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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition of Writ of Certiorari to Orangeburg County Court of Common Pleas
The Honorable Craig D. Brown, Post-Conviction Relief Judge
The Honorable Edgar W. Dickson, Trial Judge

Appellate Case No. 2020-000896

JULIAN YOUNG, #352043, Respondent,

vs.

STATE OF SOUTH CAROLINA, Petitioner.

PETITION FOR WRIT OF CERTIORARI

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V. The PCR court erred by finding Young met his burden of showing prejudice resulted from trial counsel continuing to question Ricky Gipson.

VI. The PCR court erred in undertaking a cumulative error analysis and granting relief based on cumulative error, where Young failed to establish sufficient deficiency or prejudice to warrant the grant of relief as to any of his individual allegations and South Carolina has not adopted a cumulative error approach in post-conviction relief proceedings.

STATEMENT OF THE CASE

During its April 2014 term, the Orangeburg County Grand Jury indicted Respondent Julian Young for Murder (2011-GS-38-1833. On August 14, 2012, Young proceed to trial before the Honorable Edgar W. Dickson. Young was found guilty on August 16, 2012. Judge Dickson sentenced Young to thirty-five years imprisonment

Young filed a timely notice of appeal. On June 18, 2014, the South Carolina Court of Appeals issued an unpublished opinion affirming the ruling and conviction. Following the denial of his petition for rehearing, Young sought certiorari to this Court, which was denied on December 18, 2014. App. 948.

On March 5, 2015, Young filed an application for post-conviction relief, asserting forty-four ground for relief. The State filed a Return on September 9, 2015. An evidentiary hearing was held in Dorchester County before the Honorable D. Craig Brown on October 4-5, 2018.

The Court, after considering both Young's proposed order and the State's proposed order, signed an order on May 11, 2020 and served on the State on June 4, 2020 granting post-conviction relief The lower court granted relief on the following grounds: Trial counsel was ineffective in advising the jury during his opening argument that although the evidence would not prove that Young had been in the possession of a gun, they could infer that he had a gun; Trial counsel was ineffective for failing to adequately counsel Young concerning the potential advantages and disadvantages of testifying in his own defense; Failure to advise Young as to possible defenses and lesser-included offenses; Trial counsel was ineffective for neglecting to object to testimony from SLED agent Richard Johnson in which he testified that in the course of their investigation "everyone said he didn't carry a weapon" in response to question concerning whether there was any evidence that the deceased carried a weapon for defense; Counsel was ineffective for continuing to question Ricky Gipson about whether he saw Young with a gun. Petitioner received

written notice of the entry of judgement on May 26, 2020. Petitioner filed an untimely Rule 59e motion, which was subsequently withdrawn. The lower court signed an order granting the withdrawal, but no filed order has been received at the time of filing this petition. This Petition for Writ of Certiorari, follows.

STATEMENT OF FACTS

Kendra Williams, a sergeant with the South Carolina State University (SC State) Police Department, was dispatched to 2195 Russell Street on the night of April 15, 201 1. (App. 51, line 3-p. 52, line 5). Williams was called to the property around 11:14 p.m. because a vehicle had hit the building at 2195 Russell Street, which held offices for SC State. (App. 52, lines 6-25). Williams arrived on the scene at 11:20 p.m. (App. 52, lines 6-12). When Williams arrived at the scene, she observed that a green car had struck the front of the building at 2195 Russell Street. (App. 53, lines 13-22). Williams observed "a lot of car pieces and a lot of bricks everywhere" (App. 53, lines 19-20). There were a number of public safety officers already at the scene when Williams arrived. (App. 53, lines 13-21). An ambulance was also on the scene. (App. 54, line 22-p. 55, line 2).

Williams asked Victim his name and if he was a student at SC State, but Victim would not answer her. (App. 57, line 22-p. 58, line 2). Victim gave few audible responses. (App. 62, lines 22-23). But Williams testified that she:

> …asked him if he was Queen's Village, he said he—well, he shook his head, yes. I asked him if he had been robbed, he shook his head, yes. I asked him if, how many, and he stuck his hand up and showed me four fingers. I asked him if he saw the weapon, he shook his head, yes. I asked him if it was a revolver, he shook his head, yes.

(App. 58, lines 6-14). The ambulance ultimately took Victim to the helipad at The Regional Medical Center of Orangeburg, and then he was transported to another hospital. (App. 58, lines 19-25). Victim died later that night from his injuries. (App. 59, lines 1-3).

