the murder charge is dispositive on the fact that Owens acted without malice in the incident.

This Court held in Cook v. State, 415 S.C. 551, 784 S.E.2d 665 (2015) that merely being in fear of a decedent, does not support a finding of "sudden heat of passion," or more aptly, "an uncontrolled impulse to do violence." Firing a gun in self-defense is generally considered a rational, controlled act; an act that is not based upon "an uncontrolled impulse to do violence." In State v. Starnes, 388 S.C. 590, 598-99, 698 S.E.2d 604, 609 (2010), this Court, "affirmed the principle that 'to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence." Cook 415 S.C. at 558; See also, State v. Sims, (Op. No. 5631 SC 02/27/2019).

In this case there was no physical altercation between Owens and Williams. Owens'

statement to police (which was published to the jury, and thus in evidence) was that someone said "look," and he saw Williams advancing on him with a black gun.[4] Williams went to the SUV, got a gun from the glove-box, and stated, "I was shooting and ran. I didn't know where I was at. I didn't know what he could have did to me. I just ran and shot." (ROA at p. ***). McCune backs up Owens statement, by testifying that Owens was firing at the ground, did not intent to hit Williams and was just trying to "scare" Williams. (ROA at p. ***).

Based upon the facts presented at trial, Owens was either guilty of murder, guilty of involuntary manslaughter (recklessness) or not guilty because he acted in self-defense. "Voluntary manslaughter is not a lesser included offense of self-defense." State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604 (2010). The PCR court committed error by ignoring this evidence from the trial record and trial counsel's testimony at the hearing.

The trial record is silent as to who led the parade as to the charge of voluntary manslaughter; the State or trial counsel for Owens. Trial counsel failed to recognize the evidence supporting involuntary manslaughter, and in ignoring the lack of evidence which could support voluntary manslaughter in Owens' case, and because of that failure, Owens was prejudiced by counsel's unprofessional errors under the standard of Strickland v. Washington, and its progeny.

In State v. Cooley, 342 S.C. 63,70, 536 S.E.2d 666 (2000), this Court warned the State against improperly moving for an unwarranted charge of voluntary manslaughter in a

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4 Just as in the Cook case, no gun was found on or near the decedent.

murder case by stating, "[t]his is a cautionary tale for solicitors as to the pitfalls of requesting a potential 'compromise' charge which is unsupported by the evidence." Mr. Owens' case should likewise be "a cautionary tale," which applies to trial counsel for not objecting to a 'compromise' charge of voluntary manslaughter when such a charge is unwarranted. This averment is especially true when, as here, a viable charge of involuntary manslaughter is readily available based upon the trial record. The PCR court failed to analyze the evidence submitted, and therefore committed an error of law and made findings not supported by the evidence.

III. THE PCR COURT ERRED IN FAILING TO RULE AND/OR DENYING THE APPLICANT'S MOTION TO AMEND HIS APPLICATION PURSUANT TO RULES 59(e) AND 15(b) SCRCP.

The PCR court stated in its Order that it set forth, "the relevant findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985)." (ROA at p. ***). Owens confronted his trial counsel[5] at the PCR hearing with McCune's trial testimony. The PCR Order is devoid of any facts from the jury trial record. The PCR Order is likewise devoid of any legal analysis as to why voluntary manslaughter was an appropriate jury charge or as to why involuntary manslaughter was not an appropriate jury charge. The PCR court sent an e-mail on April 4th 2019 stating that:

> "After careful and considerate deliberation, and based upon

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5 The PCR Order references "William Brunson" of Sumter County as Owen's trial counsel. David Matthews of the 14th Circuit Public Defender's office represented Owens at trial in Colleton County and testified at the PCR hearing. (ROA at p. ***).

> the record before the Court in its entirety, Judge Seals hereby denies all PCR Applications heard this week in Beaufort County. Mr. Limbaugh, Judge Seals requests you prepare an Order to that effect for each case for his signature. Please send these Orders to Judge Seal's chambers along with a SASE so a signed copy of the Order mat be returned to you for filing. I hope everyone has a good afternoon." (ROA at p. ***).

The e-mail did not give the State any direction or analysis of law or fact upon which to deny relief in any of the four cases heard on April 1-2, 2019. The PCR court abrogated to the State its core function to assess the evidence and apply the law as to why and on what grounds the Applications were denied. Further, the PCR attorneys were not afforded an opportunity to review the Orders dismissing the Applications with prejudice issued by the PCR court until after they were signed and filed. Upon receipt of the PCR court's Order, Owens filed and served a Rule 59(e) Motion requesting the Court to reconsider and/or make specific findings of fact and law in its' Order written by the Attorney General. (ROA at pp. ***).

The State informally responded via e-mail that Owens did not move to amend his pleadings to include a claim of ineffective assistance of counsel for failing to request an involuntary manslaughter charge despite evidence raised at the trial to warrant such a charge. The State's informal response to the Applicant's Rule 59(e) Motion to alter or amend and to make more definite and specific findings of fact and conclusions of law, was based solely upon on procedural grounds. The State's informal email did not respond to any substantive issues raised in the Owens' Motions. (ROA at pp. ***).

