

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Horry County

William H. Seals, Circuit Court Judge
—————

BRITTANY A. JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000012
—————

PETITION FOR WRIT OF CERTIORARI
—————

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Aug 31 2020

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INDEX

INDEX i

ISSUES PRESENTED.....1

STATEMENT.....2

ARGUMENTS

 ARGUMENT I

 Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the improper jury instruction which allowed the jurors to infer malice from the use of a deadly weapon where the only issue in the case was whether Petitioner acted with malice, evidence in the record excused and reduced the offense, and the jury struggled for three days to arrive at a verdict, which was the product of a coercive instruction in order to avoid a mistrial.10

 Relevant facts.....10

 Discussion.....13

 ARGUMENT II

 The PCR court erred in finding Petitioner failed to prove by a preponderance of the evidence that there was a reasonable probability the trial judge’s erroneous instruction that informed the jury that its “one single objective” was “to seek the truth” contributed to the guilty verdict where the jury deliberated over the course of three days after hearing conflicting eyewitness accounts and the judge issued multiple coercive instructions to avoid a mistrial.19

 Relevant Facts.....19

 Discussion.....20

CONCLUSION.....25

ISSUES PRESENTED

I. Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the improper jury instruction which allowed the jurors to infer malice from the use of a deadly weapon where the only issue in the case was whether Petitioner acted with malice, evidence in the record excused and reduced the offense, and the jury struggled for three days to arrive at a verdict, which was the product of a coercive instruction in order to avoid a mistrial?

II. Did the PCR court err in finding Petitioner failed to prove by a preponderance of the evidence that there was a reasonable probability the trial judge's erroneous instruction that informed the jury that its "one single objective" was "to seek the truth" contributed to the guilty verdict where the jury deliberated over the course of three days after hearing conflicting eyewitness accounts and the judge issued multiple coercive instructions to avoid a mistrial?

STATEMENT

Around March 2007, sixteen-year old Petitioner began dating Franklin “Putty” Pyatt. App. 324, l. 21 – App. 325, l. 3. At the time, Pyatt lived in an apartment complex with his girlfriend, Monica Burroughs, the deceased. App. 326, ll. 15-16. Eventually, the deceased learned about Pyatt’s relationship with Petitioner. App. 327, ll. 10-15. After the deceased confronted Petitioner about the relationship in August 2007, Petitioner never returned to the deceased’s home unless Pyatt assured Petitioner the deceased was not around. App. 330, ll. 18-21. However, the ill will between the deceased and Petitioner continued.

A couple of months later, Petitioner was in the backyard waiting for Pyatt when the deceased arrived home. App. 333, ll. 1-8. After the deceased and Pyatt argued in the house, the deceased and her sister approached Petitioner in the backyard. App. 333, ll. 11-16. The deceased took off her shoes and her jewelry and threatened to beat Petitioner. App. 334, ll. 4-13. Petitioner left, avoiding a confrontation. App. 334, ll. 23-24. Despite earlier efforts to avoid a physical altercation, on December 14, 2007, Petitioner and the deceased physically fought. App. 336, ll. 11-18; App. 339, l. 22 – App. 340, l. 12.

In March 2008, the deceased called Petitioner to tell her that whatever was between the two of them – meaning Petitioner and Pyatt – was between them. App. 347, ll. 8-11. However, on May 16, 2008, the deceased confronted Petitioner because she had learned Petitioner was pregnant with Pyatt’s child. App. 349, ll. 1-16. The deceased told Petitioner to stay away from Pyatt and pulled out a black gun. App. 349, ll. 17-19. From that day forward, Petitioner carried a gun for protection. App. 363, ll. 2-9. Three days later, Petitioner had an abortion. App. 351, ll. 10-12.

At least two weeks prior to June 24, 2008, the deceased and Franklin “Putty” Pyatt broke up. App. 242, ll. 19-22.

On June 23, 2008, Petitioner and Pyatt argued because Petitioner believed Pyatt forced her to get an abortion to save his relationship with the deceased. App. 353, ll. 4-25. The argument turned physical while the deceased encouraged Pyatt to hurt Petitioner. App. 354, ll. 2-6; App. 356, ll. 1-20.

The following morning, on June 24, 2008, Petitioner was waiting on her friend, Tamika Skipper, to arrive home. App. 287, ll. 8-13; App. 361, ll. 16-17. When Skipper arrived home, the two entered the home and talked. App. 288, ll. 6-9; App. 362, ll. 3-5. Skipper left Petitioner at her home while she went to Subway to get lunch. App. 288, l. 10 – App. 289, l. 2; App. 362, ll. 10-14. Skipper lived in the same apartment complex as the deceased. In fact, the two lived in apartments that were diagonally across from each other. App. 289, ll. 4-10.

When Skipper returned from Subway, Petitioner went to “the bootlegger house,” which was in the same apartment complex, to buy some cigars. App. 291, ll. 8-10; App. 364, ll. 8-9. Skipper asked that Petitioner get her some strawberry cookies from the bootlegger. App. 292, ll. 10-12. On her way, Petitioner heard the bootlegger call out her name. App. 365, ll. 2-14.