SLED Agent Richard Johnson came to Orangeburg on April 16, 2011 to begin his investigation. (App. 305, lines 14-24). Investigators lifted two latent prints from the outside of the passenger door of Victim's vehicle, one from the top of the window and one from the door, near the key entry. (App. 261, line 22-p. 265, line 9). The latent print from the window was identified as belonging to Ray Alston. (App. 284, line 13-p. 286, line 8; App. 294, lines 15-19). The other print could not be identified at first, but eventually it was identified as belonging to Young. (App. 286, line 9-p. 292, line 11).

At trial Alston testified that, on the night of April 15, 2011, he was hanging out with Young and others at a friend's house. (App. 167, line 8-p. 171, line 4). Alston decided he wanted to get some marijuana. (App. 171, lines 3-10). Alston asked Young about arranging for him to buy marijuana, and Young made some phone calls and set something up. (App.171, line 1 1-p. 172, line 3). Then, Alston, Young, Milliard Pinckney, and Maurice Thompson drove to the SC State campus in silver Buick. (App. 168, lines 9-13; App. 173, lines 1-20). Thompson drove, and Pinckney sat in the passenger seat. (App. 173, line 2 1-p. 174, line 4). Alston and Young sat in the back seat. (App. 174, lines 5-24).

On the SC State campus, the group picked up Gipson, who had been contacted by Young earlier in the day about purchasing marijuana. (App. 99, line 16-p. 104, line 4). Because Gipson did not have as much marijuana as Alston wanted to buy, Gipson arranged for Victim to sell to Alston. (App. 100, line 16-p. 101, line 20). In the car Gipson sat between Alston and Young, but Young was the only one there who knew Gipson. (App. 103, line 18-p. 105, line 16; App. 174, line 25-176, line 3).

Gipson testified that he had arranged to meet with Victim at the marriage housing area.

(App. 103, line 18-p. 104, line 4). The group arrived before Victim, so they reversed and parked in a parking space and waited for Victim to arrive. (App. 107, lines 8-21; App. 176, lines 4-24). When Victim arrived, he pulled into a parking spot such that his passenger side was closest to the passenger side of the Buick. (App. 107, line 21 -p. 108, line 11; App. 176, line 25-p. 177, line 21). Gipson, Alston, and Young went to Victim's car, and Gipson got in the passenger seat to facilitate the transaction. (App. 109, lines 1-13). Alston and Young were not happy with the quality of the marijuana, and they began complaining to Victim. (App. 109, line 8-p. 1 10, line 18; App. 178, line 13-p. 179, line 7). Gipson then got out of the car and turned his attention to another car in the parking lot. (App. 110, line 19-p. Ill, line 12). When Gipson turned back around, he saw Young and Victim "tussling in the car. . . ." (App. 111, lines 12-14). Gipson observed that Young was leaning in the car, but Gipson could not tell what Young and Victim were fighting over. (App. 112, lines 10-24). Gipson never saw anyone with a gun. (App. 112, line 25-p. 113, line 2). Gipson noticed that Victim's car was in reverse and the passenger door was open. (App. Ill, lines 14-16). Gipson also observed that Alston was standing away from the car. (App. 113, lines 11-19). Gipson testified that he heard Victim's tires make a noise, then he heard a pop, and he ran away. (App. 111, lines 16-21). Gipson looked back at the scene and saw that Victim's car had left the parking spot. (App. Ill, lines 21-25). Gipson kept running. (App. 111, line 25).

Alston also testified that Young was leaning in Victim's car when he "heard a pow go off." (App. 179, line 19-p. 181, line 1 1). Alston thought the "pow" was a gun shot. (App. 181, lines 12-14). Young then got back in the Buick. (App. 180, lines 2-3). Alston asked Young "if he was alright, and then [Alston] asked if he shot the guy, but [Young] never answered" (App. 180, lines 3-6; App. 183, lines 1-7).

STANDARD OF REVIEW

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, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 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); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief 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 erred by finding trial counsel was not ineffective for advising the jury during his opening argument that, although the evidence would not prove that Young had a gun there, they may be able to infer he had a gun where the point was all but uncontested at trial and the statement served to undermine the State's evidence.

Trial counsel reiterated the following to the jury in his opening statement: "there is no testimony and we believe from the evidence we have seen there is no testimony that you, Julian, had a gun there. You may be able to infer it, but no testimony." App. 1394. The PCR court found trial counsel was deficient for reiterating that one may be able to infer Young had a gun. Further, the PCR court found that Young was prejudiced since "the jury was told they could infer malice and infer that Young had a gun from the very beginning." App. 196. The PCR court erred where trial counsel employed a valid trial strategy by gaining credibility with the jury by admitting uncontested evidence and by challenging the strength of the State's evidence against Young. This

Court should grant certiorari to review the PCR court's erroneous finding that trial counsel's strategy was invalid.

