STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Horry County Court of Common Pleas

The Honorable William H. Seals, Post-Conviction Relief Judge
The Honorable Edward B. Cottingham, Trial Judge

Appellate Case No. 2020-000012

Brittany A. Johnson,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S 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?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES PRESENTED

I. Did the PCR court correctly find Counsel was not constitutionally ineffective despite failing to object to an erroneous jury instruction regarding implied malice where the State presented substantial evidence of malice in the form of Petitioner's repeated statements of intent to harm the victim; her unprovoked physical attack on the victim; and her flight to another county after the shooting, such that Counsel's error did not prejudice Petitioner?

II. Did the PCR court correctly find Counsel was not constitutionally ineffective despite failing to object to the trial court's instruction to the jury to "seek the truth" where, in the context of the jury instructions as a whole, the instruction was harmless beyond a reasonable doubt, and therefore, Petitioner was not prejudiced by it?

STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections. Petitioner was indicted at the September 2008 term of the Horry County Grand Jury for murder (2008-GS-26-03648). Ronald Hazzard (Counsel) represented Petitioner, and Scott A. Graustein, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. Petitioner proceeded to trial on February 7, 2011, before the Honorable Edward B. Cottingham and a jury. The jury found Petitioner guilty as indicted on February 11, 2011. Judge Cottingham sentenced Petitioner to thirty years' imprisonment.

Petitioner filed a timely notice of appeal and was represented by Appellate Defender Breen R. Stevens of the South Carolina Commission on Indigent Defense – Appellate Defense Division. Four questions were presented to the Court of Appeals:

I. Whether the trial court's credibility determination was clearly erroneous where [Petitioner's] testimony during the Jackson v. Denno[1] hearing regarding her alleged invocation of her right to counsel was "simply not plausible."

II. Whether the trial court abused its discretion in denying defense counsel's motion for a mistrial based on alleged premature deliberations, when the trial court found "there's no basis [in the jury's note] for me to assume that [the jury] discussed any issue in the trial."

III. Whether the trial court abused its discretion in failing to charge the jury regarding self-defense where: (a) defense counsel failed to present an argument supporting such a suggestion at trial; and (b) the record demonstrates [Petitioner], after approaching the car in which the victim was seated, then hitting her with a handgun after which she pointed and presented a firearm at the victim and shot her, was not without fault in bringing about the difficulty.

IV. Whether the trial court abused its discretion in failing to charge the jury regarding involuntary manslaughter where the uncontradicted testimony from trial established that [Petitioner] approached the victim, who was sitting in a car, began hitting her with a handgun, pointed and presented a .45 caliber handgun and admitted shooting the victim.

[1] 378 U.S. 368 (1964).

The parties proceeded to oral arguments on May 14, 2013. By unpublished opinion decided June 26, 2013, the South Carolina Court of Appeals reversed Petitioner's conviction and remanded the case on the first question;[2] the Court of Appeals declined to address the remaining issues. State v. Johnson, Op. No. 2013-UP-288 (S.C. Ct. App. filed June 26, 2013). The State petitioned for rehearing, which was denied by order filed August 22, 2013.

The State then petitioned the Supreme Court of South Carolina for a writ of certiorari, which was granted by order dated September 11, 2014. The State raised three questions to the Supreme Court:

I. Whether the appellate panel erred in reversing the trial court's ruling in a Jackson v. Denno, 378 U.S. 368 (1964), hearing where the trial court determined, as a factual matter, that [Petitioner's] testimony during the Denno hearing, specifically her testimony that she allegedly invoked her right to counsel was "simply not plausible" especially since the trial court was not required to accept Johnson's testimony as true under state law.

II. Even assuming [Petitioner's] testimony from the Jackson v. Denno, 378 U.S. 368 (1964), hearing is true, whether the appellate panel erred in reversing the trial court's ruling where [Petitioner] was not being interrogated when she inquired about counsel and did not clearly and unequivocally invoke her right to counsel.

III. Whether the appellate panel erred when it failed to determine whether [Petitioner] had shown she was prejudiced as required by the standard of review, especially since multiple eyewitnesses saw [Petitioner] shoot [Burroughs], and [Petitioner] admitted to shooting [Burroughs] in her testimony at trial.

