

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Sep 24 2020

S.C. SUPREME COURT

Certiorari to Pickens County

The Honorable Edward W. Miller, Trial Judge
The Honorable Letitia H. Verdin, PCR Judge

Appellate Case No. 2019-000468

LESTER D. MOSLEY, JR., #361397,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General
S.C. Bar No. 103282

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-0904

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF ISSUES ON CERTIORARI.....ii

STATEMENT OF THE CASE.....1

STATEMENT OF FACTS.....4

STANDARD OF REVIEW.....8

ARGUMENT.....10

The PCR court correctly found trial counsel was not constitutionally ineffective for failing to preserve for appellate review his objection to the accomplice liability instruction because the instruction was warranted by the evidence admitted at trial and Petitioner has not proven that there is a reasonable likelihood that he would have prevailed on appeal had the issue been preserved.....10

The PCR court correctly found Petitioner failed to prove trial counsel was constitutionally ineffective for not objecting to the jury instruction on malice because the instruction is proper and because it is inappropriate for Petitioner to argue trial counsel’s performance was deficient on the basis that trial counsel did not seek a change in law at Petitioner’s trial.....14

CONCLUSION.....19

STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Issues Presented

Did the PCR court err in not finding ineffective assistance of counsel where Trial Counsel failed to timely object to the jury charge on accomplice liability?

Did the PCR court err in not finding ineffective assistance of counsel where Trial Counsel failed to object to the jury charge that malice can be inferred if one intentionally kills another during the commission of a felony?

Respondent's Issues Presented

Did the PCR court correctly find trial counsel was not ineffective for failing to preserve for appellate review his objection to the accomplice liability instruction when the instruction was warranted by the evidence admitted at trial and Petitioner has not proven that there is a reasonable likelihood that he would have prevailed on appeal had the issue been preserved?

Did the PCR court correctly find Petitioner failed to prove that trial counsel was constitutionally ineffective for not objecting to the jury instruction on malice when the instruction is proper and when it is inappropriate for Petitioner to argue trial counsel's performance was deficient on the basis that trial counsel did not seek a change in law at Petitioner's trial?

STATEMENT OF THE CASE

Lester Mosley, Jr. (“Petitioner”) is presently incarcerated in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. During its July of 2014 term, the Pickens County Grand Jury indicted Petitioner for murder, two counts of attempted robbery, the possession of a weapon during the commission of a violent crime, and first-degree burglary. Thirteenth Circuit Solicitor William Walter Wilkins, III, and Assistant Solicitor William Richardson Timmons, IV, prosecuted the case, and Petitioner was represented by Scott D. Robinson (“trial counsel”), Esquire. On September 15-17, 2014, Petitioner proceeded to trial with the Honorable Edward W. Miller (“trial court”) presiding. At the conclusion of trial, the jury convicted Petitioner as indicted. The trial court sentenced Petitioner to imprisonment for fifty years for murder, fifty years for first-degree burglary, twenty years for each count of armed robbery, and five years for possession of a weapon during the commission of a violent crime, with credit for time served and with all sentences running concurrently.

Trial counsel filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense represented Petitioner on appeal. Senior Assistant Attorney General William Edgar Salter, III, of the South Carolina Attorney General’s Office represented Respondent. Hudgins moved to be relieved as counsel and filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), arguing the trial court erred in instructing the jury that malice can be inferred if one intentionally kills another during his commission of a felony. Petitioner filed a pro se brief. The South Carolina Court of Appeals denied Hudgins’ motion and directed the parties to brief the following issue (along with any other issue of

arguable merit): “[w]hether the trial court erred by instructing the jury on accomplice liability in response to the jury’s questions during deliberations.” State v. Mosley, S.C. Ct. App. Order dated December 2, 2016. Hudgins then argued that the trial court erred in instructing the jury on the theory of accomplice liability after the jury asked for additional instruction during its deliberations. The Court of Appeals granted Petitioner’s motion to substitute William G. Yarborough, III, Esquire, as his attorney in Hudgins’ place. State v. Mosley, S.C. Ct. App. dated July 18, 2017. The Court of Appeals affirmed in an unpublished opinion. State v. Mosley, Op. No. 2017-UP-353 (S.C. Ct. App. filed September 6, 2017) (per curiam). The remittitur was issued on September 27, 2017.