An opening statement serves to inform the jury of the general nature of the action and defenses involved in the case so they will be better prepared to understand the evidence presented. State v. Brown, 277 S.C. 203, 284, S.E.2d 777 (1981).

First, the fact a gun was used is a point that was all but uncontested at trial. Trial counsel tried to establish that Young did not bring a gun to the vehicle and that the victim brought the gun (admitting a gun was involved). Moreover, witnesses testified Young did not bring a gun, and they heard a sound like a gunshot when Young was hanging out of the car window. Additionally the forensic expert testified the injury was consistent with a gunshot wound, and a shell casing was found outside of the car in the spot where it ultimately crashed (likely rolling out when the door was opened). All of the above clearly and firmly establish a gun was used in this case, thereby negating any possible harm or prejudice that could be gleaned from counsel's statement in his opening argument to the jury. as the fact that a deadly weapon was used was not a contested point at trial and was ultimately a factor in a number of the possible lesser-included offenses. This issue is discussed in further detail below, specifically in the section addressing trial counsel's advice as to whether or not Young's testimony was necessary to receive jury charges on lesser-included offenses.

Second, the PCR court erred by failing to consider and give appropriate weight to trial counsel's strategic considerations in his opening argument. When viewed in context, defense counsel was challenging the strength of the State's evidence placing a gun in Young's hand by emphasizing no direct testimony would be able to be presented on that issue while candidly acknowledging—at best—the jury might be able to circumstantially infer Young had a gun from

the State's evidence. Furthermore, courts have recognized a defense attorney acknowledging and addressing evidence that is potentially negative for the defendant can be a valid trial strategy that enhances defense counsel's credibility with the jury. See, e.g., Carter v. Johnson, 131 F.3d 452, 466 (5th Cir. 1997) ("[C]ounsel may make strategic decisions to acknowledge the defendant's culpability and may even concede that the jury would be justified in imposing the death penalty, in order to establish credibility with the jury."). In Young's case, defense counsel needed to make the point to the jury about how no testimony would directly place a gun in Young's hand, and, if he does that without acknowledging the possibility there would be evidence presented suggesting Young did have a gun and such evidence is subsequently presented during trial, it could make defense counsel look shifty or incapable of responding to the circumstantial evidence. Therefore, the PCR court erred in finding trial counsel was deficient and that he was prejudiced by counsels opening statement. This Court should grant certiorari where trial counsel's opening statement concerning a potential inference that Young had a gun was not deficient as it was part of a valid trial strategy to gain credibility with the jury and challenge the strength of the State's evidence, as well as lacking any prejudice to Young where the presence of a gun was uncontested at trial.

II. The PCR court erred by finding trial counsel was ineffective for failing to adequately counsel Young concerning the potential advantages and disadvantages of testifying in his own defense.

At trial, Young was advised by the trial court of his constitutional rights, including his right to testify. App. 1399. Young was asked if he had discussed the matter with his attorney, he indicated that he had done so, but that he wanted to discuss the matter again with his attorney and his family. The trial court provided Young with opportunity and he indicated that he did not wish to testify. App. 1400. Trial counsel testified at the PCR hearing that Young understood the decision not to testify and was afraid to take the stand. App. 1400. Trial counsel further testified he informed

Young that if he did not take the stand then he could not put him up to give the evidence. App. 1400. Further, trial counsel testified he did not specifically tell Young that if he did not take the stand there would be no chance of receiving a charge on the lesser-included offenses. The PCR court found trial counsel deficient for failing to advise Young that if he did not take the stand then there would be no chance of receiving a jury charge on the lesser-included offenses and Young was prejudiced because it is a reasonable probability that the outcome would have been different. App. 1405. The PCR court erred in this finding where Young knowingly and voluntarily waived his right to testify and where trial counsel would have affirmatively misadvised Young on the law had he advised that it was necessary for him to take the stand in order to receive jury charges on the lesser-included offenses. This Court should grant certiorari where trial counsel provided competent advice upon which Young relied in making his knowing and voluntary decision to waive his right to testify.