The parties again proceeded to oral arguments on March 4, 2015. By unanimous opinion decided August 19, 2015, the Supreme Court reversed the decision of the Court of Appeals, finding that "[b]ecause the trial court found [Petitioner's] testimony that she actually invoked her right to

[2] The Court did not elaborate upon its reasoning, but found the trial court erred in admitting Johnson's inculpatory statement to police, citing "State v. Middleton, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986) (noting the trial court must make an affirmative finding that there was no violation of Miranda v. Arizona during a Jackson v. Denno hearing before admitting a statement into evidence); State v. Franklin, 299 S.C. 133, 137, 382 S.E.2d 911, 913 (1989) (noting the State has the burden to prove a defendant validly waived his Miranda rights), and State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001) ("If a suspect invokes her right to counsel, police interrogation must cease unless the suspect herself initiates further communication with police.")."

counsel was 'simply not plausible'—or lacked credibility—[Petitioner] cannot satisfy the first prong of inquiry." State v. Johnson, 413 S.C. 458, 467, 776 S.E.2d 367, 372 (2015).

On August 20, 2015, Petitioner filed a motion to remand the matter to the Court of Appeals on grounds that the appellate court did not rule on three of the four issues she raised. The Supreme Court granted the motion by order dated November 6, 2015. On remand, without further argument or briefing, the Court of Appeals affirmed Petitioner's conviction on the merits of the remaining issues by unpublished opinion. State v. Johnson, Op. No. 2016-UP-353 (S.C. Ct. App. filed July 6, 2016). The remittitur issued on July 22, 2016.

Petitioner filed a timely application for post-conviction relief (PCR) on October 11, 2016, which she amended November 14, 2018. An evidentiary hearing into the matter was convened on March 26, 2019, at the Horry County Courthouse before the Honorable William H. Seals. James K. Falk represented Petitioner. At the hearing Petitioner raised three issues:

I. "There was evidence introduced at trial that would 'reduce, mitigate, justify, or excuse the homicide,' [and] therefore, trial counsel provided ineffective assistance of counsel by failing to object to the inferred malice charge found at p. 405, l. 12-23. As this issue was not preserved for appeal, it could not have been raised on direct appeal."

II. "Trial counsel provided ineffective assistance of counsel by not objecting to the 'seek the truth' language included in the Court's charge at p. 402, l. 22-25."

III. "Trial counsel provided ineffective [assistance of counsel] by failing to interview Joseph Gagum who could have testified to the victim's role in escalating the hostilities between her and Applicant."

Judge Seals denied relief via written order filed December 20, 2019. Petitioner then filed a timely notice of appeal of the decision denying relief.

STATEMENT OF THE FACTS

On June 24, 2008, Teresa Cox drove her 1999 Jeep Grand Cherokee to her friend, Monica Burroughs' residence. App. pp. 226-27. Cox, who was stopping in on her way to work, parked her vehicle head-in in front of Burroughs' residence where she was greeted by Burroughs and her stepsister, Joanne Davis. App. pp. 226-28. Thereafter, Burroughs got into the front passenger seat of Cox's Grand Cherokee while Davis sat in the backseat. App pp. 189, 228-29. According to both Cox and Davis, they left the doors open. App. pp. 192, 230.

After Davis and Burroughs got into Cox's Grand Cherokee, the trio began discussing two pairs of designer sunglasses that Burroughs had recently purchased which prompted Burroughs to momentarily return to her residence to get the sunglasses in order to show them to Cox. App. pp. 192-93, 229. When she returned to the Grand Cherokee, Cox tried on one pair of sunglasses, said she did not like them, then tried on the other pair of sunglasses telling Burroughs she liked them. App. p. 229. Cox added that Burroughs's former boyfriend, Franklin "Putty" Pyatt, would be mad that Burroughs was wearing one of his favorite designer's sunglasses. App. p. 229. The conversation then shifted when both Cox and Davis observed Petitioner approaching the Grand Cherokee on the passenger side. App. pp. 193, 230.

Cox, who believed Petitioner was armed with a knife, and Davis, who recognized Petitioner was armed with a gun, watched as Petitioner attacked Burroughs with the gun as if she were pistol-whipping her. App. pp. 193-94, 196-97, 230-31. Reacting to the attack, Burroughs said "oh shit" and blocked Petitioner's blows while simultaneously trying to defend herself and get out of the car. App. pp. 195-97, 231. Meanwhile, Cox and Davis jumped out of the vehicle and were running around to help Burroughs, who was already separated from Petitioner, when they heard a shot. App. pp. 194-95, 198-99, 231, 232-33. Next, Cox and Davis observed Burroughs running away

from the Cherokee. App. pp. 200, 234. According to both women, Petitioner then began screaming "I told you I was going to get you, bitch" which she repeated four to five times before she ran away. App. pp. 201-02, 235, 237. After Petitioner left, both Cox and Davis ran to Burroughs who was in the bushes beside her residence. App. pp. 204, 238. According to both women, Burroughs, who was unarmed, had been shot in the chest and was bleeding profusely. App. pp. 204, 238. She asked both women why she had been shot. App. pp. 204, 238.