While Skipper was on her porch, she saw Petitioner across the street and the deceased in a Jeep backing out. App. 293, ll. 15-18. When the brake lights turned on, four doors opened, and four people surrounded Petitioner in a threatening manner. App. 293, ll. 18-20; App. 298, ll. 22-23. Skipper ran toward her friend. App. 293, l. 20. While running toward Petitioner, Skipper heard a shot, which stopped her. App. 298, ll. 9-10. Petitioner and the deceased were within arms’ length when the shot rang out. App. 299, ll. 11-20. Petitioner looked stunned. App. 298,

ll. 12-13. The others ran away. App. 300, ll. 11-12. Skipper told her friend, Petitioner, to run. App. 300, ll. 12-13.

Unsurprisingly, the occupants of the Jeep told a different story. Joanne Davis, Teresa Cox, and the deceased, who was Davis's stepsister, were sitting in a Jeep when Petitioner approached them. App. 188, l. 25 – App. 190, l. 1; App. 228, ll. 13-17. Davis lived across the street from the deceased. App. 186, ll. 2-16. The three women were parked in the lot in front of the deceased's apartment. App. 190, l. 20 – App. 191, l. 25; App. 227, ll. 6-8. Although two of the women lived just feet from the car, the three women sat in the car with the doors open “[j]ust talking.” App. 192, ll. 5-15; App. 229, ll. 6-7; App. 230, ll. 3-9.

Davis claimed that Petitioner “approached the vehicle,” but then she backtracked and indicated she did not see Petitioner until she was “in the front seat ... like she was trying to get on top of [the deceased].” App. 193, ll. 5-20. Further, Davis alleged Petitioner “had a gun in her hand” and was trying to hit the deceased with the gun. App. 193, ll. 12-13. Later, Davis alleged Petitioner “was trying to pistol whip” the deceased. App. 194, l. 9. However, according to Davis, the deceased blocked Petitioner's efforts. App. 194, ll. 16-19.

Davis and Cox jumped out of the Jeep, while Petitioner and the deceased were “hand to hand.” App. 195, ll. 4-17. Davis explained the deceased got out of the car and then, Petitioner and the deceased were “tussling hand to hand together.” App. 197, ll. 19-24. According to Davis, as she walked around the Jeep to where Petitioner and the deceased were, “they [were] already separated.” App. 198, ll. 1-18. She clarified, they were not “touch[ing] each other anymore,” but they were “[n]ot far apart.” App. 198, ll. 17-21. Davis also claimed that “[a]s [she] was going to the front of the car to go around, [she] heard a gunshot.” App. 199, ll. 22-23. Upon hearing the gunshot, Davis “ducked down.” App. 200, ll. 3-4. She was still at the front

end of the car when she heard the gunshot. App. 200, ll. 7-11. The deceased then ran by Davis. App. 200, ll. 15-23.

Davis alleged that Petitioner then said, “I told you I was going to get you, bitch” several times. App. 201, ll. 19-21. Seconds later, Petitioner left. App. 202, ll. 10-16. Davis went to the deceased’s home, which was nearby, to check on her. App. 202, ll. 20-24. Davis found the deceased lying on the porch beside her house. App. 203, ll. 10-11.

The day after the shooting, Davis told police that she did not believe Petitioner intended to shoot the deceased. App. 209, ll. 21-25; App. 210, ll. 14-17; app. 211, ll. 1-7. Additionally, Davis told the police that the two were struggling when the gun went off. App. 214, ll. 8-14. Davis elaborated that the deceased was trying to take the gun from Petitioner. App. 215, ll. 11-14. She told the police Petitioner and the deceased were in close combat when the gun went off. App. 217, ll. 4-19.

Cox’s version of events differed from Davis’s version in some key aspects. Cox alleged that she saw Petitioner entering the car with her right hand. App. 230, ll. 12-18. Cox could tell there was something in her hand, but she was unsure what it was. App. 230, ll. 20-22. According to Cox, the deceased grabbed Petitioner’s hand and jumped out of the car. App. 231, ll. 1-2. Cox jumped out as well. App. 231, ll. 4-5. Before Cox could make it from the driver’s seat to the front tire, she heard a shot, which forced her to duck down behind her car. App. 231, ll. 5-6; App. 233, ll. 18-19. Cox claimed there was no tussle between the two women. App. 231, ll. 13-21. After hearing the gunshot, Cox saw the deceased run past her. App. 234, ll. 16-20. Later that day, Cox told the police that Petitioner “probably didn’t know she’d shot [the deceased], probably thought she’d fired the gun in the air.” App. 240, l. 23 – App. 241, l. 18.

The deceased died as a result of a gunshot to the chest with massive hemorrhage. App. 271, ll. 12-14; App. 272, ll. 3-8. The physical evidence supported the firing of a single shot as well. The police collected a .45 caliber shell casing and a projectile. App. 253, ll. 2-13; App. 254, ll. 1-15. After Petitioner's arrest, she cooperated with law enforcement by providing a statement. App. 129, ll. 6-25. Despite Petitioner guiding the police to the area where she dropped the gun, the police never recovered the weapon. App. 138, ll. 12-25; App. 254, l. 25 – app. 255, l. 7.

On September 25, 2008, an Horry County grand jury indicted Petitioner for murder (2008-GS-26-3648). App. 848-849. The state, represented by Scott A. Graustein, called the case to trial before the Honorable Edward B. Cottingham and a jury on February 7-11, 2011. App. 1. Ronald Hazzard represented Petitioner. App. 1.