Petitioner filed his application for post-conviction relief on March 2, 2018, in which he claimed he was entitled to post-conviction relief because appellate counsel did not “preserve any other arguable issues of merit as directed within the ordered briefing by the South Carolina Court of Appeals” and that there were “other issues that should have been preserved for appeal.” Respondent filed its return to the application on August 3, 2018, and requested that an evidentiary hearing be convened regarding Petitioner’s claims. Petitioner later filed an amended application, arguing he was entitled to post-conviction relief based on the following claims:

1. “Trial counsel was ineffective pursuant to Strickland v. Washington for failing to contemporaneously and properly object, and thus preserve for appeal, to improper jury instructions on the inference of malice and felony murder. The improper instructions diluted the State’s burden of proof to prove Applicant’s guilt beyond a reasonable doubt and shifted the burden to Applicant.”;
2. “Trial counsel was ineffective for failing to contemporaneously and properly object, and thus preserve for appeal, to improper jury instructions on the ‘hand of one hand all’ accomplice liability jury charge. The improper instruction, both in and of itself and together with the aforementioned jury charges on felony murder and inferred malice was

prejudicial to Applicant because it was confusing to the jury because Appellant was not tried with his codefendants, diluted the State's burden of proof to the guilty of Appellant without improper spillover evidence from the guilt of his codefendants, as well as improperly shifted the burden to Applicant, whom raised an alibi defense.”;

3. “Trial counsel was ineffective for failing to subpoena cellphone records which would have supported his alibi defense by showing that Applicant was not at the victim's home the night the charged offenses occurred.”;
4. “Trial counsel was ineffective for failing to sufficiently cross-examine Applicant's codefendants on their inherent bias in testifying for the State pursuant to a plea agreement.”;
5. “Trial counsel was ineffective for failing to request an adequate jury instruction on the credibility and weight of codefendants' testimony in light of their inherent bias.”;
6. “Trial counsel was ineffective for failing to object to the admission of evidence of flight and corresponding jury charges.”; and
7. “Trial counsel was ineffective for failing to request an adequate jury instruction on accident, voluntary manslaughter, and involuntary manslaughter.”

An evidentiary hearing was held before the Honorable Letitia H. Verdin (“PCR court”) at the Greenville County Courthouse on August 29, 2019. Petitioner was represented by Yarborough and Lauren Carole Hobbis, Esquire, and the undersigned represented Respondent. At the request of the undersigned at the start of the hearing, Petitioner clarified that he would proceed at the hearing upon the claims presented in the amended application only. The PCR court issued its Order of Dismissal on October 16, 2019, finding Petitioner failed to establish any constitutional deprivations or violations that would require the Court to grant Petitioner's application for post-conviction relief, and denied the application and dismissed it with prejudice. This appeal follows.

STATEMENT OF FACTS

On the evening of December 8, 2012, Steven Grich, Robert McKinley, and Daniel Persson were in the apartment they shared with each other and with Dalton Johnson; Kevin Keck, guests Sam Voison, Jonathan Riordan, and Laura Hill, and McKinley's friend Martin were there, too. App. 333-34, 348, 356, 363, 367, 383. At around 8:00 p.m. that night, Grich, Persson, Keck, Voison, and Riordan were watching television and drinking alcohol downstairs, and McKinley was smoking marijuana and studying in a bedroom with his friend Martin and his girlfriend Hill. App. 349, 356, 358, 363-64, 367-68, 383-84.

The back door "flew" or "burst" open and a small group of three to four men "barged" into the apartment. App. 335, 349, 356, 384, 426-27. The first man through the door was black and the two following him were white. App. 335-36, 350, 357-58. The black intruder was short or average in height and wearing a ski mask. App. 341-43, 346, 350-51, 354, 358. The two white intruders, one of whom was shorter while the other was taller, had their faces covered as well. App. 336, 341, 349. At least two of the intruders were armed. App. 341, 349, 357, 361, 423. The black intruder was acting erratically and was aiming a pistol. App. 335-36, 341. One of the intruders hit Riordan in the head with a pistol twice, and the friends got down on the ground. App. 336-37, 341, 349-50, 359, 385-86. Riordan saw through the mask that the one who struck him was black. App. 385, 389. The friends heard or saw the black intruder go around pistol whipping and kicking them. App. 338, 342, 350-51, 357-58. The intruders warned the victims not to look at them, were demanding to know the location of "the dope," and were shouting, "Where's the money?" App. 337-38, 349, 351, 358. Grich was taking the brunt of the beatings. App. 351, 359. A gunshot rang out and the intruders fled the apartment before those on the floor