Cox called 911 and first responders were dispatched to the crime scene. App. pp. 121-22, 238, 251. Upon arriving at the crime scene, Detective John King of the Conway Police Department met with Cox and took her to the police station where he interviewed her. App. p. 123. During the interview, Cox confirmed Burroughs's identity and further named Petitioner as the perpetrator. App. pp. 124-25. The following day, King interviewed Davis. App. p. 206. Thereafter, King, learned Burroughs had died and sought an arrest warrant for Petitioner. App. pp. 126-27. While authorities were initially unable to locate Petitioner, she was subsequently apprehended by U.S. Marshalls on July 2nd in Darlington County. App. p. 127.

After Petitioner was transferred to the custody of the Conway Police Department, investigators informed her she was under arrest for Burroughs's murder and advised her of her Miranda[3] rights. App. pp. 128-29, 368. Petitioner waived her rights and gave a video-recorded in which she admitted she hit Burroughs with the gun before shooting her at a distance outside of the Grand Cherokee. App. pp. 129-30, 134-36, 379-82.

Petitioner testified in her own defense. App. pp. 322-86. During her testimony, Petitioner explained she had been dating Franklin "Putty" Pyatt, who lived with Burroughs. App. pp. 324-26. Petitioner told the jury that on August of 2007, nearly a year before the shooting occurred,

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

Burroughs learned Petitioner was dating Pyatt, which resulted in a confrontation between the two women. App. pp. 327-28. A couple of months later, Petitioner said that she and Burroughs had another confrontation wherein Burroughs threatened to beat her. App. pp. 334-35. Petitioner also admitted that in December 2007, she and Burroughs got into a physical altercation after Petitioner keyed Pyatt's vehicle. App. pp. 336, 339-40. Petitioner stated, "I was pretty much getting the best of her and [Pyatt] jumped on me. App. pp. 340.

Petitioner further testified that in March 2008, Burroughs called her and told her, "whatever was between me and [Pyatt] was between me and [Pyatt], and I agreed with her, and I told her that was fine." App. pp. 347. Petitioner then testified that in May 2008, a little over a month before the shooting, Burroughs threatened her after hearing Petitioner was allegedly pregnant with Pyatt's child. App. p. 349. Petitioner stated Burroughs approached her and displayed the handle of a gun to her and walked away. App. pp. 349-50.

Petitioner further testified that in the days leading up to the shooting, she and Pyatt got into a fight. App. p. 356. Petitioner stated the fight was physical, and afterwards, Petitioner walked into Huckabee Heights and began arguing with Pyatt. App. p. 356. Petitioner admitted she returned to Pyatt's and Burroughs' residence where she poured lighter fluid on Pyatt's vehicle. App. pp. 356-57. She then returned a third time, approximately twenty minutes later, armed with a loaded .45 caliber handgun and "intentions of shooting [Pyatt]." App. p. 358. Petitioner explained she did not shoot Pyatt because, "he was gone," but she admitted to threatening both Burroughs and Pyatt, screaming, "come on out and eat—the bullets." App. pp. 358-60, 377-78.

Petitioner testified, on the day of the shooting, she arrived at her friend Tameka Skipper's home, Skipper left, and she went to sleep in Skipper's residence.[4] App. p. 362. Petitioner testified after she woke up and Skipper returned, the two decided to smoke marijuana, which in turn prompted Petitioner to head to the bootlegger's to purchase cigars. App. p. 364. Petitioner stated that on her way to the bootlegger's house, Davis, who was in front of Burroughs' home, called her name. App. p. 365. Petitioner claimed she "was not sure" what happened next, but she admitted pulling the trigger. App. pp. 365, 372-73. According to Petitioner, "[she] was just standing there, and [she] saw [Burroughs] in front of [her] with the shot going off." App. p. 373.