The jury began deliberating at 11:59 a.m. on February 9, 2011. App. 461, ll. 8-9. Three hours later, the jury asked to watch Petitioner's statement to law enforcement again. App. 462, ll. 2-9. At 6:20 p.m., the jury returned to the courtroom with another question; this time the question concerned the definition of malice. App. 468, ll. 8-17. At 6:48 p.m., the jurors went home for the evening. App. 477, ll. 24-25. On February 10, 2011, at 9:58 a.m., the jurors returned to continue deliberating. App. 482, ll. 2-4. An hour later, the jury reported they were "nine to three in [their] discussions" and that one juror repeatedly stated he or she would not change his or her mind. Finally, the jurors continued to review and re-read the judge's instructions on the law. App. 482, ll. 5-18. The judge instructed the jurors to continue deliberating. App. 483, ll. 20-21.

At 4:24 p.m., the jury informed the court they were “at eleven to one.” App. 485, ll. 9-10. The judge instructed them to continue deliberating. App. 485, ll. 11-12. Defense counsel explained that because the jury note indicated one juror was not willing to discuss the matter further, the judge should give an Allen¹ charge. App. 485, ll. 19-20. The judge refused because the jury did not indicate it was “hung up.” App. 485, ll. 21-23. Thirty minutes later, the jury informed the judge that they were “at eleven to one after much deliberation” and that “one juror [was] not willing to discuss it further.” App. 487, ll. 12-13. The judge instructed the jury that a juror who intimated that he was not going to discuss his position “is not rendering efficient jury service.” App. 487, ll. 20-22. Zeroing in on the holdout, the judge stated that a juror who refused to discuss the case was not “doing justice to our system of justice.” App. 488, ll. 1-4.

Thereafter, the judge allowed the jury to go home for the evening. App. 488, ll. 6-9. However, he gave them further instructions, including that a mistrial may occur, which “helps no one.” App. 488, ll. 11-12. He informed that jurors that a mistrial would result in the case be tried again. App. 488, ll. 11-18. He insisted that “all jurors, at least, discuss their positions with everyone else to see if their positions is the correct one.” App. 488, ll. 22-24; App. 489, l. 9. Notably, the judge instructed the jurors:

I don’t know what [juror] is failing to say anything but, apparently, he or she won’t even discuss it. Well, that’s not jury service.

Whoever it is is entitled to their opinion and entitled to talk to the majority of you to see if you might be convicted by what they say.

On the other hand, the majority of you are entitled to her to see if she – he or she is, perhaps, wrong in their view.

But it is important in our judicial system that we get this resolved.

¹ Allen v. United States, 164 U.S. 492 (1896).

App. 489, ll. 10-20. Succinctly, the judge stated that if the case ended in a mistrial, it meant “our [jury] system does not work.” App. 489, ll. 23-24. “And so it is if at all possible, whatever you do, I want an opinion that is unanimous.” App. 489, l. 25 – App. 490, l. 1.

The jury returned at 9:30 a.m. on February 11, 2011, to resume its deliberations. App. 493, ll. 2-5. Approximately an hour later, the jury asked to see the written transcripts of the witnesses’ depositions.” App. 493, ll. 6-12. The judge instructed the jurors that the transcripts were not available. App. 493, ll. 14-16. At 10:18 a.m., the jury requested to rehear all of the testimony in the case. App. 494, ll. 21-25. The judge exclaimed that it was the only time in his twenty-seven years on the bench that a jury had made such a request. App. 494, ll. 21-25. While offering to comply with the jury’s request, the judge asked them to narrow their request to “some particular testimony.” App. 495, ll. 1-9. The jury resumed deliberations at 10:26 a.m. and returned with its verdict at 11:25 a.m. App. 498, ll. 19-20; App. 499, ll. 1-3.

The jury found Petitioner guilty as charged. App. 500, ll. 16-19. Judge Cottingham sentenced Petitioner to thirty years imprisonment. App. 509, l. 25 – App. 510, l. 1; App. 850.

Petitioner appealed her conviction and sentence. Breen Stevens represented Petitioner on appeal. App. 518-545. On appeal, Petitioner challenged the trial judge’s admission of her statement to police, his failure to grant a mistrial for premature deliberations, his failure to charge the jury with self-defense, and his failure to charge the jury with involuntary manslaughter. App. 518-545. On June 26, 2013, the Court of Appeals reversed Petitioner’s conviction in an unpublished opinion based upon the trial judge’s admission of Petitioner’s statement to law enforcement into evidence. App. 588-589; State v. Johnson, Op. No. 2013-UP-288 (S.C. Ct. App. filed June 26, 2013). The state filed a petition for rehearing, which was denied on August 22, 2013. App. 590-614. Thereafter, the state filed a petition for writ of

certiorari. App. 616-646. Benjamin Tripp, representing Petitioner, filed a return. App. 637-673. This Court granted the petition on September 11, 2014. App. 674. On March 4, 2015, this Court reversed the Court of Appeals. App. 755-764; State v. Johnson, 413 S.C. 458, 467, 776 S.E.2d 367, 372 (2015).

Pursuant to Petitioner's request, this Court remanded the case to the Court of Appeals for review of the remaining issues she raised on appeal. App. 765-777. On remand, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. App. 778-781; State v. Johnson, Op. No. 2016-UP-353 (S.C. Ct. App. filed July 6, 2016). Remittitur was sent on July 22, 2016. App. 782-783.