could look up. App. 338, 350, 352, 358, 386. The friends realized that Grich had been shot, called the police, and saw Grich pass away while they waited for help to arrive. App. 339, 350, 359-60. After viewing Petitioner standing at trial, Keck, Persson, Riordan, and Voison confirmed that Petitioner's height was consistent with the height of the black intruder. App. 343, 353, 360-61, 389. None of the victims in the living room was able to positively confirm at trial that Petitioner was the shooter. App. 344-45, 354-55, 361-62, 389-90.

From their location in a bedroom in the home, McKinley, Hill, and Martin heard the back door open and the commotion begin in the living room. App. 364, 68. They heard shouting about "dope" and it sounded like "a brawl" was taking place, with tables being overturned outside the bedroom door. App. 368-69. The three realized that the house was being robbed, so they went to the bathroom and jumped out a window, and Hill ran to a neighbor's house. App. 364-65, 368-69. Martin fled the scene entirely. App. 369. McKinley took with him out the window a backpack that he had filled with approximately two pounds of marijuana, which he hid in woods near the house. App. 369-70, 373. While at the neighbor's door, Hill witnessed multiple people clad in all black run between the houses and get into a black SUV. App. 365. McKinley also saw the three masked intruders leaving and jumping into a waiting black Dodge Durango, with a driver waiting inside. App. 369-72, 381-82. McKinley saw that one of the fleeing intruders was black. App. 372, 379. After his failed attempt to chase down the departing Durango, McKinley returned to the home, discovered that Grich had been killed, and attempted to hide some drug paraphernalia before police arrived. App. 371-73. Hill similarly returned to the victims' home after a few minutes at the neighbors'. App. 365.

McKinley had been selling marijuana out of the friends' home and had customers in the home around six or eight times each day for drug sales. App. 374-75. He identified Winton Botchway as a customer who had bought marijuana from him at the home on three to five occasions. App. 375. While smoking and selling marijuana at Botchway's apartment in September of 2012, he met Petitioner, who was interested in collecting McKinley's contact information. App. 376-77. McKinley notified Botchway on the day of the robbery that he had just received a large shipment of marijuana worth more than \$5,000.00 in individual sales and was ready to make a deal. App. 378-79.

On the day of the robbery, Jaron Dalton and his younger brother Jordan Dalton drove to Clemson in their black Dodge Durango. App. 413-14. They picked up their friend Kadeem Ramsey and unsuccessfully tried to find marijuana for sale. App. 414-16. Ramsey told them of a potential robbery target, pointed out to him first by Petitioner, from which they could steal marijuana. App. 416. The group dressed and masked themselves for the robbery and picked up Petitioner, who told them more details about the victims' home. App. 417-19. When they all arrived at the apartment complex where the victims lived, Petitioner and Ramsey pointed out the place. App. 422. Jaron armed Petitioner with a 9mm handgun, and Petitioner was the first one into the victims' home. App. 424. Ramsey and Jordan went upstairs in search of the marijuana while Jaron and Petitioner stayed downstairs with the victims. App. 426, 462. Jaron testified that Petitioner struck Grich with his handgun at least eight to ten times, at which point he saw Petitioner's pistol "[go] off" and shoot Grich. App. 426. The robbers fled the scene in the Daltons' Durango. App. 427.