Petitioner admitted she saw Burroughs in the vehicle with the doors open, as she walked to the bootlegger's. App. pp. 378-79. Likewise, Petitioner admitted in her statement to police that she took the .45 caliber handgun out, hit Burroughs with the gun, and they struggled momentarily, after which Burroughs, who was now outside of the car, separated from her, and she shot Burroughs. App. pp. 379-80. Petitioner confirmed multiple times there was some distance between

[4] Skipper also testified and corroborated much of Petitioner's version of events. Skipper testified that she saw Petitioner and Petitioner's son around noon on the day of the shooting. App. pp. 87-88. Skipper stated she left to get lunch at a nearby Subway and left Petitioner with the key to her residence. App. pp. 290. Skipper said that upon her return to her residence, she found Petitioner had locked the door. App. pp. 290. After beating on the door for what she believed was five minutes, Petitioner, who had been asleep, unlocked Skipper's door. App. pp. 290. Next, Skipper explained Petitioner asked her to take care of Petitioner's son, while Petitioner went to "the bootlegger." App. pp. 291-92. Later, Skipper emerged from her residence and saw "[Petitioner] across the street . . . [Cox] in a jeep backing out and then . . . the brake lights jump on and four car doors open up[.]" App. p. 293. Skipper further stated that by the time everyone was out of the car, she had already started running. App. p. 293. Skipper said that as she was running towards Petitioner she heard a shot go off, at which point "everybody [was] screaming and hollering." App. p. 298. Immediately afterwards, Skipper admitted telling Petitioner to "run." App. p. 298. Skipper further related that she believed the group was going to "jump" Petitioner, but added "[w]hatever [Petitioner] and [Burroughs] got going that's between her and Monica but no one else was going to touch her. App. p. 298. Skipper acknowledged that when the shot was fired, Petitioner, whose back was to Skipper, "wasn't that close" to Burroughs. App. p. 299. Further, Skipper admitted she had no knowledge as to whether Petitioner or Burroughs started the altercation. App. pp. 314-15.

herself and Burroughs when she fired the gun. App. pp. 380-81. The State asked Petitioner about the accuracy of her account of the events to which Petitioner responded, "I felt like I was wrong. I killed somebody, and that was on my conscience." App. pp. 382. When asked to confirm that she killed someone, Petitioner again admitted she killed Burroughs and agreed with the State that "it was wrong." App. pp. 382-83.

The trial court instructed the jury on the law of murder, voluntary manslaughter, and accident. App. pp. 411-17. The trial court also explained express malice and set forth several bases on which the jury could find implied malice:

> In order to convict of murder, the State must prove not only the killing of the deceased by the defendant but that it was done with malice aforethought. Such proof must be beyond a reasonable doubt. . . .
>
> Manslaughter may be defined as the felonious killing of a human being without malice in... sudden heat and passion upon a sufficient legal provocation. . . . [T]he difference between manslaughter is the presence or absence of malice; malice being present in murder but not present in manslaughter. Malice is the difference.
>
> Now, having spoken to you about malice, let me give you the legal definition of that term.
>
> Malice, ladies and gentlemen, is a word suggesting wickedness, hatred, a determination to do what one knows to be wrong without just cause or excuse or legal provocation.
>
> Malice need not be in the mind of the one doing the killing any particular length of time before the killing to render the killing murder. If it is present in the mind of the one doing the killing any length of time before the act, then its presence would be sufficient to render the killing murder.
>
> Malice is said to be expressed when there is manifested a violent, deliberate intention unlawfully to take away the life of another human.
>
> Malice 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.
>
> Malice 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 heart fatally bent upon mischief.

> Such implications or inferences are not conclusive, and you, the jury, depending upon your view of the evidence may accept or reject the same.
>
> The law says that 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 the other evidence in this case. . . .
>
> [I]f, and I say that advisedly, if the evidence should show under what circumstances a shot was fired or a blow delivered which took the life of another, then you, the jury, would have to determine whether under such circumstances the act was malicious.

App. pp. 411-14.

The jury ultimately convicted Petitioner of murder, and Judge Cottingham sentenced her to thirty years' imprisonment. App. p. 850.

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 defer 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. Id. at 180, 810 S.E.2d at 839. (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. Id. at 180-81, 810 S.E.2d at 839-40. 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

Petitioner asserts the post-conviction relief court erred in denying her relief because Counsel was allegedly constitutionally ineffective for failing to object to two an erroneous jury instructions – one on implied malice from the use of a deadly weapon where there was evidence presented to mitigate the charge and one stating the jury's function was to "seek the truth." However, the PCR court properly considered the record in its entirety, listened to the evidence and arguments presented, and determined Petitioner did not meet her burden of establishing counsel was constitutionally ineffective because Petitioner was not prejudiced by Counsel's failure to object. Because these findings are supported by probative evidence and not premised on an error of law, this Court should deny certiorari.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging counsel was constitutionally ineffective, she 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, 466 U.S. 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 counsel's performance was deficient. Id.; 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." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. 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, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, 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.