Petitioner filed her application for post-conviction relief (PCR) on October 11, 2016. App. 784-791. On November 14, 2018, through counsel, Petitioner amended her application. Supp. App. 1. The matter proceeded to an evidentiary hearing on March 26, 2019, before the Honorable William H. Seals, Jr. App. 800. Lindsey McCallister represented the state, and James K. Falk represented Petitioner. App. 800. By an order issued on December 5, 2019, Judge Seals denied Petitioner relief from her conviction and sentence. App. 834-847.

On December 31, 2019, Petitioner served her notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

I. Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the improper jury instruction which allowed the jurors to infer malice from the use of a deadly weapon where the only issue in the case was whether Petitioner acted with malice, evidence in the record excused and reduced the offense, and the jury struggled for three days to arrive at a verdict, which was the product of a coercive instruction in order to avoid a mistrial.

Relevant facts

The judge instructed the jury that “[m]alice is said to be expressed when there is manifested a violent, deliberate intention unlawfully to take away the life of another human.” App. 412, l. 24 – App. 413, l. 1. He further instructed the jury that “[m]alice may be implied where one intentionally and deliberately does an unlawful act which he or she then knows to be wrong and in violation of her duty to another.” App. 413, ll. 2-4. Next, the judge instructed that “[m]alice may be implied when no excuse or legal provocation for the killing appears and when the circumstances attending the killing show an abandoned heart, a malignant heart fatally bent upon mischief.” App. 413, ll. 5-8. Finally, he instructed:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise if facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction. This inference would simply be another 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 in your judgment determine it should receive.

In other words, the inference of malice from the use of a deadly weapon is simply an evidentiary fact that you may take into consideration along with all of the other evidence in this case.

App. 413, ll. 12-23. Trial counsel did not object to the instruction. App. 422, ll. 8-9.

In his opening statement, trial counsel informed the jurors that the evidence would show the gun discharged during a struggle between Petitioner and the deceased. App. 118, l. 13 – App. 119, l. 10. Thus, according to trial counsel the killing was unintentional. App. 118, l. 13 – App. 119, l. 10. Similarly, in his closing argument, trial counsel focused his attention on the element of malice to argue that Petitioner was not guilty of murder due to the state’s failure to present evidence of this essential element. App. 424, l. 20 – App. 425, l. 25; App. 435, l. 25 – App. 436, l. 19.

At the PCR hearing, trial counsel explained that his strategy was to “paint the picture” that shooting of the deceased was the “inevitable escalation” of the interactions between Petitioner and the deceased, which consisted of verbal threats, physical altercations, and the brandishing of a gun by the deceased. App. 811, ll. 7-14. Further, “[t]he escalation” of animosity “ramped up” on the deceased’s side because Petitioner had become pregnant by the deceased’s boyfriend. App. 815, ll. 1-6. One witness said that Petitioner and the deceased were “hand to hand,” which trial counsel used to argue the two were engaged in a fight and the gun discharged accidentally. App. 815, l. 25 – App. 816, l. 8. In essence, the evidence supported trial counsel’s argument that there was no malice. App. 816, ll. 5-9.

Most importantly, the solicitor told the jury that the only question for the jury was whether Petitioner killed the deceased with malice aforethought. App. 452, ll. 20-25. Petitioner admitted to shooting the deceased; thus, the only question for the jury was whether it was murder, voluntary manslaughter, or an accident. App. 452, ll. 13-25. To answer the question of “was there malice,” the solicitor informed the jurors, “you can infer malice.” App. 453, ll. 1-2. He admitted his own witnesses told the police that they did not think Petitioner intended to kill the deceased, but he encouraged the jurors to ignore that evidence because “[w]ell, what do they

know?” App. 453, ll. 3-5. Completely undermining the law on voluntary manslaughter, the solicitor told the jurors that deciding the pull the trigger was enough to establish malice. App. 455, ll. 4-8.

Six hours into the jury’s deliberation, the jury sent a note to the jury explaining they did not understand malice. App. 468, ll. 10-11; App. 469, ll. 18-19. The judge noted that the jury should not concern itself with Matlock or Columbo; rather, the judge emphasized the jury must base its verdict on the law as given to them by the judge. App. 469, ll. 8-17. He then read the instructions to the jury again, and provided a written copy of the instructions, which he ordered the jurors to read. App. 469, l. 18 – App. 471, l. 6. After instructing the jurors to listen to the statement regarding the length of time malice must exist in the mind of the defendant prior to the act, the judge repeated the erroneous instruction regarding inferring malice from the use of a deadly weapon. App. 470, l. 5 – App. 471, l. 6.

Trial counsel admitted he failed to object to the instruction that allowed the jurors to infer malice from the use of a deadly weapon. App. 818, ll. 21-24. Further, trial counsel admitted he “clearly should have objected.” App. 818, ll. 21-24. He had no strategic reason for not objecting. App. 818, l. 25 – App. 819, l. 1.

The PCR court found trial counsel was deficient in failing to object to the judge’s instruction that the jury could infer malice from the use of a deadly weapon. App. 842.² Nevertheless, the PCR court found Petitioner “failed to prove she was prejudiced by counsel’s failure to object because there was substantial evidence from which the jury could find malice other than from [Petitioner]’s use of a deadly weapon.” App. 842. The PCR court noted the trial judge instructed the jury on “two additional bases on which the jury could find implied malice.”