Jaron called his roommate, Connor Mann, the morning after the robbery and asked that Mann to take some items from Jaron's room, place them in a bag, and take them to Jaron at his father's home; those items included two firearms—one a .380 caliber handgun and the other a 9 mm handgun—, a toboggan, and a hat. App. 403-04, 406. A few days after the robbery, Jaron led police to a remote, wooded location on his grandmother's property where they uncovered a backpack holding a black, hooded sweatshirt; a gray stocking cap with holes cut into it; a black University of South Carolina hat; a .380 caliber Taurus handgun; a 9mm Springfield handgun; and spare, hollow point ammunition. App. 393-99, 401. The Dalton brothers buried the bag and its contents there after receiving them from Mann the day after the robbery. App. 430. The police were able to determine that the two handguns belonged to Jaron. App. 400. Jaron, Jordan, and Ramsey ultimately confessed to police that they and Petitioner were the robbers and that Petitioner was the shooter. App. 430, 449-50, 465. Jaron lent his 9 mm pistol to Petitioner before he, Jordan, Ramsey, and Petitioner broke in to the victim's home; Jordan was armed with the .380 caliber pistol. App. 423, 426-27, 432-33, 442, 450-51, 461. The State's fingerprint expert was not able to find fingerprints on either of the handguns surrendered by the Dalton brothers. App. 506, 508-09. The State's firearms identification expert determined the bullet removed from Grich's body was fired by the 9 mm handgun surrendered by the Daltons. App. 326, 396, 517. At trial, Petitioner denied riding in the Dalton's Durango to the victims' home and denied robbing the victims, but he admitted to giving Ramsey directions to the victim's home. App. 545, 550.

STANDARD OF REVIEW

Petitioner has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008); Strickland v. Washington, 466 U.S. 668 (1984). Petitioner has the burden of proving the allegations in his PCR action, and when alleging that trial counsel was constitutionally ineffective, he must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Petitioner must prove trial counsel’s performance was deficient. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Id. at 117, 386 S.E.2d at 625 (quoting Strickland, at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, at 690). Petitioner must overcome this presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625. Second, trial counsel’s deficient performance must have prejudiced Petitioner such that “there is a reasonable probability that, but for Counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-18, 386 S.E.2d at 625.

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When

reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed de novo without deference to the lower court. Smalls, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

- I. The PCR court correctly found trial counsel was not ineffective for failing to preserve for appellate review his objection to the accomplice liability instruction because the instruction was warranted by the evidence admitted at trial and Petitioner has not proven that there is a reasonable likelihood that he would have prevailed on appeal had the issue been preserved.**

Petitioner argues the PCR court erred in finding trial counsel was not constitutionally ineffective for failing to preserve for appellate review the issue of the trial court's instructing the jury on the theory of accomplice liability. His argument is that the instruction was incompatible with the defenses trial counsel raised at trial, including the defenses of alibi and accident; confusing to the jury in light of the jury charges as a whole; and diluted the State's burden of proof by allowing the State to imply the existence of Petitioner's guilt from the fact that Petitioner's codefendants had already pleaded guilty and were testifying on behalf of the State. Petitioner's argument fails because the accomplice liability charge was appropriate and correct, and even if trial counsel had preserved the issue of the trial court's accomplice liability charge for appellate review, Petitioner has failed to show that there is a reasonable likelihood Petitioner would have prevailed on appeal.

The trial court in this case instructed the jury as follows:

Now, if a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person which occurs as a natural consequence of the acts done in carrying out the common plan and purpose. For example, two people can be guilty of killing another person when only one of the two had a gun, there was only one bullet, and only one of the two fired the shot that caused the death. If two or more people are together acting together, assisting each other in committing the offense, the act of one is the act of all, or as it is sometimes said the hand of one is the hand of all.

App. 613. Trial counsel did not voice an objection to the instruction at the time it was first given.

App. 622. During its deliberations, the jury asked, “What is murder? Does the defendant have to pull the trigger to consider it murder? Can we have a copy of the law?” App. 647. The solicitor suggested that the trial court instruct the jury on murder and that the hand of one is the hand of all, which drew an objection from trial counsel on instructing the jury on the theory of accomplice liability. App. 623. The trial court instructed the jury on accomplice liability again over trial counsel’s objection. App. 623. As the PCR court noted, the South Carolina Court of Appeals concluded that trial counsel’s objection to the accomplice liability instruction was not preserved because his objection came after the jury asked for clarification but not when the instruction was first given. App. 15.