The standards, however, do not establish mechanical rules; the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

I. The post-conviction relief court correctly found Counsel was not constitutionally ineffective despite failing to object to an erroneous jury instruction regarding implied malice where the State presented substantial evidence of malice in the form of Petitioner's repeated statements of intent to harm the victim; her unprovoked physical attack on the victim; and her flight to another county after the shooting, such that Counsel's error did not prejudice Petitioner.

Petitioner argues Counsel was constitutionally ineffective because Counsel failed to object to an erroneous jury instruction on implied malice from the use of a deadly weapon where there was evidence presented to mitigate the charge.[5] Petitioner argues Belcher v. State required counsel to object because there was evidence presented which would have supported the lesser-included

[5] The trial court charged murder, manslaughter, and accident; thus, Respondent agrees the deadly weapon implied malice charge was erroneous, and the PCR court correctly found Counsel was deficient for failing to object to this improper instruction. App. pp. 830, 842.

offense of voluntary manslaughter or the defense of accident. 385 S.C. 597, 685 S.E.2d 802 (2009) (holding jury charges instructing malice may be inferred from the use of a deadly weapon are improper where evidence is presented that would reduce, mitigate, excuse or justify the homicide); PWC p. 10. However, to prove prejudice, an applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 694). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In this case, the PCR court correctly found Petitioner was not prejudiced by the erroneous jury instruction because there was significant evidence of malice, other than Petitioner's use of a deadly weapon. App. p. 844.

"'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). Express malice is "when there is a deliberate intention to unlawfully take the life of another." State v. Wilds, 355 S.C. 269, 276, 584 S.E.2d 138, 142 (Ct. App. 2003) (citations omitted). Implied malice is when circumstances demonstrate a 'wanton or reckless disregard for human life' or 'a reasonably prudent man would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act.'" Id. at 276-77, 584 S.E.2d at 142. "In its legal sense, it does not necessarily 'import ill-will toward the individual injured, but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief.'" Id. at 276, 584 S.E.2d at 142 (citing State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957)).

As discussed above, the evidence presented at trial showed Petitioner was involved in a long-running feud with Burroughs which included physical altercations and verbal threatens. In

fact, Petitioner directly threatened Burroughs the day before the shooting, repeatedly showing up at Burroughs' home and one point yelling at both Burroughs and Pyatt to "come on out and eat—the bullets." App. pp. 358-60, 377-78. Moreover, multiple witnesses testified Petitioner initiated the attack on Burroughs, unprovoked, and began trying to beat Burroughs around the head with the gun, which in and of itself could lead to death, even if the gun was never fired. App. pp. 193-94, 196-97, 230-31. Finally, immediately after Petitioner fired the shots and while Burroughs was laying on the ground, Petitioner repeatedly yelled, "I told you I was gonna get you, bitch" at Burroughs. App. pp. 201-02, 235, 237. Petitioner then fled the scene, and the county altogether, and she was apprehended days later. App. p. 127.

Thus, the malice in this case was not proven solely or necessarily from the use of a deadly weapon – rather, malice could be implied from the fact Petitioner initiated an unprovoked physical attack on Burroughs, beating her about the head, as this conduct clearly demonstrates a "wanton or reckless disregard for human life." See, e.g., Mouzon, 231 S.C. at 662, 99 S.E.2d at 675 (concluding evidence was sufficient to sustain conviction for murder although there was "no actual intent to kill or injure another, there [was] evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life, from which a jury could infer malice"). Additionally, Petitioner fled the scene and was apprehended days later by the U.S. Marshals' in another county. App. pp. 202, 237, 367. See State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 266 (2006) ("Flight from prosecution is admissible as guilt.").