²The state conceded the instruction was improper during the PCR hearing. App. 830, ll. 19-24.

App. 843. According to the PCR court, the most significant evidence presented was that Petitioner went looking for the deceased the day before the shooting and stood outside the deceased's house waving her gun and yelling at the deceased. App. 843. Additionally, the PCR court noted Petitioner "initiated an unprovoked attack," fled the scene, and was apprehended days later in another county. App. 843. Further, the PCR court noted the state "did not argue the jury should find implied malice from the use of the gun." App. 843. After quoting statements allegedly made by Petitioner, the PCR court found the "statements were sufficient evidence by which the jury could find the existence of expressed malice, beyond a reasonable doubt." App. 844. Thus, the PCR found "no reasonable probability the erroneous jury instruction contributed to the jury's verdict." App. 844.

Discussion

The Fifth, Sixth, and Fourteenth Amendments require that the state must prove each element of a crime beyond a reasonable doubt. See State v. Brown, 360 S.C. 581, 595, 602 S.E.2d 392, 400 (2004) ("[T]he United States Supreme Court recently has re-emphasized the constitutional protections of surpassing importance contained in the Fourteenth Amendment's due process clause and the Sixth Amendment right to a jury trial, which indisputably entitle a defendant to a jury determination that he is guilty of every element of the crime which he is charged, beyond a reasonable doubt." (internal quotations omitted)); see also In re Winship, 397 U.S. 358 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); Jackson v. Virginia, 443 U.S. 307, 314 (1979) ("A meaningful opportunity to defend, if not the right to trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused."). When a jury

charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant, the Due Process Clause of the Fourteenth Amendment is violated. Sandstrom v. Montana, 442 U.S. 510, 524 (1979); Mullaney v. Wilbur, 421 U.S. 684, 703-704 (1975).

Two years before Petitioner’s trial, this Court addressed the implied malice instruction at issue. In State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-804 (2009), this Court overruled prior law and held “that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide.”

Belcher was convicted of murder and possession of a firearm during the commission of a violent crime following the shooting of his cousin. Belcher, 385 S.C. at 600, 685 S.E.2d at 803. The jury was charged with the offenses of murder and voluntary manslaughter, as well as self-defense. Id. This Court noted that of special importance was the jury instruction that permits an inference of malice from the use of a deadly weapon. Id. Belcher argued on direct appeal that because the evidence presented a jury question on self-defense, the trial judge committed error by charging the jury that it may infer malice from the use of a deadly weapon. Belcher, 385 S.C. at 601, 685 S.E.2d at 804. Belcher asserted that the permissive inference charge violated South Carolina common law and the state’s constitutional prohibition against charging juries on the facts. Belcher, 385 S.C. at 602, 685 S.E.2d at 804.

After an extensive review of the South Carolina’s jurisprudence in this area, this Court discovered that when the permissive inference charge first developed in the late nineteenth century it was subject to “some qualification,” specifically “the recognition that some facts will not permit the inference of malice from the use of a deadly weapon.” Belcher, 385 S.C. at 604, 685 S.E.2d at 806. This Court stated, “We are persuaded . . . that this qualification relates to

homicide prosecutions where the evidence shows the death may have been something less than murder—that is, mitigated, excused or justified.” Belcher, 385 S.C. at 605, 685 S.E.2d at 806. This Court recognized that it later “began a slow, and at first almost imperceptible, retreat” from above established law and that “by the 1970s, juries were routinely charged in any murder prosecution involving a deadly weapon that ‘malice is presumed from the use of a deadly weapon.’” Belcher, 385 S.C. at 605-608, 685 S.E.2d at 806-807.

Believing that the earlier cases more closely reflect the “proper application of the charge,” this Court concluded “that instructing a jury that ‘malice may be inferred by the use of a deadly weapon’ [was] confusing and prejudicial where evidence [was] presented that would reduce, mitigate, excuse or justify the homicide. A jury charge [was] no place for purposeful ambiguity.” Belcher, 385 S.C. at 611, 685 S.E.2d at 809. In light of the evidence of self-defense presented at Belcher’s trial and it was “conceivable that the only evidence of malice was Belcher’s use of a handgun,” this Court held the permissive inference charge was not harmless error and Belcher was entitled to a new trial. Belcher, 385 S.C. at 612, 685 S.E.2d at 810.

In effect, the Belcher ruling “return[ed] to the rationale” of prior South Carolina jurisprudence on the matter dating back to the late nineteenth century, and overturned existing case law to the contrary that occurred in the intervening century. Id.

The question presented is whether Petitioner proved by a preponderance of the evidence that she suffered prejudice as a result of the judge’s erroneous jury instruction that malice could be inferred from the use of a deadly weapon. In short, is there a reasonable probability that the erroneous jury instruction contributed to the jury’s verdict? In this case, the answer is a resounding yes as demonstrated by the jury’s struggles during deliberations.

The PCR court concluded Petitioner failed to satisfy her burden because there was substantial evidence from which the jury could find malice other than from her use of a deadly weapon. However, the PCR court completely ignored the revelations in the trial transcript that the jury struggled – **over the course of three days** – with the concept of malice. While the PCR court correctly noted the trial judge instructed the jury on other forms of implied malice and that the solicitor did not argue that he proved malice through the use of a deadly weapon, the PCR court neglected to consider that the solicitor admitted the entire case boiled down to whether Petitioner acted with malice and he told the jurors to imply malice in the case. See App. 452, ll. 20-25; App. 452, ll. 13-25; App. 453, ll. 1-2. In his closing argument, the solicitor admitted his own witnesses told the police that they did not think Petitioner intended to kill the deceased, but he encouraged the jurors to ignore that evidence. App. 453, ll. 3-5.