Some decisions are reserved for the client, rather than for the lawyer, notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forego an appeal. Jones v. Barnes, 463 U.S.745, 751 (1983). A defendant's decision to testify or not must be made with knowledge of the consequences of either choice. Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing State v. Orr, 304 S.C. 185, 403 s.E.2d 623 (1991)). A waiver of one's Fifth Amendment right must be knowing and voluntary. Id. (citing State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)). Generally during trials, the presiding judge will inquire of the defendant whether or not they want to testify and if this decision was their decision. While no specific inquiry must occur on the record, the decision to testify or not to testify is ultimately up to the defendant. However, this Court has found counsel can be ineffective in advising a defendant not to testify

when that advice was based on an error of law. Horton v. State, 306 S.C. 252, 411 S.E.2d 223 (1991).

Young was advised of his Constitutional Rights, including his right to testify. App. 330, ln. 3- p. 332, ln. 3). The trial court inquired as to whether Young had previously discussed this issue with his attorney and he acknowledged that he had. App. 330, ln. 4-6. The trial court then inquired as to whether Young had discussed this issue with his family or friends and Young indicated that he had not. App. 330, ln. 13-15. Finally, Young indicated to the trial court that he wanted an opportunity to discuss this issue with his family. App. 330, ln. 16-17. Young was given the opportunity to meet with his attorneys and family to discuss whether or not he would testify. After meeting with his attorney and family, Young indicated to the trial court that he did not wish to testify. App. 378, ln. 9-21.

Trial counsel testified at the PCR hearing that Young did not want to testify. App. 1115, ln. 24. Young had the opportunity whether he wanted to take the stand or not. (App. 1116, ln. 10-11); Young was real nervous (App. 1116 34, ln. 12); Young said, "Look, I don't want to take the stand. I'm nervous." (App. 1116, ln 15-16); Young's decision not to testify was not from not knowing or from not explaining (App. 1116, ln. 24-25); we talked about all the issues and the fact that Young could testify but Young said he was nervous and that he did not want to take the stand (App. 1122, ln. 8-16); there not a "t" that was not crossed nor an "I" not dotted (App. 1159, ln. 17-18); and that if Young did not want to take the stand, then he could not put him up to give the evidence (App. 1190, ln. 2-3).

Young testified at the PCR hearing that: he was told a little bit about the good and bad of testifying (App. 1324-1325, ln. 24 through 3); he was scared (App. 1341, ln. 24-25); Young was told that if he testified, they (the State) would cross-examine him, mix him up, mix up his words,

and it would be like 500 degrees (App. 1342, ln. 5-10); trial counsel did not think he should testify because they would cross-examine him (App. 1346, ln. 11-13); he was nervous and scared (App. 1346, ln. 13-14); the conversation that took place with his family about him testifying occurred during an approximate thirty minute break during the trial (App. 1347, ln. 5-7); and they never had a discussion about whether or not he should testify before trial. (App. 1347, ln. 8-10). Young was also asked at the PCR hearing whether his attorneys ever explained to him that if he did not testify and tell his side of the story, then there was not going to be a factual basis for "jury instructions on any of those things," to which Young responded that he could not really remember. App. 1324, ln. 10-20. When Young was further asked "but did they tell you that if you didn't testify there wasn't gonna be a way to get those charges," Young responded, "No. They didn't told me that." App. 1325, ln. 12-14.

First, the PCR court erred as a matter of law and fact when it found trial counsel was ineffective for failing to advise Young that he would not be entitled to jury instructions on self-defense, accident, or the lesser included offense of involuntary manslaughter if he failed to testify. Initially, sufficient evidence was already presented by State's witnesses to support just instructions on these defenses and lesser included offenses, so any "advice" from counsel would have been erroneous misadvice.[1]

[1] As to the elements of self-defense: Gipson, Pinckney, and Alston all testified they did not see Young bring a gun to the vehicle. Gipson testified that he saw Young and the victim struggling over something in the vehicle. Gipson, Alston, and Thompson all testified that Young was still partially in the vehicle when the shot was heard and Thompson; Alston testified most descriptively saying Young was being "dragged" by the vehicle. Thompson also testified it wasn't until he felt their car jerk from being hit that he heard the bang. As to the elements of accident: the same testimony referenced above would apply. As to the elements of involuntary manslaughter, the same testimony referenced above concerning a struggle evidences the unintentional nature of the act. Further, Alston testified that he was the one who wanted to purchase marijuana and planned on buying an ounce. This testimony indicates the drug deal was for an ounce of marijuana which constitutes a misdemeanor pursuant to S.C. Code Ann. § 44-53-370 (c) (4) (1976 & Supp. 2011). Complete testimony and citations follow below in the subsections addressing the specific jury charges.