In Barber, the South Carolina Supreme Court found the trial court did not err in instructing Barber’s jury on accomplice liability because the evidence at trial was equivocal as to whether Barber or one of his codefendants shot and killed a victim during a home invasion and robbery. 393 S.C. at 234, 239, 712 S.E.2d at 437-38, 440. The Supreme Court analyzed the propriety of the accomplice liability instruction by questioning “whether there [was] any evidence that another co-conspirator was the shooter and [that] Barber was acting with him when the robbery took place. Id. at 237, 712 S.E.2d at 439 (citing State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000)). There was evidence to support the conclusion that Barber acted with his three codefendants during the robbery because the robbers’ wore all black clothing and covered their faces during the robbery so that witnesses could distinguish between the robbers only by way of their weapons and physiques, and Barber’s three codefendants all testified that Barber was involved in the planning of the robbery and was the shooter. Id. The victim was killed with a semi-automatic handgun, which the State’s evidence put in Barber’s hands; on the other hand,

Barber was able to elicit testimony at trial that all three of the robbers inside the victim's home were armed. Id. at 234, 237, 712 S.E.2d at 438-39. This evidence could have supported a finding on the part of the jury that one of Barber's codefendants was the shooter. Id. This sort of analysis has been used since Barber was decided. See State v. Washington, 424 S.C. 374, 420-21, 818 S.E.2d 459, 483-84 (S.C. Ct. App. 2018) (finding the trial court did not err in instructing the jury on the theory of accomplice liability because there was evidence to support the conclusion that Washington joined with a codefendant to accomplish an illegal purpose in assaulting the victim and evidence that could have supported a finding on the part of the jury that Washington had an accomplice who was the shooter), cert. granted, State v. Washington, S.C. Sup. Ct. Order filed February 1, 2019; Wilds v. State, 407 S.C. 432, 438-39, 756 S.E.2d 387, 390 (S.C. Ct. App. 2014) (finding the PCR court correctly found that Wilds' appellate attorney was constitutionally ineffective for failing to argue that the trial court improperly instructed the jury on the theory of accomplice liability because "no evidence . . . indicated anyone other than Wilds was the shooter."), cert. dismissed, Wilds v. State, 414 S.C. 341, 778 S.E.2d 112 (per curiam).

The PCR court properly applied Barber in this case and determined the accomplice liability instruction was warranted at Petitioner's trial. App. 16. There was evidence at trial that Petitioner and his codefendants acted together in planning and committing the robbery. App. 16. The codefendants testified Petitioner had joined them in planning the robbery and carrying it out, even that Petitioner identified the victims' home as their preferred target. App. 419-27, 439, 442-44, 450-52, 459-63, 465. There was also evidence at trial that could have supported the conclusion that one of the codefendants, and not Petitioner, fired the fatal shot during the robbery. App. 16. The victims could not positively identify Petitioner as Grich's killer, they

could not give an exact accounting of the shooter's height, they could not see the shooter's face because of his mask, and the mental fog of marijuana and their position on the floor obstructed their view of all events in the room. App. 16. Though the victims named the masked, black man as the killer, Ramsey testified Petitioner was not wearing a mask at the time of the robbery. App. 453. The PCR court was therefore correct that, when all the evidence at trial was considered, the accomplice liability instruction was properly given. App. 16-17. See State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (2010) (holding that the jury instructions are to "be determined from the evidence presented at trial."). Because the instruction was proper, trial counsel was not deficient for failing to object to it, and this Court should not grant certiorari as to this issue.

Additionally, Petitioner has failed to show the trial court's instruction had any improper effect on the jury's decision. Petitioner did not introduce any evidence at the PCR hearing that the jury was struggling with the relationship between accomplice liability and alibi or accident. Petitioner was only able to speculate that he was somehow prejudiced by the lack of preservation. The PCR court honed in on the jury's precise question to the trial court during deliberations, which concerned the relationship between accomplice liability, liability as a principal, and murder. App. 17. The jury's question gave no indication that it was confused about Petitioner's physical whereabouts at the time of the robbery or whether the trigger man meant to kill Grich; instead, the jury wanted to know about the legal standard for determining whether Petitioner was guilty of murder if someone else intentionally fired the shot. Petitioner's argument is that he suffered prejudice because the accomplice liability instruction and evidence undercut his defenses. Of course, in order to meet its burden in any trial, the State has to try to rebut the defenses raised by the defendant. The jury's question shows the jury disbelieved Petitioner's

testimony about being elsewhere at the time of the robbery and was focused on whether Petitioner could be guilty of Grich's murder even if he did not personally pull the trigger.