The best evidence of a reasonable probability that the judge's erroneous instruction contributed to the verdict is what was revealed during the jury's deliberations. The jury began deliberating at 11:59 a.m. on February 9, 2011. App. 461, ll. 8-9. Around 3 p.m., the jury asked to watch the video of Petitioner's statement to police again. App. 462, ll. 2-9. After deliberating for six hours, the jury expressed its frustration with understanding the concept of malice. App. 468, ll. 10-11; App. 469, ll. 18-19. Snidely, the judge told the jurors not to play Matlock or Columbo, and he emphasized that the jurors must decide the case based on the law as he alone instructed. App. 469, ll. 8-17. This included the erroneous implied malice instruction, which the judge provided to the jurors again verbally and in writing, which he ordered the jurors to read. App. 469, l. 18 – App. 471, l. 6. At 6:48 p.m., the jurors went home for the evening. App. 477, ll. 24-25.

On February 10, 2011, at 9:58 a.m., the jurors resumed deliberations. App. 482, ll. 2-4. An hour later, the jury informed the judge they were “nine to three” and that one juror was steadfast in his or her view. App. 482, ll. 5-18. The judge instructed the jurors to continue deliberating. App. 483, ll. 20-21. At 4:24 p.m., the jury informed the court they were “at eleven to one.” App. 485, ll. 9-10. The judge instructed them to continue deliberating. App. 485, ll. 11-12.

Thirty minutes later, the jury informed the judge that they were “at eleven to one after much deliberation” and that one juror was unwilling to discuss it further. App. 487, ll. 12-13. The judge then reprimanded the holdout in front of the others. Repeatedly, the judge scolded the juror for refusing to discuss the case by insisting the juror was not “rendering efficient jury service” and not “doing justice to our system of justice.” App. 487, ll. 20-22; App. 488, ll. 1-4. The judge continued, explaining that if they failed to render a verdict a mistrial would occur, which would help no one. App. 488, ll. 11-12. The judge ordered “all jurors, at least, discuss their positions with everyone else to see if their positions is the correct one.” App. 488, ll. 22-24; App. 489, l. 9. He then returned to his original theme by stating that the juror who was not discussing his or her opinion was not engaging in “jury service.” App. 489, ll. 10-20. According to the judge, the majority was “entitled” to see if the holdout was “wrong in their view.” App. 489, ll. 10-20. He then emphasized that it was “important to our judicial system” to resolve the case. App. 489, ll. 10-20. Chidingly, the judge warned that if the jurors did not reach an unanimous verdict, then it meant “our [jury] system does not work.” App. 489, ll. 23-24. He then excused the jurors for the evening.

Returning at 9:30 a.m. on February 11, 2011, the jury resumed deliberating. App. 493, ll. 2-5. An hour later, the jury requested copies of the written transcripts of the witnesses’

depositions.” App. 493, ll. 6-12. The judge informed them that the transcripts were unavailable. App. 493, ll. 14-16. At 10:18 a.m., the jury requested to rehear all of the testimony in the case. App. 494, ll. 21-25. After bemoaning how much time it would take to hear the testimony repeated, the judge proclaimed that no jury had requested to rehear the testimony of an entire trial during his twenty-seven years as a judge. App. 494, ll. 21-25. He asked the jury to narrow their request to “some particular testimony.” App. 495, ll. 1-9. Instead, the jury resumed deliberations at 10:26 a.m. and returned with its verdict at 11:25 a.m. App. 498, ll. 19-20; App. 499, ll. 1-3.

The entire case centered on whether Petitioner killed the deceased with malice – as the solicitor admitted. The jury struggled to answer this very question, which was abundantly clear by the notes the jury shared with the judge. Not only did the jury hear the erroneous instruction once, but the jury heard it again when it requested a greater understanding of malice. Further, the judge gave the jurors the erroneous instruction in written form and ordered them to read it, which the jurors affirmed they did – multiple times. When the jury continued to express doubts, the judge berated the holdout by insisting the juror was not engaging in jury service and the holdout’s refusal to go with the majority would mean the jury system did not work. Despite the PCR judge’s insistence that there was an abundance of evidence of malice apart from the use of a deadly weapon, the jury’s actual deliberation, which occurred over three days, shows otherwise. Petitioner carried her burden of showing by a preponderance of the evidence a reasonable probability that the erroneous instruction that allowed the jurors to infer malice – the only matter in dispute – from the use of a deadly weapon – which was undisputed – influenced the jury’s verdict.

II. The PCR court erred in finding Petitioner failed to prove by a preponderance of the evidence that there was a reasonable probability the trial judge's erroneous instruction that informed the jury that its "one single objective" was "to seek the truth" contributed to the guilty verdict where the jury deliberated over the course of three days after hearing conflicting eyewitness accounts and the judge issued multiple coercive instructions to avoid a mistrial.

Relevant facts

After instructing the jurors on their duty to determine the credibility of the witnesses, the judge informed the jury that "[t]hroughout this entire process [they had] but one single objective, just one, and that is to seek the truth, to seek the truth regardless of from what witness that testimony may have been derived - - to seek the truth." App. 410, ll. 22-25.