Second, trial counsel cannot be found deficient for harboring uncommunicated concerns that if Young testified he could potentially commit fraud upon the court. Trial counsel testified that Young told him that the gun would never be found. App. 1115. Trial counsel inferred this meant that Young was the one who brought the gun to the incident. App. 1115. Trial counsel was concerned about Young testifying and not being able to ask him about whether or not he had the gun. App. 1115. Trial counsel's fears, though potentially misplaced, could not possibly be the basis for a deficiency finding and certainly should not be considered in evaluating whether trial counsel was deficient for allegedly failing to advise Young as to the advantages and disadvantages of testifying. The PCR court's order and the record are both void of any testimony that trial counsel ever espoused his concerns about committing fraud on the court if he were to put Young on the stand. Thus, trial counsel's concerns could not possibly have weighed into Young's decision whether or not to testify if he was never made aware of trial counsel's concerns. Therefore this Court should grant Certiorari because; Young was properly advised that he would not be able to present his side of the story if he did not testify, counsel was not deficient for failing to advise Young the legally erroneous position that if he did not testify he could not receive charges on the lesser included offenses, trial counsel cannot be found deficient for failing to be clairvoyant, and trial counsel's uncommunicated belief that he would perpetrate fraud upon the court if Young testified could not have weighed into Young's decision whether or not to testify.

A. <u>The PCR court erred by finding trial counsel failed to advise Young that jury charges on the lesser included offenses would not be given absent evidence or testimony from Young.</u>

Trial counsel requested the following jury charges: self-defense, accident, voluntary manslaughter, and involuntary manslaughter. App. 1406-1407. The trial court refused to instruct the jury as to any of the aforementioned instructions due to a lack of evidence in the record. App.

1407. The PCR court found trial counsel was deficient for failing to adequately explain the necessity of Young's testimony to receive such charges and Young was prejudiced by showing that he would have received these charges had he testified. The PCR court erred in its finding where it is legally erroneous to suggest that it was necessary for Young to testify in order to receive the aforementioned jury charges where sufficient evidence existed in the record to merit the instructions be given. This Court should grant certiorari due to Young's failure to show that without the gift of hindsight, trial counsel was deficient for failing to advise Young as to a legally erroneous position that he must testify in order to receive he benefit of the aforementioned jury charges.

The law to be charged to the jury is determined by the evidence presented at trial. State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). If there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). A trial court commits reversible error when it fails to give a requested charge on an issue raised by the evidence presented. Lee, 298 S.C. at 364, 380 S.E.2d at 835.

The PCR court found trial counsel was deficient for failing to advise Young that if he did not testify he would not receive the benefit of the aforementioned jury charges. Specifically, the PCR court found that Young was prejudiced because had he testified he would have received jury charges on self-defense, accident, and involuntary manslaughter. As discussed below, the PCR court erred in its finding of prejudice where sufficient evidence existed in the record to require the trial court to instruct the jury as to self-defense, accident, and involuntary manslaughter.

i. Self-Defense

The record supported a jury instruction on self-defense without any testimony from Young. The elements of self-defense are as follows:

> (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3)(a) if the defense is based on the belief of imminent danger, then a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or (3)(b) if the defendant was actually in imminent danger, the circumstances were such that would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and, (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

The South Carolina Supreme Court held that a defendant who brought a concealed pistol to a drug deal brought on the difficulty and is therefore not entitled to a self-defense charge. State v. Williams, 427 S.C. 246, 250, 830 S.E.2d 904, 906 (2019), reh'g denied (Aug. 15, 2019). If there is any evidence in the record from which it could reasonably be inferred that Defendant acted in self-defense, it should be charged. State v. Burkhart, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002) (internal citation omitted). The State must disprove self-defense beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-493 (1998). The defense of self-defense is not established if any one of the elements is disproven. See State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010).

Gipson testified at trial, on cross examination by Trial Counsel, that in neither one of his statements did he say that Young had a gun. (App. 155, ln. 11-13). Pinkney testified that he didn't see Young get out of the car or get back in the car after the incident with a gun. (Trial App. 186, ln. 6-11). Alston testified that he did not see Young with a gun. (App. 225, ln. 1-20). Thompson testified that he never saw Young with a gun. (App. 262, ln. 17-20). Finally, Young testified at

the PCR hearing that it was Bailey that pulled a gun from beside his console. (App. 253, ln. 10-19). Based upon the testimony of each of these individuals, there is no evidence that Young brought the gun to the incident or was at fault in bringing on the difficulty.