Most tellingly, multiple witnesses testified to statements by Petitioner which constitute express malice, namely Petitioner's threat the day before the shooting, and Petitioner's repeated exclamation of "I told you I was gonna get you, bitch," immediately after shooting Burroughs. App. pp. 201-02, 235, 237; see Blakely v. State, 360 S.C. 636, 639, 602 S.E.2d 758, 759

(2004) ("[E]vidence of previous threats by the defendant is admissible to show malice."). The fact Petitioner had a gun and shot Burroughs was not a contested issue at trial, and the State did not argue the jury should find implied malice from the use of the gun. Rather, the record reflects the State argued the evidence of malice was found in Petitioner's own statements, particularly her threats to Pyatt and Burroughs the day before to "come out and eat the bullets."[6] App. pp. 453-55, 458. Therefore, although the deadly weapon instruction was objectionable, there is no reasonable probability that instruction affected the result of the proceeding as the jury had ample evidence to find malice – either express or implied – from other evidence and testimony. The PCR court correctly denied relief as to this issue, and this Court should deny certiorari.

II. The post-conviction relief court correctly found Counsel was not constitutionally ineffective for failing to object to the trial court's instruction to the jury to "seek the truth" because, in the context of the jury instructions as a whole, the instruction was harmless beyond a reasonable doubt, and therefore, Petitioner was not prejudiced by it.

Petitioner alleges Counsel was constitutionally ineffective because he did not object to the trial court's jury charge to "seek the truth."[7] App. p. 410. However, because the PCR court

[6] Petitioner makes much of the fact the jury "struggled with the concept of malice" over the course of their deliberations. PWC p. 16. Although deliberations took several days, the record does not reflect, as Petitioner implies, the jury struggled with the concept of malice after asking its initial question and receiving a recharge on the issue, as well as a printed copy of the instructions. App. pp. 468-74. While the jury deliberated for some time after its question was answered and informed the court it was struggling to come to a unanimous decision, it gave no further indication as to the issue(s) dividing the jury. App. pp. 482, 485-88, 493-96, 499. Furthermore, at the evidentiary hearing, Petitioner only raised the issue of whether Counsel was ineffective for failing to object to the erroneous deadly weapon implied malice instruction; she did not raise any issues with the other instructions regarding malice or the trial court's handling of the jury's struggle to reach a unanimous verdict. Because these arguments were not raised to the PCR court, this Court should not consider them now. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974) ("It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal."); State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court.").

[7] As discussed above, Petitioner raises arguments in support of this allegation – specifically the discussion of the trial judge's instructions to the jury regarding the state of their deliberations and

correctly found Petitioner failed to prove she was prejudiced by this instruction for failing to object to this improper instruction because it is harmless in the context of the instructions as a whole, this Court should deny certiorari.

Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Aleksy, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). In Aleksy, this Court examined the use of "seek the truth" language in a jury instruction and 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. Id.

The instruction appears in the same context in Petitioner's case. At the conclusion of the trial court's charge on the jury's role "as the sole judge of the credibility, meaning reliability, of the witnesses" in the case, the trial court stated the jury's objective was "to seek the truth *regardless of from what witness that testimony may have been derived* – to seek the truth. *All of these things you will consider bearing in mind that you must give the defendant the benefit of every reasonable doubt*." App. pp. 409-11 (emphasis added). The trial court repeatedly explained in detail the State's burden of proving Petitioner's guilt beyond a reasonable doubt, and Petitioner has not challenged those portions of the jury instructions. App. pp. 407-09, 412, 416, 418-19, .

Accordingly, "the instruction as a whole properly conveyed the law to the jury, and there is not a reasonable likelihood the jury applied the judge's instructions to convict [Petitioner] on less than proof beyond a reasonable doubt." Id. at 29, 538 S.E.2d 253. Notably, Petitioner's argument relies heavily on two cases decided after Petitioner's trial, and neither case resulted in

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whether such comments and instructions were "coercive" – which were not made to the PCR court, and therefore these arguments are not preserved for appellate review and should not be considered. See n. 6, supra.

reversal of the conviction due to the trial court's use of "seek the truth" language. See State v. Beatty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2016) ("Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that Appellant has not shown prejudice from this error sufficient to warrant reversal."); State v. Daniels, 401 S.C. 251, 260, 737 S.E.2d 473, 477 (2012) ("In the instant case, the trial court included several improper statements as part of his jury instruction. However, the trial court prefaced those remarks with full and adequate instructions on reasonable doubt. . . . [D]espite the trial court's mistake, the instruction as a whole properly conveyed the law to the jury and it is not reasonably likely that the jury acted in contravention of the reasonable doubt standard.") (Toal, C.J., concurring).

Because the PCR court correctly found Petitioner failed to prove the improper instruction caused the jury to dilute the standard of proof, she was not prejudiced by Counsel's failure to object to the instruction, and the PCR court properly denied relief as to this issue. Likewise, this Court should deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding Counsel was not constitutionally ineffective. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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January 20, 2021