As explained, the jury began deliberating midday on February 9, 2011. App. 461, ll. 8-9. For the next seven hours, the jury deliberated and asked numerous questions, particularly about malice. App. 462, ll. 2-9; App. 468, ll. 10-11; App. 469, ll. 18-19. In response to the jury's questions, the judge provided his instructions in written form, including the erroneous instruction to seek the truth. App. 469, l. 18 – App. 471, l. 6. On February 10, 2011, at 9:58 a.m., the jurors returned and resumed deliberations. App. 482, ll. 2-4. Throughout the day, the jury expressed its struggles to the judge, first stating they were "nine to three" and then "eleven to one." App. 482, ll. 5-18; App. 483, ll. 20-21; App. 485, ll. 9-10. Toward the end of the second day of deliberations, the jury informed the judge that one juror was unwilling to discuss the matter any further. App. 487, ll. 12-13. Thereafter, the judge repeatedly chastised the holdout juror. App. 487, ll. 20-22; App. 488, ll. 1-4; App. 488, ll. 11-12; App. 488, ll. 22-24; App. 489, ll. 9-20; App. 489, ll. 23-24. With this castigation in mind, the jurors went home for the evening.

On February 11, 2011, the jury resumed deliberating at 9:30 a.m. App. 493, ll. 2-5. Based on the jury notes – first requesting copies of depositions and then requesting to hear the testimony of all witnesses again – it was clear, the jurors remained undecided. App. 493, ll. 6-16; App. 494, ll. 21-25. Unable to have their requests satisfied, the jury returned with a guilty verdict at 11:25 a.m. App. 498, ll. 19-20; App. 499, ll. 1-3.

At the PCR hearing, trial counsel made clear that he did not even consider objecting to the trial judge instructing the jury that they had a duty to search for the truth. App. 809, ll. 9-25.

The PCR court found – and the state conceded – trial counsel was deficient for failing to object to the trial court’s jury charge to “seek the truth.” App. 844. However, yet again, the PCR court found Petitioner suffered no prejudice as a result of the instruction. App. 844. The PCR court relied upon this Court’s opinion in State v. Aleksy, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000), to deny relief to Petitioner. App. 844-845. According to the PCR court, this Court concluded the “instruction was harmless because it did not appear in the reasonable doubt or circumstantial evidence portion of the jury charge, but rather in the witness credibility portion. App. 845. The PCR judge noted “[t]he instruction appears in the same context in [Petitioner]’s case.” App. 845. Thus, the PCR court concluded Petitioner was not prejudiced by trial counsel’s deficient performance because she “failed to prove the improper instruction caused the jury to dilute the standard of proof and reach its verdict in a way that violations the Constitution.” App. 845.

Discussion

Twenty-two years ago, and thirteen years prior to Petitioner’s trial, in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), this Court strongly urged trial judges to avoid using any “seek” language in their charges to the jury. This Court noted that such “in search of the truth” language

was unnecessary and ran the risk of unconstitutionally shifting the burden of proof to the defendant. 333 S.C. at 151-56, 508 S.E.2d at 865-68.

Two years later, in State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), the Court repeated its warning that trial courts should avoid using any “seek the truth” language. However, this Court in Aleksey noted that in that case the “seek” language was used in the instruction on witness credibility. 343 S.C. at 27, 538 S.E.2d at 251-52. The “seek” language did not appear in either the reasonable doubt or circumstantial evidence portion of the instruction. Id. Thus, the Aleksey Court found that there was not a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state’s burden of proof beyond a reasonable doubt. Id. at 28-29, 538 S.E.2d at 252-53.

In State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), the year after Petitioner’s trial, this Court considered a jury instruction that “whatever verdict you reach will represent truth and justice for all parties that are involved in this case.” Although the issue was not preserved, this Court instructed trial judges “[to] remove any suggestion from his general sessions charges that a criminal jury’s duty is to return a verdict that is ‘just’ or ‘fair’ to all parties. Such a charge could effectively alter the jury’s perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the state’s burden to prove the defendant’s guilt beyond a reasonable doubt.” 401 S.C. at 256, 737 S.E.2d at 475.

Despite this Court’s repeated admonitions regarding the dangers of “seek the truth” language in the court’s jury charge, trial judges have continued to employ new derivatives of this burden shifting language. Recently, in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2016), this Court reviewed the trial court’s preliminary remarks to the jury, which included use of the terms “search[ing] for the truth,” “true facts,” and “just verdict.” This Court ruled:

[W]e agree with appellant that a trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt.

Beaty, 423 S.C. at 34, 813 S.E.2d at 506. Even so, the Beaty Court found no prejudice sufficient to warrant reversal from the comments in light of its review of the entirety of the opening comments and the trial record. Id. at 16.