As to element 2 and 3, Gipson testified at trial that Young was leaning in Bailey's car and that Young and Bailey were tussling over something that Gipson could not see. (App. 143, ln. 19-24). Gipson also testified that Bailey backed up and at that point he heard a "pop." (Trial App. 144, ln. 17-21). Gipson further stated that when he heard the "pop", he believed Young was still hanging in the car tussling with Bailey. (App. 144-45, ln. 25 & 1-4). Alston testified that when Bailey began to back his car up, Young was inside Bailey's car, "getting dragged by it, somewhat getting dragged by it" and that is when he heard a "pow." (App. 212, ln. 6-11). Thompson testified that after Alston decided not to purchase the marijuana from Bailey and after Alston had returned to the car that they came in, he felt the car jerk and Young was hanging out the passenger side of the car and then he heard a loud bang. (App. 251, ln. 21-24). Young testified that he was leaning in Bailey's car talking to him when he reached by his console, that Bailey put the car in reverse, that the car was hitting him with the door and that it was knocking him out of the way. Young also testified that Bailey hit their car and that he was "jammed in it." (App. 1334, ln. 11-25). Finally, Young testified that while he was trying to take the gun away from Bailey, he heard a "pop." (App. 1336, ln. 19-22).

As to the final element of self-defense, Gipson testified that Young was hanging out of the car and tussling with Bailey when he heard the "pop." Alston testified Young was getting dragged by the car when he heard the "pow." Thompson testified Young was hanging out the passenger side of the car when he heard a loud bang. Finally, Young testified that Bailey hit their car and that he was "jammed in it." (App. 1334, ln. 11-25).

Trial counsel was ineffective, where any such advice that Young must testify in order to receive a just instruction on self-defense would have been erroneous. Young's testimony was not necessary or required to supplement additional evidence already in the record that required the trial court give a jury charge on self-defense. As is abundantly clear, there was no evidence at trial that Young brought the gun to the incident or brought about the controversy. The testimony of Gipson, Alston, and Thompson more than meet the standard of "any evidence" sufficient to require a jury charge in relation to elements two, three, and four. The above testimony clearly establishes evidence from which a jury could reasonably find Young acted in self-defense, thus necessitating a jury charge on self-defense. Further, Young's testimony was merely cumulative to that of the other three witnesses. Young simply removed the inference from the other witness' testimony that the struggle was over the gun. Young's testimony does nothing to add to the evidence already in the record before the trial court. If any error occurred, it was the trial court erroneously refusing to charge self-defense where there was ample evidence in the record to support giving such a jury charge. Counsel was not deficient for failing to advise Young his testimony was necessary to support a charge on self-defense, particularly where there was sufficient evidence in the record to support the charge.

ii. Accident

A homicide will be excusable on the ground of accident when: (1) the killing was unintentional, (2) the defendant was acting lawfully, and (3) due care was exercised in the handling of the weapon. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). The defense of accident protects a defendant who, while acting lawfully and with due care, unintentionally causes harm to another. See State v. Commander, 396 S.C. 254, 271, 721 S.E.2d 413, 422 (2011). If the circumstances of a case show a defendant was entitled to arm himself in self-defense when the gun

went off, he would be entitled to a charge of accident supposing evidence satisfies the other elements of the doctrine. State v. Burriss, 334 S.C 256, 513 S.E.2d 104 (1999). The defense of accident fails if the State proves beyond a reasonable doubt that the defendant's unlawful activity proximately caused the harm. State v. Goodson, 312 S.C. 278, 280 n. 1, 440 S.E.2d 370, 372 n. 1 (1994). Where there is evidence that the Bailey was the aggressor along with evidence that the gun discharged accidently then a jury charge on accident would be applicable. See Tisdale v. State, 378 S.C. 122, 126, 662 S.E.2d 410, 413 (2008).

As discussed above in the section on self-defense; the evidence before the trial court was that Young did not bring a gun to the victim's car, there was a struggle over something in the victim's vehicle, and a gunshot was heard when the victim's vehicle hit the vehicle Young arrived in while he was still hanging out of the window. The testimony before the trial court was sufficient evidence to support a jury charge on accident. The testimony presents a factual question as to whether the victim was the aggressor, whether the killing was the unintentional result of the struggle in the vehicle, and whether Young handled the weapon with due care. The only element that is at question is whether Young was acting lawfully at the time, however, the State would have to prove that Young purchasing marijuana was the proximate cause of the killing. The PCR court accurately found that it is unlikely that Young purchasing marijuana proximately caused the killing, especially considering the lack of evidence that Young brought a gun or that there was a plan to rob the victim.