It was proper for the trial court to instruct the jury on the theory of accomplice liability because Petitioner's codefendants testified as to his crucial role in planning and executing the robbery, and the evidence at trial could have left the jury in doubt as to whether Petitioner or another of his codefendants actually fired the shot that killed Grich. The jury's question during its deliberations shows that the jury was likely not confused by the relationship between accomplice liability and Petitioner's defenses of accident, and alibi, but instead was focused on the question of Petitioner's culpability for Grich's death, if the shooting was intentional but Petitioner was not the shooter.

Petitioner has failed to show that there is a reasonable likelihood that the outcome of his trial or appeal would have been different even if trial counsel had preserved for appellate review his objection to the accomplice liability instruction. This Court should deny the petition for a writ of certiorari as to the first question presented by Petitioner.

II. The PCR court correctly found Petitioner failed to prove trial counsel was constitutionally ineffective for not objecting to the jury instruction on malice because the instruction is proper and because it is inappropriate for Petitioner to argue trial counsel's performance was deficient on the basis that trial counsel did not seek a change in law at Petitioner's trial.

Petitioner argues the PCR court erred in finding trial counsel was not constitutionally ineffective for failing to object to the jury instruction on malice because the instructions, when they were given together, were improper comments by the court upon the evidence and because the instructions diluted the State's burden of proof by relieving it of the burden of proving malice. Petitioner's argument fails because the trial court's instructions were proper and did not

require an objection from trial counsel and because Petitioner has not shown that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel objected. The PCR court therefore correctly denied relief, and this Court should deny certiorari.

Petitioner asks this Court to reconsider the viability of inferring malice from the commission of an underlying felony in light of its opinion in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). This Court should not do so here when the question before the Court is whether the PCR court erred in finding trial counsel rendered effective assistance of counsel even though he did not object to the implied malice instruction at trial. To judge the adequacy of trial counsel's performance according to a rule of law that is not accepted even today in this State would be to hold trial counsel to an even greater standard than that of a clairvoyant. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (explaining that the South Carolina Supreme Court "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."). Condemning trial counsel for not making in 2014 the argument laid out by Petitioner today, years after Petitioner's trial, would be particularly egregious because this Court expressly provided that its holding in Belcher should not be applied in PCR matters concerning convictions obtained prior to the date the decision was announced. Belcher, 385 S.C. at 613, 685 S.E.2d at 810. It is not a required component of constitutional effectiveness that a criminal defense attorney be the trailblazer in the courts' overturning of controlling precedent.

Furthermore, Petitioner's call for this Court to adopt his preferred inferred malice instruction implicitly acknowledges there was no authority that would have required trial counsel to raise the objection Petitioner has since formulated. As Petitioner writes in his petition, this

“Court has not addressed [the inference of malice and the felony-murder rule] as of yet, and it should take this opportunity to look at it here,” and that our appellate courts “have not addressed the felony murder rule since the decision in Belcher.” Petitioner’s argument begins with a glaring error because our appellate courts did not address the “felony-murder rule” in Belcher. Accordingly, the PCR court correctly discounted Petitioner’s contention the instruction in Petitioner’s trial violated the requirements of Belcher. App. 14. In Belcher, this Court held that a trial court could no longer instruct a jury that it could infer malice from the use of a deadly weapon “where evidence is presented that would reduce, mitigate, excuse or justify the homicide.” Id. at 600, 685 S.E.2d at 803-04. At the same time, this Court clarified:

The standard implied malice charge remains valid, as does the general permissive inference instruction: “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.”

Id. at 612, 685 S.E.2d at 810 n.9. Because the trial court in this case did not give the improper instruction at issue in Belcher, the PCR court was right that Belcher afforded trial counsel no reason to object to the jury instructions. App. 13-14.