A recent empirical study reveals the practical reality of the problems with truth-related language in jury charges. Michael D. Cicchini & Lawrence T. White, Truth or Doubt? An Empirical Test of Criminal Jury Instructions, 50 U. Rich. L. Rev. 1139 (2016). Two-hundred ninety-eight mock jurors were presented with the same fact pattern of a hypothetical sexual assault case, which included an instruction on the elements of the crime charged; a synopsis of testimony from the minor child, the child's mother, and the defendant; and closing arguments from the prosecution and defense. Cicchini, at 1150-51. The mock jurors were randomly given one of three jury charges – a “to search for the truth” instruction, a “doubt-only” instruction, or a “combination” truth and doubt instruction. Cicchini, at 1152-53. The study provided strong empirical data that “the truth-related language at the end of an otherwise proper reasonable doubt instruction actually diminishes the government's burden of proof.” Cicchini, at 1155. The authors opined that their study reflects the invalidity of the judicial perception that the remainder of a jury charge can render the “truth” language harmless. Cicchini, at 1156-57.

It is simply not the jury's function to search for the truth. A jury's function is to determine whether the state has proven the defendant's guilt *beyond a reasonable doubt*. See

Francis v. Franklin, 471 U.S. 307, 313 (1985) (“The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”) (citing In re Winship, 397 U.S. 358, 364 (1970)). While the PCR judge was correct that the trial judge issued the improper “seek the truth” instruction immediately after charging the jurors on how to judge witness credibility, the PCR judge failed to consider the instruction as a whole, which included the improper instruction to infer malice from the use of a deadly weapon, discussed in Issue I, supra, and the coercive instructions to compel a verdict. Petitioner carried her burden of proving by a preponderance of the evidence a reasonable probability that the improper instruction to seek the truth contributed to the jury’s verdict when the improper instruction is considered in conjunction with the improper malice instruction and the coercive charge intended to compel a verdict.

“The trial judge has the duty to urge, but not coerce a jury to reach a verdict.” Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) (citing Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002)); see also Workman v. State, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015). “An Allen charge cannot be directed to the minority voters on the jury panel, but must instead be even-handed, directing both the majority and the minority to consider the other’s views.” Id. (citing Green, 351 S.C. at 194, 569 S.E.2d at 323). “Whether an Allen charge is unconstitutionally coercive must be judged ‘in its context and under all the circumstances.’” Id. (quoting Tucker v. Catoe, 346 S.C. 483, 491, 552 S.E.2d 712, 716 (2001)); see Lowenfield v. Phelps, 484 U.S. 231, 237 (1988). “An Allen charge is an instruction advising deadlocked jurors to have deference to each other’s views, that they should listen, with a disposition to be convinced, to

each other's argument." State v. Lee-Grigg, 374 S.C. 388, 418 n.1, 649 S.E.2d 51, 57 n.1 (Ct. App. 2007), aff'd, 387 S.C. 310, 692 S.E.2d 895 (2010).

In Tucker, this Court adopted the standard set forth by the United States Supreme Court in Lowenfield to determine whether an Allen charge is unconstitutionally coercive. In Lowenfield, the United States Supreme Court considered, among other things, the following factors: (1) whether the charge speaks specifically to the minority juror(s); (2) whether the charge includes such language as "You have got to reach a decision in this case;" (3) whether there is an inquiry into the jury's numerical division; and (4) whether the jury returns a verdict shortly after the supplemental charge. Tucker, 346 S.C. at 492, 552 S.E.2d at 716 (citing Lowenfield, 484 U.S. at 237); see also Workman, 412 S.C. at 130-131, 771 S.E.2d at 638.

In order for an Allen charge to pass constitutional muster, it must remind the jurors that the verdict must be the result of each juror's own convictions, and not mere acquiescence in the conclusion of the other jurors. State v. Pulley, 216 S.C. 552, 555-557, 59 S.E.2d 155, 157-158 (1950); State v. Jones, 320 S.C. 555, 558-559, 466 S.E.2d 733, 734-735 (Ct. App. 1996); State v. Tillman, 304 S.C. 512, 521, 405 S.E.2d 607, 613 (Ct. App. 1991); State v. Hale, 284 S.C. 348, 355, 326 S.E.2d 418, 422 (Ct. App. 1985).

In Dawson, this Court found that the following language included in the Allen charge given to the jury in that case was coercive because it "could be perceived as being directed toward the minority juror:"

I have sometimes thought that the juror who could render less service to the Court and to the country than any other juror is the juror who says, I know what I want to do in this case and when and if everybody agrees with me, then we'll write a verdict, and we'll not write a verdict until that time.

Id. at 18-20, 572 S.E.2d at 446-447.

There can be little doubt the judge's instructions were coercive. Repeatedly, the judge spoke specifically to the minority juror. Repeatedly, the judge degraded the minority juror and blamed the juror for the jury system as a whole not working. While the minority juror held out for a substantial period of time, even after the judge's demeaning and coercive instruction, the minority juror could hold out no longer once it became evident the judge was unwilling to accommodate the jury's request to hear the evidence again. Although the improper "seek the truth" instruction occurred in conjunction with the credibility instruction, it informed the jurors that seeking the truth was their duty "[t]hroughout this entire process." In other words, it was not limited to judging the credibility of the witnesses. Further, when the instructions are reviewed as a whole, the error in diluting the state's burden through the "seek the truth" charge combined with the improper inferred malice instruction and the coercive Allen charge, the significant damage to Petitioner is clear. Thus, a reasonable probability exists that the improper instruction to seek the truth contributed to the jury's verdict when considered alongside the improper inferred malice instruction and the coercive charge intended to compel a verdict.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented. In the event this Court grants the petition and dispenses with further briefing, Petitioner respectfully requests this Court reverse the PCR court, find counsel's deficient performance was prejudicial, and order a new trial.

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of August, 2020.