As previously discussed in the prior section, the same testimony elicited during the State's case was sufficient to support a jury charge on accident. Unlike the previously discussed self-defense charge, although Young's testimony would have provided significant additional evidence in support of the accident charge it was not necessary for the charge to be given. Young's testimony

clearly provides a much clearer picture of the events that unfolded during the incident. However, the standard requiring a trial court charge a lesser included offense is not that significant evidence exists to warrant a jury charge, but rather whether there is ***any*** evidence to warrant a jury charge. State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004).

Therefore, the PCR court erred in finding that trial counsel was deficient for failing to inaccurately advise him that a jury charge on accident would not be given unless Young testified at trial. If any error has occurred, it was the trial court refusing to give a jury charge on accident where evidence in the record warranted giving the charge. This Court should grant Certiorari where trial counsel did not erroneously advise Young that his testimony was necessary to receive a jury charge on accident where evidence in the record warranted the charge being given by the trial court.

iii. Involuntary Manslaughter

Involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Smith, 391 S.C. 408, 706 S.E.2d 12 (2011). Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was unintentional. State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996). Evidence of a struggle between the defendant and the Bailey over a weapon supports submission of an involuntary manslaughter charge. Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991). The South Carolina Supreme Court also recognized in State v. Brayboy that evidence of a struggle between a defendant and Bailey supports submission of an involuntary manslaughter charge. State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (2010) (citing to State v. Light,

378 S.C. 641, 648-49, 664 S.E.2d 465, 468-69 (2008), holding a jury charge on involuntary manslaughter was proper when petitioner testified that he took a loaded gun from the Bailey who was threatening him with the gun, that the gun fired almost immediately after he took possession of it, and that there was a struggle between he and the Bailey over the gun).

As discussed above, Gipson and Alston both testified that they saw Young struggling with Bailey over something in the vehicle. Gipson also testified at trial that he brought Bailey in on the deal because the guy wanted more than the amount of marijuana he had available. Gipson said he thought it was going to be "something small like a Ten or a Twenty." (App. 131, ln. 22 – p. 132, ln. 2). Alston testified that he was the one who wanted to buy marijuana that night and said he planned to buy, "probably like an ounce or something." (App. p. 203, ln. 8). Therefore, the testimony seems to indicate that the drug deal that was planned involved an ounce of marijuana which would constitute a misdemeanor pursuant to S.C. Code Ann. § 44-53-370 (c) (4) (1976 & Supp. 2011).

As discussed in the previous two sections, the testimony of the other witnesses at trial was sufficient to warrant a jury charge on involuntary manslaughter. The testimony at trial established that Young did not bring a gun to the victim's vehicle, a gunshot was heard while Young was struggling with the victim, and Young was engaged in unlawful activity not amounting to a felony and not naturally tending to result in death or serious bodily harm. As the PCR court properly noted, evidence of a struggle supports submission of an involuntary manslaughter charge. Again, Young's testimony provides a clearer picture of the events that took place in the victim's vehicle, however, the testimony was not necessary to warrant an involuntary manslaughter charge.

Therefore, the PCR court erred in finding that trial counsel was deficient for failing to advise Young improperly that his testimony was necessary to warrant a jury charge on involuntary

manslaughter. If any error occurred, it was the trial court refusing to give a jury charge on involuntary manslaughter. This Court should grant certiorari where trial counsel did not advise Young erroneously that testimony was necessary to receive a jury charge on involuntary manslaughter where evidence in the record warranted the charge being given by the trial court.

III. The PCR court erred by finding trial counsel was deficient for neglecting to discuss Belcher with Young and the potential impact of the decision on the State's ability to receive a jury instruction through which the jury would be advised that they could infer malice from the use of a deadly weapon.

At trial, the State requested a jury charge that malice may be implied from the use of a deadly weapon. App. 382. Trial counsel objected to the jury charge on the grounds that there was evidence in the record that would mitigate the charge of murder. App. 382. The trial court overruled the objection and charged the jury as to implied malice from the use of a deadly weapon. App. 382. Trial counsel testified that he believed he had discussed the significance of Belcher with Young and persisted with his objection in an effort to protect the record. App. 1420. Co-counsel testified that he believed that he knew that they had to get evidence of mitigation on the record to receive the benefit of Belcher. App. 1421. The PCR court found trial counsel was deficient for failing to adequately advise Young on the necessity of his testimony in order to receive the benefit of Belcher and Young was prejudiced because he would have received the benefits of Belcher had he testified. App. 1422. The PCR court erred where sufficient evidence of mitigation existed in the record to merit Young benefitting from the decision in Belcher and where Young's testimony was not necessary to supplement the record with additional evidence. This Court should grant certiorari where trial counsel accurately understood the holding in Belcher to be that any evidence of mitigation in the record would preclude the trial court from instructing the jury that malice can be implied from the use of a deadly weapon and where such evidence existed in the record without Young's testimony.