The State contended that, as to the issue of trial counsel's failure to request a jury

charge on involuntary manslaughter, the PCR Application did not contain this issue, nor did Owens move to amend his Application to include such a claim. Owens did raise the ineffective assistance of counsel issue in his PCR Application as to the voluntary manslaughter jury charge. At the PCR hearing Owens trial counsel testified that he thought the voluntary manslaughter charge was available despite the fact that no temporal provocation existed between Owens and the decedent, nor was there any evidence at trial that Owens acted in a sudden heat and passion, or an uncontrollable impulse to do violence when firing the pistol and the ground.

At the PCR hearing, trial counsel was questioned about not objecting to the voluntary manslaughter charge. Extensive examination was focused on trial counsel's failure to request an involuntary manslaughter jury charge. Trial counsel admitted he failed to recognize the involuntary manslaughter evidence, failed to request such a jury charge and had no strategic reasons for not objecting to a voluntary manslaughter jury charge and no reason for not requesting an involuntary manslaughter jury charge notwithstanding evidence in the trial record which supported such a jury charge. (ROA at p. ***). The State did not object to the line of questioning, fully participated in the cross-examination of Owens' trial counsel and addressed the involuntary manslaughter charge in his closing arguments to the PCR court. (ROA at p. ***).

To the extent necessary, Owens moved to Amend his Application to allege more specifically the trial counsel's failure to request the involuntary manslaughter jury charge based upon the evidence introduced (by the State no less) at Owens' jury trial, pursuant to Rule 15(b) of the S.C. Rules of Civil Procedure (SCRCP). There is no doubt that this issue

was tried by consent, addressed and argued during the PCR hearing. The State did not object to this line of questioning, did not request a continuance, claimed no prejudice during the hearing and fully participated in cross-examination and closing argument as to the involuntary manslaughter evidence and failure of counsel to request that charge at trial.

"Motions to conform to proof made be made upon motion of any party at any time, *even after judgment.*" Ball v. Canadian Am. Express Co., 314 S.C. 272,275, 442 S.E.2d 620, 622 (S.C. Ct. App. 1994)(Emphasis added). Rule 15(b) (SCRCP) is "intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel." Pool v. Pool, 329 S.C. 324, 494 S.E.2d 820 (S.C. 1997)(Quoting with approval from 6A Federal Practice & Procedure §1491). "The focal inquiry in allowing amendment of pleadings is whether doing so will prejudice the opposing party." Id., See also, Soil & Material Eng'rs, Inc. v. Folly Assocs., 293 S.C. 498,501, 361 S.E.2d 779, 78 (S.C. Ct. App. 1987).

The State has not claimed, and cannot now claim that it was prejudice or unfairly surprised by the evidence of ineffective assistance of trial counsel at the PCR hearing for not requesting an involuntary manslaughter jury charge. The burden of proof on establishing prejudice is on the party opposing the Motion to Amend. Foggie v. CSX Transportation, Inc., 315 S.C. 17,23, 431 S.E.2d 587, 590 (1993).

"Ordinarily, amendments to conform to proof should be liberally allowed." Ball, 442 S.E.2d at 622. The prejudice Rule 15 (SCRCP) envisions is "a lack of notice, and a lack of opportunity to refute it." Folly Assocs., 361 S.E.2d at 501. Therefore, without the opposing party's proof of prejudice, Rule 15(b) (SCRCP) has a "bias in favor of granting

amendments." "Unless there is a substantial reason to deny leave to amend, the discretion of the circuit court is not broad enough to permit denial." Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 369 S.E.2d 156 (S.C. Ct. App. 1988).

Although Owens submitted a Rule 59(e) (SCRCP) motion to alter or amend, the PCR court gave no response to the issues raised therein. Owens then submitted a Supplemental Rule 59(e) Motion, which included a Rule 15(b) (SCRCP). The PCR court did not address any of the issues raised in either motion. The PCR Court issued a handwritten Form 4 Order stating:

> "This matter comes before the Court on Applicant's Motion to Alter or Amend Judgment under Rule 59(e). After careful and deliberate reconsideration of the arguments made at the evidentiary hearing, the Court's Order denying and dismissing the application with prejudice, the Motion to Alter or Amend Judgment, all evidence presented, case law, and the State's Return to Applicant's Motion, the Court is hereby denying Applicant's Motion to Alter or Amend Judgment under Rule 59(e)."

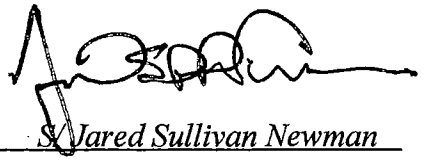
(ROA at p. ***). There is no mention in the Form 4 Order of Owens' Supplemental Motion addressing the Amendment of the Application based upon Rule 15(b) (SCRCP). The PCR court's use of "careful and deliberate consideration" (Original Order of Dismissal) and "careful and deliberate *re*consideration," (Form 4 Order) are hollow words and shorthand for evading the mandates of S.C. Code Ann. §17-27-80 (1985).

CONCLUSION

For the reasons stated above, this Court should reverse the the judgment of the circuit court, grant Owens' Application for Post Conviction Relief, and grant a new trial limited to

the charge of involuntary manslaughter.

Respectfully Submitted,



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