Recently, this Court extended its holding in Belcher by holding that, regardless of the evidence presented during trial, a trial court is prohibited from instructing “the jury that it may infer the existence of malice when the deed was done with a deadly weapon.” State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019) (emphasis added). Rather than supplying justification for Petitioner’s request that this Court retroactively find the trial court’s adherence to law in effect at the time of trial in 2014 was improper, the limitation of Burdette to instructions regarding implied malice from the use of a deadly weapon, specifically, reinforces

the PCR court's finding. Petitioner failed to supply a meritorious basis upon which trial counsel could have objected to the jury instructions because the trial court did not instruct the jury in this case that it could infer malice from the use of a deadly weapon. This Court's limitation of its holding in Burdette was a carryover from its holding in Belcher. 385 S.C. at 610, 685 S.E.2d at 809, n.7 (referencing opinions in other states holding the instruction that malice may be inferred from the use of a deadly weapon was improper when evidence is admitted that could reduce, mitigate, excuse, or justify the killing) (citations omitted).

The jury instruction given in this case was proper. In Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008), this Court found that a trial court's supplemental jury instruction on felony murder shifted the burden of proof as to the malice element of murder onto Lowry from the State. The trial court's initial instruction on felony murder stated:

[I]f one intentionally kills another during the commission of a felony, the inference of malice may arise. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, again I tell you this inference would be simply an evidentiary fact to be taken into consideration by you along with the other evidence in this case. I charge you that armed robbery with, which [Lowry] is also charged, is under our state law a felony.

Id. at 502, 657 S.E.2d at 762. Later, the trial court provided a supplemental felony murder instruction to the jury at odds with its original instructions, saying:

[I]f a person kills another in the doing or the attempting to do an act which is considered a felony, the fact that this occurs while one is doing or attempting to commit a felony makes the killing murder. And, therefore, the killing by one of another in the commission or the attempted commission of a felony makes that killing, by virtue of it occurring in that context, a murder.

Id. at 502-03, 657 S.E.2d at 762. This Court specifically noted the trial court's initial instruction on felony murder was proper. Id. at 506, 657 S.E.2d at 764. This Court, though, took issue with the supplemental instruction as impermissibly shifting the burden of proof for malice onto Lowry

because the supplemental instruction created a mandatory presumption of the malice element by omitting permissive language. Id.

This present case is distinguishable from Lowry. In this case, the PCR court correctly found Petitioner failed to show trial counsel should have objected to the felony murder instruction because the instruction was proper. App. 13. The trial court's malice instruction was:

Now, the Defendant is charged with murder. The State must prove beyond a reasonable doubt that the Defendant killed another person with malice aforethought. Malice is hatred, ill will, or hostility towards another person. It is the intentional doing or wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent.

App. 614. The instruction was essentially identical to the initial, proper instruction given during Lowry's trial. App. 615-16. What is more, as the PCR court detailed, the trial court's instruction is easily distinguishable from the improper instruction given during Lowry's trial because, in this case, the trial court extended procedural safeguards, allowing the jury—but not requiring it—to infer the existence of malice. App. 13. Trial counsel justifiably saw no fault in the instruction for the same reason and did not object. App. 13. The PCR court therefore correctly found trial counsel was not deficient, nor was Petitioner prejudiced by trial counsel's lack of objection.

Petitioner has failed to show that the trial court's jury instruction was improper at the time of Petitioner's trial and has therefore also failed to supply a basis upon which trial counsel was required to object. Petitioner's quest for a reassessment of the instruction that malice may be inferred from the commission of a felony, in addition to taking the wind out of his argument that it was improperly charged at Petitioner's trial in 2014, should not be adopted by this Court here as this is a direct appeal argument, and it certainly should not operate as a standard by which trial counsel's performance at trial is judged retroactively. The PCR court correctly found Petitioner

failed to show that trial counsel was constitutionally ineffective for not objecting to the trial court's jury instructions. This Court should deny certiorari as to the second question presented by Petitioner.

CONCLUSION

The PCR court properly found Petitioner failed to demonstrate that trial counsel was constitutionally ineffective for failing to preserve for appellate review his objection to the jury instruction on accomplice liability and for not objecting to the instruction on the inference of malice from the commission of a felony. The instruction at issue was properly given at the time of trial, and is proper now, and did not create a basis for a meritorious objection. Petitioner has not shown that there is a reasonable likelihood that the outcome of his trial or his appeal would have been different had the objections been made and preserved. This Court should therefore deny the petition for a writ of certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General
S.C. Bar No. 103282

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

By: s/Taylor Zane Smith
ATTORNEYS FOR RESPONDENT

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

September 24, 2020