The Belcher decision, held that a jury cannot be told that they may infer malice when a defendant uses a deadly weapon during a homicide if there is evidence of mitigation, excuse or justification for the homicide. Belcher, 385 S.C. at 611, 685 S.E.2d at 809. Trial counsel testified that he believed that discussed with Young the significance of his testimony and receiving the benefit of Belcher. App. 1419-1420. Trial counsel testified further that he argued Young should receive the benefit of Belcher even after the State's case in order to protect the record. App. 1420. Co-Counsel testified that he could not recall advising Young that if did not testify that he could not stop the judge from giving a jury charge on inferring malice from the use of a deadly weapon if he did not testify. App. 1420. Co-Counsel testified further that in order to receive the benefit of Belcher they needed to get some evidence of mitigation on the record. App. 1421. Evidence existed in the record to mitigate, excuse, or justify the homicide and therefore trial counsel was not deficient for failing to advise Young that he needed to testify in order to prevent the trial court from instructing the jury they could infer malice from the use of a deadly weapon.

Trial counsel failing to advise Young as to Belcher was not ineffective where sufficient evidence existed in the record to warrant Young receiving the benefits of the Belcher decision. Trial counsel could only be deficient for failing to advise Young as to the implications of Belcher if there was not already sufficient evidence in the record to warrant Young benefiting from the decision or if trial counsel was able to see the future to know that Young was not going to receive any jury charges on the lesser included offenses. As argued extensively above, trial counsel was not required to advise Young that his testimony was necessary to benefit from Belcher where sufficient evidence already existed in the record. Young has failed to establish that trial counsel was deficient for failing to advise him of the implications of Belcher or that he was prejudiced as a result of the alleged deficiency.

IV. The PCR court erred by finding trial counsel ineffective for failing to object to testimony from SLED Agent Johnson where Young failed to establish the requisite prejudice for relief met his burden of showing prejudice resulting from trial counsel failing to object to testimony from SLED agent Richard Johnson.

Young contends that trial counsel was deficient for failing to object to testimony from SLED agent Richard Johnson that amounted to hearsay. Young has failed to establish that he was prejudiced by the alleged deficiency. Young has failed to establish that had trial counsel objected to this testimony the result of the trial would have been different. The vast majority of the evidence at trial was that Young did not have a gun the night of the incident and did not bring a gun to the victim's vehicle. The testimony of Agent Johnson does not place a gun in Young's hands, but simply states that he did not discover in his investigation that the victim carried a gun for protection. Young has failed to establish that if trial counsel had objected to this testimony there is a reasonable probability the result of the trial would have been different.

V. The PCR court erred by finding Young met his burden of showing prejudice resulted from trial counsel continuing to question Ricky Gipson.

Young contends trial counsel was deficient for continuing to question Gipson concerning seeing Young with a gun. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland at 688-89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Strickland therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. Young

has failed to establish he was prejudiced by the alleged deficiency. Trial Counsel ultimately elicited testimony that Gipson had an earlier statement where he said Young or another person had a gun. However, the vast majority of the testimony at trial was that no one saw Young with a gun that night. Young has failed to show that had trial counsel not elicited this testimony, the result of the trial would have been different.

VI. The PCR court erred in undertaking a cumulative error analysis and granting relief based on cumulative error, where Young failed to establish sufficient deficiency or prejudice to warrant the grant of relief as to any of his individual allegations and South Carolina has not adopted a cumulative error approach in post-conviction relief proceedings.

The lower court erred in finding that Young's PCR should be granted based on cumulative error. Although a novel question, the issue of whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, is the threshold to deciding the question in a case where there is a finding of multiple errors. Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002); see also, Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008) (stating it is an unsettled question in South Carolina whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief).The Fourth Circuit has held that "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively" and does not recognize a cumulative error analysis. Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998). Cumulative error has not been established as a basis for granting a PCR in South Carolina. Therefore, this Court should reverse this finding.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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